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EPA REGIONAL INCONSISTENCIES

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 28, 2006

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ONE HUNDRED NINTH CONGRESS
SECOND SESSION

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EPA REGIONAL INCONSISTENCIES

Wednesday, June 28, 2006

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 628, Dirksen Senate Office Building, Hon. James M. Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Warner, Jeffords, and Obama.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. The meeting will come to order. Our policy is to start on time. We have done that 100 percent of the time so far, so we want to keep it up.

Today we are going to take a hard look at the organizational structure of the EPA and whether it contributes to damaging and unfair practices against States and businesses. I am referring to the regional structure that divides the Agency into 10 different geographic areas, each one having about a thousand EPA career employees. Because of this design, the EPA regions are notoriously autonomous and have been known to advance their own priorities and agenda.

Some regional flexibility is necessary; however, when regions make their own determination of law we end up with 10 different sets of rules for regulated communities throughout the country. This is unfair to similarly situated businesses located in different regions. For example, the businesses in a particularly aggressive region must comply with requirements that the same businesses in another region don't have to comply with.

The GAO will inform us of their studies on this issue and what they believe EPA could do to address this.

We will also hear today of an example of a renegade region whose interpretation of laws is not only contrary to national practice and standards but has been openly questioned by Congress and the Judicial Branch.

When District Judge Gilbert threw out the Region V pesticide criminal case filed days before the statute of limitations ran, he questioned the Government's judgment in filing a case and declared the statute unconstitutionally vague as applied. Unfortunately, this was after the defendant, Wabash Valley, a farmer-owned co-op, had paid over $220,000 to defend itself. The Wabash Valley, however, was willing to spend any amount of money to keep

their pesticide applicator out of jail for allegedly "applying pesticide in a manner inconsistent with its labeling."

Another troubling incident occurred this past December. The Illinois agriculture community was shocked when Region V determined that the entire fertilizer retail industry, approximately 500 members, was not in compliance with the Clean Air Act because they did not include so-called "nurse tanks" in their risk management plans. This Region V requirement was never communicated to the agriculture community and is not required in other regions.

In fact, Region V's first contact with the fertilizer retailers was to send enforcement letters to the members who had bothered to file the RMPs, only threatening $32,500 a day penalties. Incredibly, these letters were mailed right before the Christmas holidays. Consequently, it was a very difficult thing to try to comply with.

Jean Payne, the president of the Illinois Fertilizer and Chemical Association, is here to provide the facts of this story, and we want to hear this. As a former businessman, myself, I can speak to challenges of disputing the Federal Government and bureaucracies like the EPA. It is not hard to imagine the level of fear and uncertainty that accompanies letters like these for the average citizen. I became aware of this situation immediately after the fertilizer retailers received the letter, and I opened an inquiry as chairman of the committee of jurisdiction. I felt that someone had to do this.

We remember the other things that have happened in the past, Senator Jeffords, when you and I sat up here and heard the testimony of a guy named Jimmy Dunn who had a lumber company where they were going to impose penalties on him on a daily basis that would have put him out of business after three generations of his family running the company, in a matter of about 40 days.

Senator JEFFORDS. Yes.

Senator INHOFE. It is the fear factor that is always out there of the bureaucracy doing something that is going to take away your livelihood.

Finally, another important aspect that requires review when evaluating the EPA's regions and bureaucratic factor: does the presence of only one Administration appointee hamper effective policy implementation? To what extent are unelected officials setting policy in these regions? If bureaucrats are managing the regions, how can we be sure that the public's wishes are translated into policy and realistically implemented?

I am a firm believer that elected officials who answer to a constituency can best manage according to the public's will. Dr. Richard Waterman, author of the book "Bureaucrats, Politics, and the Environment," is here today to help us understand the nuances accompanying the EPA bureaucracy and the strength of their voice in Government today.

With unlimited resources, the EPA must be mindful of prosecution techniques that can actually survive judicial scrutiny. We should not hear about cases that are thrown out with judicial commentary chastising Government for filing a criminal case. I will continue to oversee the EPA's regional activities to ensure that we are effectively protecting the environment, as well as our citizens.

In a note to Mr. Schaeffer on the second panel—I am glad to see you back here once again. You have become quite a spokesman for

the environmentalists since your departure from the EPA in 2002 when you resigned in protest of the Administration's policies. In your testimony you criticize the purpose of today's hearing as being motivated by the Region V example from last December. My staff began this oversight initiative over a year ago, more than 6 months before the Region V example took place. They discovered the problem in Region V during the investigation.

It is my intention that today's hearing will be the first in a series over the next 2 years looking at how the EPA bureaucracy operates. I am considering field hearings at the EPA's regional offices and legislation, if needed, to ensure that we get measurable results in reforming the EPA's regions in their inconsistent, detrimental approach to environmental laws.

This is a problem. I have mentioned only Region V when, in fact, there are problems in other regions, too. I think that a bureaucracy can become abusive and there has to be some consistent policy and regulations between the various regions. That is the whole purpose of this hearing.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Today we are going to take a hard look at the organizational structure of the EPA and whether it contributes to damaging and unfair practices against States and businesses. I am referring to the regional structure that divides the Agency into 10 different geographical regions headed by a Regional Administrator managing approximately 1,000 EPA career employees. Because of this design, EPA regions are notoriously autonomous and have been known to advance their own priorities and agendas. Some regional flexibility is necessary. However, when regions make their own determination of law, we end up with 10 different sets of rules for the regulated communities throughout the country. This is unfair to similarly situated businesses located in different regions. For example, businesses in a particularly aggressive region must comply with requirements that the same businesses in another region do not. The GAO will inform us of their studies on this issue and what they believe EPA could do to address this.

We will also hear today of an example of a renegade region whose interpretation of laws is not only contrary to national practice and standards but has been openly questioned by Congress and the Judicial Branch. [SEE CHART] When District Judge Gilbert threw out a Region V pesticide criminal case—filed days before the statue of limitations ran—he questioned the Government's judgment in filing the case and declared the statute unconstitutionally vague as applied. Unfortunately, this was after the defendant, Wabash Valley, a farmer-owned co-op, paid over $220,000 to defend itself. Wabash Valley, however, was willing to spend any amount of money to keep their pesticide applicator out of jail for allegedly "applying pesticide in a manner inconsistent with its labeling."

Another troubling incident occurred this past December. The Illinois agriculture community was shocked when Region V determined that the entire fertilizer retail industry—approximately 500 members—was not in compliance with the Clean Air Act because they did not include so-called nurse tanks in their Risk Management Plans. This Region V requirement was never communicated to the Ag. Community and is not required in other regions. In fact, Region V's first contact with the fertilizer retailers was to send enforcement letters to the members who had bothered to file RMPs only, threatening fines of $32,500 per day. [SEE CHART] Incredibly, the letters were mailed out on December 15 and gave the rural businessmen and women only 10 days to respond over the Christmas holidays. [SEE CHART] Jean Payne, the President of the Illinois Fertilizer and Chemical Association, is here to provide the facts of this story.

[The referenced document can be found on pages 97-125.]

As a former businessman myself, I can speak to the challenges of disputing the Federal Government and bureaucracies like the EPA. It is not hard to imagine the level of fear and uncertainty that accompanies letters like these for the average citizen. I became aware of the situation immediately after the fertilizer retailers re-

ceived the letters and I opened an inquiry as Chairman of the Committee of Jurisdiction. I felt that someone had to help these farmers deal with the EPA.

Consequently, there are many important lessons we can learn from studying the EPA regional structure and how inconsistent enforcement impacts the regulated community, the States, and their relationship with one another. I am interested to hear from the States' perspective—through Dave Paylor, the Director of the Virginia DEQ—how the EPA regions affect their ability to effectively monitor and enforce the environmental laws.

Finally, another important aspect that requires review when evaluating the EPA regions is the bureaucracy factor. Does the presence of only one Administration appointee hamper effective policy implementation? To what extent are unelected officials setting policy in the regions? If bureaucrats are managing the regions, how can we be sure that the public's wishes are translated into policy and realistically implemented? I am a firm believer that elected officials who answer to a constituency can best manage according to the public's will. Dr. Richard Waterman, author of the book Bureaucrats, Politics, and the Environment, is here today to help us understand the nuances accompanying the EPA bureaucracy and the strength of their voice in Government today.

With unlimited resources, the EPA must be mindful of prosecution tactics that can actually survive judicial scrutiny. We should not hear about cases that are thrown out with judicial commentary chastising the Government for filing a criminal case. I will continue to oversee the EPA regional activities to ensure that we are effectively protecting the environment as well as our citizens.

And a note to Mr. Schaeffer on the second panel, glad to see you back here once again. You have become quite a spokesperson for the environmentalists since your departure form the EPA in 2002 when you "resigned in protest" of the Administration's policies. In your testimony you criticize the purpose of today's hearing as being motivated by the Region V example from last December. My staff began this oversight initiative over a year ago and more than 6 months before the Region V example took place. They discovered the problem in Region V during the investigation.

It is my intention that today's hearing will be the first in a series over the next 2 years looking at how the EPA bureaucracy operates. I am considering field hearings at the EPA Regional offices and legislation if needed to ensure that we get measurable results in reforming the EPA regions and their inconsistent, detrimental approach to our environmental laws.

Senator INHOFE. Senator Jeffords.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. Thank you, Mr. Chairman. I share your interest in learning more about the important patterns within the Environmental Protection Agency. I welcome efforts to determine whether EPA regions enforce our environmental laws differently. But I am afraid that today's hearing will not accomplish that goal. Instead, we are here to discuss an isolated incident in one State. This one example tells us little about EPA's enforcement and a lot about one case that has pitted the regulators against those who are regulated.

We are here to discuss the plight of Illinois' fertilizer retailers who failed to adequately file risk management plans for the storage of dangerous chemicals. I believe we all agree that these risk management plans are essential to aiding first responders and protecting those who live near these facilities in the event of an emergency. Congress should support the Agency's efforts to administer this program.

I would hope we could expand this hearing to include discussion about the gaps in the enforcement in many regions of the Country. Perhaps more importantly, we should examine whether the lack of enforcement adversely affects human health and the environment.

We know that there must be some flexibility in EPA's regional enforcement structure. Quite simply, some regions face challenges that others do not. Managing this flexibility is sometimes difficult and has likely led to inconsistent enforcement actions within the same community. What causes these inconsistencies? What variables affect enforcement decisions? I asked earlier, how do those inconsistencies affect human health and the environment?

I had hoped today to begin to answer some of these questions. I hope that in the future hearings we may begin to address them.

Thank you, Mr. Chairman and thanks to our witnesses for participating here today.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Thank you Mr. Chairman. I share your interest in learning more about the enforcement patterns within the Environmental Protection Agency.

I welcome efforts to determine whether the EPA regions enforce our environmental laws differently. I am afraid that today's hearing will not accomplish that goal. Instead, we are here to discuss an isolated incident, in one State. This one example tells us little about the EPA's enforcement, and a lot about one case that has pitted the regulators against those who are regulated.

We are here to discuss the plight of Illinois fertilizer retailers who failed to adequately file risk management plans for the storage of dangerous chemicals.

I believe we all agree that these risk management plans are essential to aiding first responders, and to protecting those who live near these facilities in the event of an emergency. Congress should support the Agency's efforts to administer this program.

I would hope we could expand this hearing to include a discussion about the gaps in enforcement in many regions of this country. Perhaps more importantly, we should be examining whether the lack of enforcement adversely affects human health and the environment.

We know that there must be some flexibility in the EPA's regional enforcement structure. Quite simply, some regions face challenges that others do not.

Managing this flexibility is sometimes difficult, and has likely led to inconsistent enforcement actions within the same community.

What causes these inconsistencies? What variables affect enforcement decisions? And as I asked earlier, how do these inconsistencies affect human health and the environment?

I had hoped to begin to answer some of these questions today. I hope that in future hearings, we can begin to address them.

Thank you again Mr. Chairman, and thank you to our witnesses for participating in today's hearing.

Senator INHOFE. Thank you, Senator Jeffords.

We are going to be joined by other members. I think that what we have tried to do in the past, unless someone objects, when they get here we will only submit opening statements for the record for those who are not here on time.

On our first panel, we have Grant Nakayama. We appreciate, Mr. Administrator, your being here. We have Donald Welsh, the Regional Administrator of Region III; John Stephenson, Director of Natural Resources and Environment from the GAO. We appreciate your being here very much.

We will start with statements. Try to confine them to 5 minutes, and your entire statement will be made a part of the record.

We will start with you, Mr. Administrator.

STATEMENT OF GRANT NAKAYAMA, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. NAKAYAMA. Thank you, Mr. Chairman. Good morning.

Mr. Chairman and members of the committee, I am Grant Nakayama, EPA Assistant Administrator for Enforcement and Compliance Assurance. With me today is Donald Welsh, Regional Administrator for EPA Region III in Philadelphia. We appreciate the opportunity to discuss how EPA ensures consistent enforcement of Federal environmental laws throughout the United States.

First, let me state that I believe that consistent enforcement of our environmental laws is a very important goal. It is my job to oversee responsible and consistent enforcement of our environmental laws, and I take it very, very seriously.

EPA works hard to ensure a level playing field across the country when enforcing environmental laws. Unfair disparity in the application of the law is not acceptable, and I am committed to working to address and reduce instances of unfair disparity.

Second, responsible implementation of environmental laws requires a degree of regional flexibility, as I am sure my colleague Mr. Welsh will agree. This is a large and complex country. We have a wide range of environmental problems, regional and local circumstances and conditions. We cannot dictate from Washington how every situation should be handled, even if we wanted to. The particular issues and circumstances are just too many and too varied.

However, there is a lot that we can do to assure a reasonable level of consistency in the enforcement of environmental laws, and I want to assure you we are doing that. We use a number of tools to bring the regions together on a common approach to enforcement. We engage in national planning and regular communications with the regions and States to identify the most pressing environmental problems and to agree on how to address them. My office also issues national guidance and policies that direct the enforcement and compliance work of all the regions.

Do we do a perfect job? No, of course not. In a country as diverse as ours, it is inevitable that enforcement situations will occur that appear to be differences between the regions, but as you consider the examples that will be offered today I ask you to carefully consider whether you are seeing an unfair disparity in treatment or just reasonable variations in EPA's responses to different circumstances. Different circumstances and varying compliance strategies do not necessarily add up to unfair disparity in treatment, but if there is unfair disparity in treatment we will take action to address it.

While we do not do a perfect job, I would like to mention some of the excellent work we do. In fiscal year 2005 the enforcement program reduced the pollution through the Nation's air, land, and water by 1.1 billion pounds. That is the highest total in the last 5 years and is one of the highest totals in the Agency's history.

This year we launched a new tips and complaint website to allow citizens to easily report potential environmental violations. Since the site went up in January, we have seen a significant upswing, incredible information from citizens reporting significant environ-

mental problems. This has allowed EPA to focus on intentional and willful violations. The response from citizens tells me we are on the right track.

We look forward today to discussing with you how we can improve our program, and I would be happy to take any questions the committee might have.

Thank you.

Senator INHOFE. Thank you, Mr. Administrator.

Mr. Welsh, did you have something to add to that or do you have an opening statement?

Mr. WELSH. Very brief statement, sir.

Senator INHOFE. OK.

STATEMENT OF DONALD WELSH, REGIONAL ADMINISTRATOR, REGION III, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. WELSH. Good morning, Mr. Chairman. I am Don Welsh, the Regional Administrator for EPA Region III. Thank you for this opportunity to testify.

At the regional level we do often see first-hand the importance of consistency and the value of flexibility. The regional staff, along with our State partners, implement the daily activities that are guided by the strategic plan, national program guidance, and tracked through the annual commitment system. The regions, and through them the States, are active participants in the processes that develop and contribute to each of these important mechanism. The inclusion of the regions and States in a meaningful way throughout the process increases the understanding of our shared goals and reduces the opportunities for inconsistency.

While we strive to maintain consistent national program implementation, flexibility is occasionally necessary to allow us to be responsive to individual States' needs, as well as to address issues that are unique to our specific geographic areas. In circumstances where we feel that a different emphasis or approach can achieve the best environmental result, we coordinate closely with our headquarters offices, as well as our States, to discuss options and paths forward and to avoid surprises.

This can sometimes be a challenging task, with many different State and local partners and perhaps several different headquarters offices involved in implementing a particular program. I am sure our execution is not always seamless, but we do make every effort to avoid confusing our partners, the regulated community, and the public.

In conclusion, at the regional level our on-the-ground and State oversight activities necessitate that we maintain a balance between a priority of national consistency and occasional flexibility to address individual State needs and unique regional circumstances.

Thank you again for the opportunity to testify. I am happy to take your questions.

Senator INHOFE. Thank you, Mr. Welsh.

Mr. STEPHENSON.

STATEMENT OF JOHN STEPHENSON, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. STEPHENSON. Thank you, Mr. Chairman and Senator Jeffords. I am pleased to be here today to discuss our work concerning EPA's efforts to ensure consistent and equitable enforcement actions among its ten regions. Our testimony today is based on many reports we have issued on EPA's compliance and enforcement activities over the past several years, as well as ongoing work for this committee.

EPA seeks to achieve cleaner air, purer water, and better-protected land, in part through compliance with the Nation's environmental laws. Enforcement is a vital part of its effort to encourage State and local Governments, companies, and others who are regulated to meet their environmental obligations. Enforcement deters those who might otherwise seek to profit from violating the law, but it is very important to ensure a level playing field, as you heard, for regulated entities. Most companies want to do the right thing, but they need to know what is expected and that they will be treated consistently, regardless of where they are located.

While the extent of inconsistencies is debatable, largely because of the lack of data, no one disputes the fact that EPA's ten regions vary significantly in their approach to environmental compliance. These variations show up in key management indicators that EPA has used in the past to monitor regional performance, such as the number of inspections performed at regulated facilities and the amount of penalties assessed for non-compliance in environmental regulations.

For example, one of our past reports showed that 80 percent of the regulated facilities in Region III, Philadelphia, received inspections under Clean Air Act authorities, versus only 27 percent in similar facilities in Region I, Boston, and Region II, New York.

In addition, while our work did not focus specifically on the effects of inconsistent enforcement, EPA's own strategic plan notes that companies that do not comply with statutory requirements gain an unfair advantage over companies that invest the necessary resources to comply.

We also note that a recent study commissioned by the Small Business Administration suggests that environmental requirements fall most heavily on small businesses that have proportionately fewer resources for compliance activities then their larger counterparts.

EPA often cites, as you have heard today, regional flexibility or difference in philosophy as the reasons for such inconsistencies. For example, one region may choose to conduct in-depth inspections at a fewer number of facilities instead of conducting less-intensive examinations at more facilities. This may be fine, but we believe and have recommended that such variations need to be more clearly reported as part of EPA's regional oversight process.

Further, EPA needs to clarify which enforcement actions it expects to see consistently implemented across the regions and direct the regions to measure and report against these core enforcement requirements.

EPA, in effect, has somewhat competing goals in that it wants to allow regional flexibility but also wants to ensure consistent application of environmental laws. One can debate the right balance for these goals, but the basic problem as we see it is that EPA lacks sufficient data—data on the 40-plus million entities in the regulated community, on State and regional enforcement activities and programs, and on measures of environmental results to accurately determine the extent of variations and whether they, indeed, represent a problem.

In addition, EPA still lacks an adequate workforce planning and allocation system to effectively deploy staff in a manner that will ensure consistency in enforcing environmental requirements. We have made numerous recommendations to EPA in both of these areas over the past several years.

EPA, as you have heard, acknowledges that to ensure fair and equitable treatment core enforcement requirements must be consistently implemented so that similar violations are met with similar enforcement responses, regardless of geographic location. As you heard in part today—and we will hear more from your other witnesses—EPA has several initiatives underway to improve management information, to enhance workforce analyses and planning, and to establish a State review framework that will help address this problem. We are encouraged by these initiatives, but it is too soon to tell how effective they will be. It will take sustained top management commitment on these new initiatives if they are to be more successful than past initiatives.

Mr. Chairman, that concludes my statement.

Senator INHOFE. Thank you, Mr. Stephenson.

Senator Jeffords was called away to make a quorum at the Finance Committee, and he will be right back.

I will start with you, Mr. Nakayama. You heard me in my opening statement talk about what the judge said when he dismissed a Region V regional criminal pesticide case. I will actually read his statement here.

He said, "When experienced trial lawyers decide whether to file a lawsuit, they often look at the instructions the court will give to a jury if the case makes it to trial. By analyzing what he must prove to the jury, an attorney can make a reasonable approximation of the strength of the case. The court wonders if the Government considered this simple question. The court has considered it and candidly it has given pause by question."

Now, this is the farmer-owned co-op, Wabash Valley. These are the ones that had $220,000 they had to pay in attorneys' fees for what I call a frivolous lawsuit. The director of criminal enforcement, Tom Seton, at headquarters said—and this is a quote—"There is nothing unusual about the Wabash case, in that it provided a deterrent effect."

Now, I guess the question I would have of you, Mr. Administrator, is: does the EPA's goal of deterrence override the need to file legitimate enforcement cases?

Mr. NAKAYAMA. Thank you for the question, Mr. Chairman. Certainly not. We need to pursue those cases which are legitimate and we need to exercise judgment in deciding what cases to pursue.

Senator INHOFE. You disagree with the Seton statement?

Mr. NAKAYAMA. I think when a person says there is nothing unusual, in our view the case involved the need to protect human health and the environment, including ensuring that pesticide chemicals are used carefully and properly. In this particular case, there was evidence of repeat violations. Pesticides actually came in contact with a neighbor.

We understand the State had previously issued penalties concerning pesticide application at this same location. In those cases when we believe that there is a repeat violation and there is a need for some sort of sanction to prevent continued application in a manner which exposes the public, we cannot condone activities like that and we do need to take action.

Senator INHOFE. Well, you start out by saying you do not think it is appropriate to have gone ahead with this case, the fact that they ended up having to pay a defense of $220,000. Which side are you on? I am not real sure.

Mr. NAKAYAMA. Let me clarify the answer. I don't think it is ever in the Agency's intention nor is it in its best interest of its law enforcement efforts to file frivolous lawsuits. I don't believe this case was a frivolous case. Now obviously there was a difference of opinion.

Senator INHOFE. Yes.

Mr. NAKAYAMA. The judge felt that the standard couldn't be met for a criminal conviction and therefore the matter was dismissed. This difference in the view of the adequacy of the label warning is certainly a legal question, an important question, and one that obviously the Agency had a different view or it would not have brought the case.

Senator INHOFE. At the beginning of your statement you talked about you believe strongly in consistency of enforcement, which I do, too. What have you done? You're fairly new in the job, but what have you done to try to promote consistency where I believe—and I think you probably believe, judging from our discussions prior to your confirmation—that inconsistencies are there?

Mr. NAKAYAMA. Well, a couple things.

Senator INHOFE. What have you done to try to make that your program, your legacy?

Mr. NAKAYAMA. Right. Mr. Chairman, I think there are a couple of things we have done. One of the things we have done is strengthen our communications with the regions. We have, obviously, regular communications with the regions about ongoing enforcement cases.

We have also improved the coordination between our criminal program and our civil program, because, quite frankly, I thought that could use increased coordination because we need to ensure that we are bringing a unified approach to enforcement, and we need to know what the regions are doing as well as what our criminal enforcement program is doing.

Senator INHOFE. Yes.

Mr. NAKAYAMA. Structurally, the criminal enforcement program is actually run out of headquarters and it is run through our various field offices. That is run separately from our civil enforcement program. So there is a need for better coordination both between the civil and criminal side and between our regions and——

Senator INHOFE. You mentioned the tips program. Is that something you started or was that already there?

Mr. NAKAYAMA. We had a website originally that was very hard to get to before I came to EPA. It was buried several levels deep in the website. We now have a direct link from the EPA home page. The idea there was if we could get better information we could focus our efforts on really the intentional and willful violations if we knew about them.

Senator INHOFE. Yes. Do the tips come from citizens and also from the regulated community?

Mr. NAKAYAMA. Yes. They come from the public, in general, both citizens, the public in general, non-citizens. They come from the regulated community, such as competitors who believe they are unfairly disadvantaged by another company's non-compliance.

Senator INHOFE. OK. Mr. Welsh, frankly, in looking and making evaluation of the different districts and different regional offices, it seems to me that yours is a pretty good model, in that I have heard a lot of complimentary things and I think you have made a real effort to doing that. How have you accomplished this?

Mr. WELSH. I would agree with Grant that one of the real problems——

Senator INHOFE. Is your area around Philadelphia or——

Mr. WELSH. Correct. We are headquartered in Philadelphia, and it is the mid-Atlantic region, six States in the mid-Atlantic region.

Senator INHOFE. OK.

Mr. WELSH. I think one of the things that all of the regional administrators can work hard to do is really to emphasize the communications aspect of the work that we are doing.

Senator INHOFE. Yes.

Mr. WELSH. When we are doing enforcement activity, we are partners with our States and we have to coordinate with Grant's office in headquarters, as well as the national program manager for the particular media program, such as the Office of Water.

When we determine something through our pattern of investigation that we think needs additional emphasis or more work, one of the ways to avoid confusion or any concern that we are going beyond what we ought to be doing for the sake of national consistency is to be sure that we consult with the folks in headquarters and make sure they know what we are planning to do and have had an opportunity to review what we plan to do so that there are no surprises.

I mentioned in my opening statement that I am sure our efforts are not always seamless in that area, and it brings to mind the monthly Monday morning conference call that we have with the Administrator and all the AAs where the regions will frequently report on something that they are working on or something that they have discovered. From time to time the Administrator or Grant or the General Counsel will say, "Wait a minute. I haven't heard about that yet. Before you proceed on that, please give me a briefing and let me know what's going on," or, "Let me see that document before you do it." So I think communication is one of the best ways that we can avoid any areas where we are getting out of consistency in a way that is harmful.

Senator INHOFE. So you are actually talking to each other?

Mr. WELSH. Yes, I think we do, a good bit.
Senator INHOFE. All right.
Senator WARNER.

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. This is a subject that has interested me. It is difficult to manage. You want to have strong individuals take over the districts and you have got to provide them some flexibility of thinking and management, and at the same time—and this is no reflection on your district, Mr. Welsh, which serves my State very well, and throughout my long period here in the Senate I have had very good cooperation from the Philadelphia office.

But the plain fact of the matter is that there are some problems which are common among the States that shouldn't have variation in solution because the facts of the thing. A dam is a dam, really, whether it is built in my State or down in Oklahoma or wherever the case may be.

We have struggled through a dam situation. The clouds parted this morning. A little sunshine is now coming down after 14 years working to get the permits through. It is a dam that is badly in need for a growing community and a congested region where the military bases are down in Norfolk and Newport News. But she's on her way, so I don't want to jiggle the process now that we have got it going.

You have simply got to watch how the States and the time to get the permitting. I know, Mr. Welsh, when we were struggling with this the infrastructure would chatter, "Oh, you can get this permit down in the Carolinas much quicker than you can up out of the Philadelphia office," and so forth. But anyway, we worked it through.

You have got to have a certain amount of consistency in this permitting process because the industrial base in America is struggling to be competitive with the world and we have got to protect our environment and do it in such a way that we don't put too much stress on industrial and manufacturing base to achieve their goals and remain a competitive nation in the world economic market.

So, Mr. Chairman, I thank you for bringing this hearing to the attention of the full committee. Thank you very much, gentlemen. I appreciate it.

Senator INHOFE. Thank you, Senator Warner.

Mr. Stephenson, you have testified to pretty serious inconsistencies, and the first question I would ask you is: why should we be concerned with inconsistencies among the regions?

Mr. STEPHENSON. Well, I think EPA's own strategic plan says it best—"If you have inconsistent enforcement, some companies may have an unfair competitive advantage over others." It is not fair for a company in a region with particularly stringent enforcement environmental laws to compete against one in a less stringent region.

The problem is that the data doesn't exist on enforcement actions and on the activities of the States and the regions, in fact, to make informed decisions about the extent of the inconsistency and what

problems it actually represents. You have heard today that flexibility is appropriate, and I agree, but without better data you can't tell what's flexibility and what is inconsistent enforcement.

Senator WARNER. Would you yield, Mr. Chairman?

Senator INHOFE. Sure.

Senator WARNER. He has struck on an important point. I talked about that international competition, but it is certainly State by State. How well you know that we are always in competition between the several States for an industrial plant, and that area which has a reputation for granting its permits earlier is likely to get it and get the jobs that go with it. We don't want to put that into our economic system.

Thank you for bringing that important point up.

Senator INHOFE. Mr. Stephenson, how long has this been going on?

Senator WARNER. Since we probably founded the Agency.

Senator INHOFE. I asked him.

[Laughter.]

Mr. STEPHENSON. That is the right answer. You know, I have been doing this for 6 years, and it has been a prevalent problem. It is interesting to note that the State framework that EPA is working on now dates all the way back to a Barnes memo back in 1986, so at least two decades that they have been trying to address this problem. Mr. Barnes was the Deputy Administrator during the Reagan Administration. So there have been lots of initiatives to try to address this problem, but they have had limited success so far.

You know, GAO is a data oriented organization, and we want to see better data with which to measure regional performance and State performance, and then you are in a better position to say how much of this is inconsistency and how much of this is flexibility.

Senator INHOFE. Senator Warner is right, it has been since the beginning of the Agency. That is the whole reason for this hearing. We have not, to my knowledge, at least in the last 12 years, we have not had a hearing——

Senator WARNER. That is exactly right, Mr. Chairman.

Senator INHOFE [continuing]. That addresses this.

Senator WARNER. You're the first chairman really to bring this to the forefront for the whole committee, and I commend you for it.

Senator INHOFE. I think when you hear people in the regulated community that might have shops on the east coast as well as in Illinois and they see the disparity, it is wrong.

I think, Mr. Stephenson, with your research and with your efforts you could give us a lot of advice as to how to achieve a greater consistency. Do you have anything right now you would like to say in the way of offering a helpful solution?

Mr. STEPHENSON. To hark back on the data, again, better data. There could be some 41 million plus in the enforceable community—companies, waste water facilities, drinking water facilities. EPA, as the DOD IG reporting just last year, simply doesn't have a good handle on the types of facilities, the extent that they represent a problem. If you don't have good information on the regulated community, you don't have a good handle on how to effectively deploy your resources. That combined with the lack of a good

workforce planning system in EPA makes you wonder how EPA assigns enforcement resources to the individual regions.

Senator INHOFE. You heard Mr. Welsh talk about their communications effort and getting everyone in the same room and communicating.

Mr. STEPHENSON. Right.

Senator INHOFE. I had a personal experience in that. It happens in my State of Oklahoma we had probably the most devastating of the Superfund sites, and have been addressing it for some 20 years and nothing has gotten done. I found out that it is because we never had the DOI, DOJ, Corps of Engineers, EPA, and everybody in the same room. When we did that, we started on the road to resolving the problem.

Do you think that what we are hearing from Mr. Welsh is something that may be missing in some of the other regions, specifically Region V?

Mr. STEPHENSON. I do. Effective communication and coordination among the EPA staff and the State enforcers and the regulated community is an extremely important aspect of all of this. EPA has an oversight role of State enforcement. So they have to do some duplicative inspections of facilities to ensure that the States are doing it right on the one hand, but on the other hand you don't want to see EPA regions overstepping the bounds of the State enforcers who work the lion's share of the Federal environmental programs.

Let's face it. The States have over 90 percent of the responsibility for inspections, et cetera. So you don't want to see EPA coming in after them and overstepping the State enforcers and redoing an inspection. EPA needs to communicate with the States what they are doing, and with the regions, and make sure the regions toe the line and are accountable.

Senator INHOFE. What do you think about that, Mr. Nakayama?

Mr. NAKAYAMA. I do agree. I think better communications would aid in ensuring consistency, because if there is no communication you're not going to know when disparities exist.

With respect to the work with getting better data, which is important, that is one of our highest priorities. We are upgrading our integrated compliance information system—it is one of the largest data bases in the Federal Government—to get better data on what the compliance data for the various States are.

With respect to the State review framework, a very important effort started in cooperation with the Environmental Council of the States, ECOS, where EPA's regions are assessing the adequacy of the various States to ensure that, in fact, each State meets its responsibilities, to understand what the differences are between States and if there are valid reasons for those differences, and to recommend improvements to the States where there are areas that need improvement.

As part of that effort I might mention that there are several programs that we directly implement where the States have not picked up, it has not been delegated to the States, and we are evaluating ourselves as part of that State review framework to determine if there are areas for improvement or areas of inconsistency. That is a major effort. It continues through fiscal year 2007. At the end of that period we believe we will have reviewed all 50 States.

Senator INHOFE. Here's what I would like to do. I'd like to follow up and see if some of these things are actually working. One of the problems I see in regulation is that we will have meetings, point out the problems, and then nothing happens. Actually, that was the situation with the Nuclear Regulatory Commission several years ago. They had not had any oversight and had not had a chance to look and see and develop some way of measuring successes and to see what works and what doesn't work.

What I would like to do is, through a communication with you and with all of you, to follow through and see what kind of improvements we can have. It was not my intention to single out just Region V. That is one I probably personally have heard more about more of the problems, but I have also heard in some of the other areas, too. So I would like to do that and we'd like to set up something.

You will all three be receiving questions for the record from members who are not here. Their staffs are here.

Senator INHOFE. With that, we will go ahead and dismiss you as the first panel and call up the second panel. I thank you very much for being here. Mr. Nakayama, I look forward to having a visit along the lines that we discussed, too.

Mr. NAKAYAMA. Thank you.

Senator INHOFE. Yes, sir.

Our next panel is Jean Payne, president of the Illinois Fertilizer and Chemical Association; Dr. Richard Waterman, chair of the Department of Political Science, University of Kentucky; Eric Schaeffer, director, Environmental Integrity Project; and David Paylor, executive director, Virginia Department of Environmental Quality, Officer, Environmental Council of States.

Let's go ahead and start with you, Ms. Payne. If you'd go ahead and give an opening statement and try to hold in to our timing if we can, your entire statement will be made a part of the record. We will recognize you at this time.

STATEMENT OF JEAN PAYNE, PRESIDENT, ILLINOIS FERTILIZER AND CHEMICAL ASSOCIATION

Ms. PAYNE. Thank you, Mr. Chairman. I have been working with the Illinois fertilizer dealers for 15 years. We handle a lot of anhydrous ammonia in Illinois since the 1950's, and the RMP regulation is not really about handling ammonia safely, it is about documenting how you handle ammonia safely, which we have been doing very well for 30 to 40 years. Most of our fertilizer dealers have been in business for 30 to 40 years. There are about 700 agriculture chemical facilities in Illinois, the majority of which are small businesses.

When Region V actually reached out to us 7 years after the regulation went into effect, we actually kind of welcomed it because had it not been for the Fertilizer Institute and the Asmark Institute we would have really had no compliance materials to help our dealers understand what is a very complicated Federal regulation. So when they first initiated contact with us in 2002 to say, "Well, we want to do a pilot program and want to check your compliance with the RMP," we welcomed it, because we do want outreach with the U.S. EPA.

Unfortunately, 2 years after the compliance program started, I really found out by accident that they felt like all 500 of our fertilizer dealers were out of compliance. I want to tell you that the only people they checked were people who filed their RMPs and made a good faith effort to comply. There was never any effort to locate fertilizer dealers or other industries that did not file RMPs. So right away our fertilizer dealers feel like, "Gosh, I tried to do the right thing and then I get singled out for enforcement."

When I found out that they felt like every one of our fertilizer dealers was out of compliance, they suggested a monetary penalty——

Senator INHOFE. You said every one of them. You said 500. Is this about what you have?

Ms. PAYNE. We had actually a few more than that. They requested a list. They worked with our Department of Agriculture, which we supported. They requested a list of the fertilizer dealers from the Department of Agriculture, which they provided with our support.

Actually, you know, when we found out about it I immediately, in fact, the day after I was told by Region V staff they were going to enforcement, I fired off a letter to the administrator of Region V, as well as to the U.S. EPA headquarters, asking them to please not do this until they could just sit down with our industry and review what they thought were so many onerous violations.

I asked them in that meeting, when we knew that Region VII to the west of us had done a similar kind of pilot program with their Department of Agriculture, but Region VII sat down with the industry and the only thing that resulted in that region was a few fertilizer dealers in Iowa got a preliminary determination letter that stated, "We think you need to include your nurse tanks in the RMP." They didn't get violation notices or monetary penalties.

So when I asked why would Region V take this approach when Region VII did not, I was told, "Well, we really can do whatever we want. That is a different region. Everything is done differently." That was the only response I received to that question.

We were never given a chance to review the alleged deficiencies. Over the entire summer last summer I requested meetings with Region V to sit down with us. I wish I had a dollar for every phone call and e-mail I made to the Chicago office begging for them to sit down with us that was not returned.

You had a copy of a letter up there that was sent to one of our fertilizer dealers. Through the whole month of December, you know, I was told that our dealers would get—actually, they had agreed to us in a meeting with Region V that they would send out a letter but it wouldn't say "violation." It would say, "Well, there may be some deficiencies." We were OK with that, and then it would list the deficiencies, and then they would provide our dealers with an opportunity to go to training.

After that meeting, which was on November 30th of last year, I really felt good—better, at least—about the way things were going. But then 2 weeks went by and we had no contact, even though I had called many times saying, "When are you going to send out these letters. It is getting awfully close to Christmas." This letter

to Mr. Hamson he received on December 19th with a threatened $32,500 per day. I believe it is mentioned twice in there.

He called me, and I have to tell you, and this may sound like small town U.S.A., he owns this small dealership with his wife. They have been in business for 35 years. They have, like, six total employees. He called me and he was incredibly shaken. He had never had an ammonia release in the history of his company, never had gotten a letter from Region V or any EPA, for that matter, and he actually asked me if he was going to be going to jail for this.

I will tell you that that week he closed down his fertilizer facility, the shop, to frame up an addition to the church. I mean, these are the kind of people that live in these small communities and they were devastated by these letters that went out to 500 people just like Mr. Hamson.

I had to reach out to the Region V administrator, you know, begging him to put a stop to these letters because 10 days after December 19th is December 29th. A lot of our guys weren't even going to be in the office, and here you are subject to $32,500 per day, even though these inspections had happened over a year earlier.

The violations that they listed were so inconsistent with the Department of Agriculture inspection reports I was actually embarrassed for Region V. Those are some of the issues that we tried to work out.

Senator Inhofe, had you not opened an inquiry, you will see in that letter our members were going to be subject to consent agreements. No other fertilizer dealers in the country have been subject to consent agreements for alleged violations of their RMP. I am sure that we would have been forced down that path had you not intervened.

We were able, after the intervention of your office, that condition was dropped, but at the time when I protested it I was told, "Well, that is the least onerous tool in the enforcement toolbox." Honestly, I thought to myself, "Maybe we could brush off the education and outreach toolbox and see what might be in there for help with the fertilizer dealers."

If I could just have 30 more seconds, I have a statement from one of our fertilizer dealers that really says it well on how they felt about receiving these letters. This is from David Smith. He's the manager of Okaw Farmers Co-op in southeastern Illinois. He says, "I started in the grain and fertilizer business 30 years ago, and out of those 20 years I am mayor of a community of 1,300 people. I have always looked out for the safety of our community and not had a problem with anhydrous ammonia yet. We have always been checked out by the Department of Agriculture and I welcomed their visits to make sure I had not overlooked anything.

Since RMPs were put into effect, my direction has been shifted from a local safety standpoint to just trying to satisfy the U.S. EPA and the paperwork. The paperwork is not understandable. We receive very little help from EPA. Then we make one mistake and we are threatened with huge fines.

The Department of Agriculture cannot even answer my questions because they do not understand the regulation, either. I would much rather see EPA work with the Departments of Agriculture and the agrichemical dealers to create regulations that are more

uniform across the Country and more understandable if we are expected to follow them. If we operate a safe business but our paperwork is not up to EPA's expectations, we are threatened with huge fines instead of them trying to work with us."

That really says it.

Senator INHOFE. It does. Well, even though you have read the letter, without objection I will include that letter in the record. That is actually important.

Thank you very much.

Dr. WATERMAN.

STATEMENT OF RICHARD W. WATERMAN, CHAIR, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF KENTUCKY

Dr. WATERMAN. Thank you very much. Thank you, Chairman Inhofe and Ranking Member Jeffords, for the opportunity to testify before the committee today. I am here to testify regarding regional variations within the EPA, a subject that I have studied extensively. I have submitted comprehensive testimony for the record, but will limit my oral statement to a few important issues.

To my knowledge, this has been a largely overlooked area in academic studies of the EPA. Scholarly work tends to focus their attention on the activities of States with primacy or on the EPA officials in Washington, DC, yet most EPA employees operate not in Washington but in various regional offices around the Country. These regional offices represent a major reason for variations in enforcement.

EPA officials that I spoke to in the Washington or national office during the Presidencies of both George H.W. Bush and Bill Clinton described considerable frustration with the enforcement activities of the regional EPA offices. This suggests to me that this is not a Democratic or a Republican problem, as frustration with regional variations was expressed during periods when both Democrats and Republicans controlled the White House, as well as the Congress.

Both parties appear to be interested in a more uniform style of enforcement, even if they don't ultimately agree on what that style should be; that is, whether it should reflect a strict enforcement approach or a style that emphasizes a greater level of negotiation with business.

With regard to regional variations, one particular point of position stood out as a subject of concern. Most memorably, several years ago when I asked one top Agency official in the EPA Water Office why there was so much variation in enforcement from region to region, I was surprised to be treated to a rather candid and colorful exposition of how a particular regional administrator was enforcing the law, not in accordance with the wishes of the then current Administration, but rather in accord with the desires of the political culture of that region.

When I asked for more detail on this point, I was informed that some regions are naturally more aggressive in their enforcement zeal while others are not. I was told that regional administrators represented one of the last vestiges of the practice of Senatorial courtesy, and that often the administrators represented the political viewpoints of the region rather than national interests.

As a result of this and other discussions with EPA, State enforcement personnel, members of environmental groups, and people in the regulated industry, I ultimately conducted two surveys with two of my graduate students. Among the many questions on our surveys, we asked, "How much influence do various policy actors have over how your office enforces the law?"

We asked bureaucrats to rank these policy actors on a five-point scale, from no influence to a great deal of influence. Among EPA officials, regional administrators narrowly ranked first in terms of their perceived level of influence, with the EPA administrator ranking second. It should be noted that they ranked much higher than the Federal courts third, Congress fourth, environmental groups fifth, public opinion sixth, and the President seventh.

When we asked State officials the same question, they ranked the Governor first, the State legislature second, the U.S. EPA administrator third, the U.S. Congress fourth, the State's Finance Committee fifth, and then the regional administrator sixth.

What was surprising to us, however, is that regional administrators were seen as having essentially the same level as the EPA administrator among EPA enforcement personnel, and that both were seen as having more influence than either Congress or the President.

What our results suggest then is that, particularly among EPA bureaucrats, regional administrators are perceived as exerting considerable influence. Given the obvious frustration expressed by U.S. EPA officials regarding regional administrators, it is also clear that this is a point of contention within EPA, itself. In particular, there is a sense that EPA regional administrators tend to reflect the viewpoints of the regional offices and personnel rather than the national office.

One EPA official in the national office said that the regional administrators tended to be co-opted by their personnel in the offices, as well as by the political culture of the region.

What then is the solution? It is unreasonable to expect enforcement to be precisely the same in each region. There are some valid reasons for regional variations which would not be appropriate to force a one-size-fits-all approach on all regions. A stricter enforcement approach may be required in some settings and in some regions, while negotiations with industry may be appropriate in others. In this process it is clear that elected officials have a legitimate role in overseeing the bureaucracy.

First, while Presidents often pay close attention to the qualities of their national EPA officials, past experience suggests they are less attentive to the types of individuals they appoint to the regional EPA offices. This may be due to the fact that they are inherently believed that such officials will follow directives by the U.S. EPA. Since my research suggests this is not the case, the first recommendation is the President should be more attentive when they appoint regional administrators. As noted, these ten regional administrators are perceived by EPA to have slightly more influence.

Beyond appointments, is it appropriate for elected officials to have continuing oversight of the bureaucracy? I believe here the answer is yes. I have found that not only can Presidents influence the bureaucracy, but Congress can, as well. In fact, what scholars

refer to as political control of the bureaucracy can be conceptualized as part of our necessary system of checks and balances.

While our Constitution is largely silent on the bureaucratic State, it is clear that elected officials can and should exert influence over the bureaucracy. Bureaucrats have a wide array of expertise that should not be ignored, but elected officials represent the public interest in a different way. They can make sure that bureaucrats are applying the law fairly and in accordance with the intent of Congress, as well as representing public opinion.

Congress has a legitimate role in determining how much variation should be permissible and whether regional administrators should be more loyal to the regional offices in which they serve or the national EPA office.

Thank you. I will be happy to answer any questions.

Senator INHOFE. Thank you, Dr. Waterman. That was an excellent statement.

Mr. SCHAEFFER.

STATEMENT OF ERIC SCHAEFFER, DIRECTOR, ENVIRONMENTAL INTEGRITY PROJECT

Mr. SCHAEFFER. Thank you, Mr. Chairman and Senator Jeffords, for inviting me to testify today on the need for greater consistency in enforcing Federal environmental law.

I am Director of the Environmental Integrity Project, a non-profit group that generally advocates for more enforcement, and previously was director of the Office of Civil Enforcement at EPA.

EPA has a very, very difficult job, as I think everybody here recognizes. The Agency has to enforce 19 environmental laws in 50 States. EPA has delegated, as it must do under the statutes, the responsibility for enforcing those laws, most of those laws, to State environmental agencies. States have widely different philosophies and levels of competence when it comes to carrying out those responsibilities, so, not surprisingly, there is a great variation in how an environmental law that is Federal is enforced in one State compared to another. If the concern is for greater consistency—and I think everybody shares that concern—that issue ought to be looked at first.

I would agree with Dr. Waterman. This is not a partisan issue or one Administration versus another. This is a problem that has persisted for years. It is something I struggled with at EPA and was never convinced I was doing a good enough job to address, so oversight is definitely welcome.

I would suggest starting by looking at audits from the Inspector General and the Government Accountability Office conducted over the past decade which document this problem and put it in very black and white terms. I will start in 1997. The IG found that two States had completely failed to identify significant violators of Federal hazardous waste laws. In 1998, seven States had failed to identify major violations of the Clean Air Act. Between six of those States, the inspectors were able to document only 18 violations. The Inspector General found 103 looking at only about 10 percent of the files.

In 2002 the Government Accountability Office said over half the States don't inspect underground storage tanks every 3 years, as

EPA recommends. In 2003, an IG audit found that Louisiana couldn't even locate records that they needed to know whether or not facilities were in compliance. And in 2005 the IG found that States varied widely in their ability to monitor air emissions.

Those are just a few of the examples.

Again, I want to say some States are doing an outstanding job in some programs. Other States are falling well short. That disparity is probably where you are going to see the biggest differences in how Federal laws are enforced, and that really deserves your attention.

I also want to emphasize this is not a squabble about whether penalties are too high or too low. This is about the ability to even identify a violation and require correction in the first instance, which I think is pretty serious, and I hope you will take it seriously.

As with all these difficult Government issues, this is a lot easier to diagnose than it is to fix. I am sure funding is part of the problem for some States. I know appropriations are in short supply. I do think States have the authority to raise permit fees. Title five of the Clean Air Act is one example. Congress could look at that. EPA could make enforcement expectations clearer.

I think the bottom line is the Agency has to grind it out on a day-to-day basis with oversight. It is a very hard task. There needs to be dialog.

I know with respect to the Clean Air Act violations, when the IG documented all these problems in State programs we sat down with States and actually redefined the set of violations. We found there was some legitimate confusion about what should be counted and what shouldn't. So EPA has some responsibilities, too.

I do want to suggest, and I think maybe Dr. Waterman made this same point, that we are in a Federal system. The authority to enforce these laws is going to be shared. There is going to be some deviation. I think we are going to have to tolerate that and decide how much we can tolerate. Ultimately, that is a political question. But I think we can do better.

I can't resist a quick comment on the concern coming out of Region V. I have to confess I don't know the situation as well as I should. You do often see in Government letters offering amnesty, limited amnesty, the ability to comply without penalty, language that recites the penalties for failure to non-comply. I don't think that is so unusual. I would ask you to think about speeding tickets. I like to think of myself as law abiding, but I have gotten some. On that speeding ticket you will see usually language that says, "If you don't either pay or appear in court you can be arrested." That has never prompted me to ask for a hearing or suggest there is something untoward about that.

So I would just close by saying I hope you do follow up on State programs and the deviations that have been documented in these IG and GAO reports. I think the oversight is welcome and I look forward to continued discussion.

Senator INHOFE. Thank you, Mr. Schaeffer.

Mr. PAYLOR.

STATEMENT OF DAVID PAYLOR, EXECUTIVE DIRECTOR, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICER, ENVIRONMENTAL COUNCIL OF STATES

Mr. PAYLOR. Thank you, Mr. Chairman.

I am David Paylor. I am the Director of the Virginia Department of Environmental Quality and I am here representing the Environmental Council of States, in which I am an officer. The Environmental Council of States is made up of the 50 States' commissioners, and we exist to improve the relationship with EPA.

States' environmental agencies have as their primary contact the ten regional offices, and then we work directly with the central office, as well, with which we have good relationships. I would have to say in general the State relationships with regional offices is very good, but in some cases we do find that we have concerns about performance that have to do with inconsistencies.

I think it is worth noting that the States operate 75 percent of the Federal programs. We have about 95 percent of the enforcement actions and we collect 95 percent of the data in response to the Federal programs.

I'd say that the four areas that we would want to point to where we have concerns about consistency are related to enforcement issues, provisions of grants, interpretation of NPM National Program Manager guidances, and then some staffing issues.

when it comes to the question of enforcement, ECOS went to EPA in 2004 with our concern that the Agency might be allowing inequities in performance with environmental matters. I would have to say that the inequities probably fall into two categories. One is philosophical and it focuses on whether or not the primary measure is, in fact, the size of the penalty, or whether or not the primary measure has more to do with the environmental result that is achieved.

We propose that the Agency and ECOS work together in a State review framework that you heard referred to earlier. This is underway, and we believe that it is bearing some positive fruit and would recommend that you follow the State review framework to see how that goes.

As regards to funding concerns, States get between 5 and 30 percent of their funding for the operation of their programs from the Federal Government. Oftentimes, we see delay in provision of funding. For example, in Tennessee in Region IV just this year, out of 12 grants all but four of them were delayed more than 3 months, and one of them still has not been paid. We really rely on these grants in order to be able to do our programs, and would like to see more consistency in the way that the grants are made available to the States so that they can have access to those funds.

Four, national program manager guidance, those rules are not implemented consistently across the State. The way it works is the central office provides that guidance to the regional offices. As you have heard, they have a fair amount of flexibility in how they are implemented. I agree that that flexibility is needed to deal with regional differences, but I would also submit that philosophical differences enter into some of those inconsistencies.

For example, in Oklahoma it was recently determined that for a certain rule that a cooling water discharge was exempt, EPA ini-

tially agreed; then, when they were asked again they hedged. Oklahoma had a difficult time and was unable to determine what, in fact, the EPA rule was.

I would say that the inconsistencies that we see fall into about three categories. One is a failure to provide clear guidance to the States on what the rule would be. A second would be adding to the interpretation some regions may interpret rules more narrowly than others. For example, in air rules they are fairly complicated when you have to determine the applicability of new source review requirements. We would see different guidance from different regions on whether or not those rules apply.

Third, we would have a concern about the additional requirements that come in addition to NPM guidance, and those really have to do primarily with adding on reporting requirements that are perhaps more than is justified for States to have to do, and that impacts our resource issues.

I wanted to make a comment last about resource issues. In 1992, the States implemented 45 percent of the Federal rules. Now we implemented in 2002 [sic] 75 percent of the Federal rules with actually only one new statute during that time, yet we see 40 new rules per year come along. States have been downsizing over that time in terms of their staff, while getting increased resources. From 1992 to 2000 EPA staffing has stayed about 18,000. We have not concluded that that is an inappropriate level of staffing for EPA, but we just would raise the issue that there maybe are some resource issues that we need to look at holistically across the Nation so that we can continue to provide the environmental services that we are called upon to provide in a cost efficient way.

I thank you for the opportunity.

Senator INHOFE. Thank you, Mr. Paylor.

I appreciate the fact that you have come in in a well-organized way with four suggestions. That helps us a lot. I would like to just go ahead and ask if any of the other members of the panel, after hearing the suggestions that were given by Mr. Paylor, have any comments about those suggestions. Anybody?

Ms. PAYNE. We have always enjoyed working with our State agencies. I mean, the RMP is one of the few rules that really was not delegated to the State agencies, and I think that caused the bigger part of the problem. I mean, our Department of Agriculture has had oversight over the ammonia regulations.

We really welcomed this pilot program because we thought that would be a good balance of Region V working through our Department of Agriculture to improve compliance. But rather than take the next step and then review the findings with industry and the Department of Agriculture, they went straight to enforcement.

I think that pilot program can work if there is just a better understanding up front of engaging the State agencies and helping, because the State agencies are at our facilities three or four times a year, and we have a lot of respect. Quite frankly, we couldn't have a safety record as we do were it not for people like our Illinois Department of Agriculture.

It will be a challenge for Region V now because my counterparts in Indiana and Wisconsin and Minnesota saw what happened to us and they're afraid to touch this thing with a ten-foot pole.

I think it can be resolved; it is just going to take some work and some rebuilding of some trust.

Senator INHOFE. Any other comments?

Dr. WATERMAN. Yes. People have talked about variations in enforcement, and enforcement is one of the issues that I have looked at the most. One of the things, in terms of variation, is the number of enforcements vary tremendously from region to region, but there is also a tremendous variation even within categories.

For example, what is an inspection? I looked at fairly substantially the national pollution discharge elimination system. You would think there is a uniform way to do an inspection, but, in fact, some inspections are just somebody showing up and looking at a water sauce and saying it looks clean. It is essentially called a visual inspection. Other times they actually do chemical inspections.

So when you get the numbers and you look at the actual numbers and you see this many inspections were done or that many inspections were done, oftentimes that doesn't tell you a lot, either, because there are variations in the types and ways that these things are done, as well as in the overall numbers, so the variation is just really difficult to get a handle on.

Senator INHOFE. Yes.

Mr. SCHAEFFER. I thought Mr. Paylor's recommendations were very good. I am especially sensitive to the problem of conflicting interpretations because they create a real problem for enforcement and make enforcement much more difficult.

It is going to be hard to get it back because businesses on a day-to-day basis want quick answers. They're looking for quick answers, and so a lot of the answers come from the region, and even more come from the State, so pulling all that together and trying to get some consistency is going to be a challenge, but it is not a challenge that Government can walk away from.

Senator INHOFE. Ms. Payne, let me ask you a question. Did you get a phone call from the administrator of Region V, I guess Bharat Mathur—I may not be pronouncing that right—prior to your appearance here concerning your testimony today?

Ms. PAYNE. Yes, I did, several weeks ago. I have known Mr. Mathur since he was at Illinois EPA, so I have known him for a long time. You know, it made me uncomfortable being asked that question because I have to have an ongoing relationship with Region V. This is not going to be the only issue that we have to work with them on.

I will give him credit. I think had he not really took notice of what was happening to our fertilizer dealers and listened to the concerns of your inquiry we could have ended up with a worse situation, but I really feel—and I think this happens in more than just Region V—sometimes by the time the administrator becomes aware of what the staff is doing it is too late and the damage has been done. The violation letters have been issued, and those violation letters will always be on the records of our fertilizer dealers. They can't undo that.

That is a concern, because if these guys ever do have an accident in the future, maybe not something that they even caused, a meth head breaking into an ammonia tank and causing a release, they

are on record as being in violation of the Clean Air Act already for something that we really tried to challenge and without your help would have consent agreements on. That can shut down your business, as many of you know.

Senator INHOFE. The threat that we talked about that was in the letters, $32,500 a day, was it?

Ms. PAYNE. Yes.

Senator INHOFE. You know, I don't know the financial structure of these complaints, but I am sure that you have looked at that and certainly they have looked at it. How long can they stay in business if they are faced with something like that? Again, I use the analogy of the experience that we had in Oklahoma in the Superfund site. Here's a guy that was complying with the law that would be out of business in 40 days.

Now, I have to say, Mr. Schaeffer, if the best analogy you can come up with to justify that kind of intimidation is a speeding ticket, I'd say that you don't have a very strong case.

Mr. SCHAEFFER. I just have to respectfully disagree. I don't find a letter that basically outlines penalties for non-compliance, you know, by itself to be the end of the world. I mean, these are laws and there are penalties for not complying. In this case no penalty was collected and the companies were allowed to self certify compliance. This strikes me——

Senator INHOFE. Wait, wait.

Mr. SCHAEFFER [continuing]. as a fairly gentle approach.

Senator INHOFE. Just because no one had to pay, these people are not professional bureaucrats. These people are the people who are out there with real jobs, paying taxes, paying for all the fun we are having up here, and they don't know that when they get a letter that is $32,500 a day, all they look at that and say, "How can I be competitive? How can I stay in business?" I know this because I have been in that position before. I look at this and I see this as unreasonable, outrageous intimidation. I just can't believe this would happen.

Look at my farmers in Oklahoma. The cost of fertilizer has gone through the roof. We recognize it. We have had hearings here on the cost of natural gas and other things. But this is the type of thing also that is causing that, having an adverse effect on my farmers.

I will go ahead and let you go ahead, Senator, from your Region V Illinois perspective. I am sure you have some questions.

OPENING STATEMENT OF HON. BARACK OBAMA, U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator OBAMA. Well, first of all I apologize for being late. I was hoping to catch all the testimony. I appreciate this, Mr. Chairman. I am going to be very brief.

First of all, one of the reasons I wanted to come was because Ms. Payne and I used to work in Springfield together way back when, so I wanted to make sure that she had her Senator here when she was providing testimony. It is good to see you.

I actually had the opportunity to read the written testimony about the interactions, and as I think everybody here is aware Illinois is another farm State, so ammonia has a lot of important uses

as a fertilizer. It is also flammable and is a key ingredient in the production of methamphetamine.

So my staff and I have met with members of the IFCA. They are terrific people. They understand, I think, the need for Federal and State regulation to safeguard the storage of these substances. But I don't think the IFCA is being unreasonable to expect some kind of certainty and consistency in the way the regulators do their jobs.

Now, I have to also say, Mr. Chairman, you know, that bureaucrats at the EPA are actually working hard and doing their jobs, too, so I don't want the notion that they're not. I mean, I think they are civil servants who are trying to do their best to apply laws that we passed. So I am very sympathetic to that, as well. They are trying to follow Congress' mandates, oftentimes because they have limited resources.

I don't want the EPA to not do its job. The RMP program is an important one. It has made millions of people safer. I think we want to keep on doing it.

So I think the key—and I saw this in Ms. Payne's testimony—is to just develop a better sense of communication and trust between the parties so that, to the extent that we can avoid a letter going out where a phone call might suffice, to the extent that we can make sure there is consistency in the application of these rules, that there is good outreach and education ahead of time, I think that everybody will benefit.

Let me just close by saying this. When 90 percent of the members of the IFCA are found to have failed an inspection, that seems to me to be a sign not of a disregard of regulations as much as a serious breakdown in communications about what the risk management program requires. It suggests that EPA could do a better job of outreach than it is doing right now.

I appreciate the fact that there were some concrete recommendations made by Mr. Paylor and others. I hope that those address them. But it strikes me that this is an industry that wants to do the right thing, that has a stake in doing the right thing, and if we can try to break down some of the barriers to folks working together on this we should be able to work it out.

With that, Mr. Chairman, I have nothing further.

[The prepared statement of Senator Obama follows:]

STATEMENT OF THE HON. BARACK OBAMA, U.S. SENATOR FROM THE STATE OF ILLINOIS

Mr. Chairman, thank you for holding this hearing today. First, I'd like to recognize one of the witnesses, who is a constituent from my State. Jean Payne is the President of the Illinois Fertilizer and Chemical Association, and I appreciate her taking the time to appear before the committee this morning.

Today's hearing is about how the 10 regional offices of the Environmental Protection Agency enforce the nation's environmental laws. I'm well aware of the difficulties that Federal regulatory agencies face in balancing Congress' intent in passing a law and the need for some latitude of enforcement. I look forward to hearing the comments of the first panel in that regard.

Later, we'll hear from Ms. Payne about the recent interactions between her association and EPA regarding risk management plans for anhydrous ammonia retailers. In Illinois, as in other farm States, ammonia has important uses in products such as agriculture fertilizer, but it is also highly flammable, can form explosive mixtures, and is a key ingredient in the production of methamphetamines.

My staff and I have met with members of the IFCA. They're good people, and I know they understand the need for Federal and State regulations to safeguard the

storage of anhydrous ammonia. But I don't think the IFCA is unreasonable to expect some kind of certainty and consistency in the way that regulators do their jobs.

I also know that the hard-working civil servants in EPA's regional offices are doing their best to follow Congress' mandates despite limited financial resources and an Administration that has a less-than-enviable track record on enforcement. The EPA's RMP program is an important one that has made millions of people safer all across the country. We need to make sure that EPA regional offices have the guidance, policies and resources to make this program work in a fair and effective way.

So, I'm interested in learning about what happened in my State. When 90 percent of the member facilities of the IFCA were found by the EPA to have failed an inspection, that doesn't appear to be a sign of misdeeds, or a disregard of regulations, but rather a serious breakdown in communications about what the risk management program requires. Now, I'm not sure I'd call this an example of regulatory inconsistency but it certainly suggests that EPA could have done a far better job of outreach and communication in this case.

So, I look forward to the testimony today and hearing about what we can do to improve the functioning of our regional offices. Thank you.

Senator INHOFE. Thank you, Senator.

You know, you commented that when 90 percent are found, I guess, in violation, I would agree with that. There is something seriously wrong. It has to be wrong with the system. I know that people don't want to violate, because they know it costs them money to violate. Quite often there is an attitude in Washington that the regulated communities are all out there trying to pollute and trying to do things and, in fact, they are not. But that does show that there is a serious problem if all 500 of the fertilizer dealers were found to be out of compliance.

I wonder, going back to the case that we talked about where the imposition of the excessive—what I consider excessive—or suggestion of them, even though they never came to reality, in that particular company was there analysis made by the company or reported to you as to how long they could actually stay in business if they were to have to be paying these fines?

Ms. PAYNE. I would say that for the majority of our fertilizer dealers less than a week probably. I mean, some of them have multiple facilities. Some of them are a single family owned business. It varies. But we could have accomplished probably improved compliance without that threat, and that was one thing that I, in a meeting with Region V staff, really begged for is, you know, send us a letter, talk about the areas that we can improve upon, but there is no need to threaten the $32,500 or criminal imprisonment if you don't respond by 10 days, you know, right before Christmas.

I really thought that they agreed with us, but they then proceeded, which was rather shocking to us and shocking to our fertilizer dealers, because, going on EPA's word, I had communicated to them that you will be getting these letters. Please don't panic. We are going to be working with you at our upcoming convention to provide more tips on how to comply with the RMP now that Region V has finally told us after 7 years what they really want us to do. We had that commitment from them. So when they sent that letters anyway—and it was exactly like Senator Obama said, a complete breakdown in communication that could have been avoided had they just returned one of my dozen phone calls.

Senator INHOFE. Yes.

Dr. Waterman, you wrote the book called "Bureaucrats, Politics, and the Environment." I would ask you the question: does EPA's

regional structure provide bureaucrats the opportunity to wield considerable influence over policy? If so, it this bad?

Dr. WATERMAN. It definitely does. I mean, there is the issue of primacy, obviously, where the States have a great deal of influence, but even beyond that it is clear that there are substantial variations between regions, and, whether you want to characterize it as bad or inappropriate, it clearly is a problem. I think one of the factors that explains that problem has been discussed by the first panel and by people on this panel, as well, which is that EPA has a goal of national consistency and flexibility. If you think about that, they are contradictory goals. If you want to have national consistency and flexibility, those two things are going to be running against each other at some point. So regional administrators and people in the regional office are trying to deal with this contradiction. I think clearly there has to be more of a national consistency.

Senator INHOFE. I think, though, that what I was really getting to is the power of an unelected bureaucrat. Now, what we do, we are the ones who hear the complaints. We have to answer to an electorate. I know this because I spent 30 years in the real world dealing with regulators, and I have seen a lot of things happen where the fear of putting someone out of business is there. It is an incredible power.

Something you said, Ms. Payne—I wrote it down—you said you had a response from one of the people in the regional office, "We can do what we want."

Ms. PAYNE. Yes. I mean, on the CAFO, when I protested the CAFOs—and understand, too, we really felt that was wrong. We didn't feel like we had the resources to hire attorneys to take on the Federal Government, to challenge that. My association doesn't have the resources, much less these fertilizer dealers have that kind of resource. Yes, I mean, I was told—I tried to understand it because I do work with Federal agencies—that it was the least onerous tool in the enforcement toolbox. That is where I think maybe the flexibility factor needs to come in, that there can be other alternatives than just you either get this letter or this letter or this letter and that is all we can do.

Senator INHOFE. Mr. Schaeffer, in your testimony you point out how the inspections for underground tanks has dropped off, according to the GAO, and I would ask you if you were equally concerned back in 1998 when, during the Browner administration, when the inspections dropped off, although they called it "enforcement discretion" at that time, as opposed to the term that is used now as "environmental rollback." Were you concerned back then when that happened, or did you disagree that it happened?

Mr. SCHAEFFER. First of all, in my testimony I said these problems weren't confined to one Administration or another. We have struggled with this consistency problem for years under different Administrations, so I want to be very clear about that.

Second, in the Browner administration the issue was not inspection frequency but whether or not we would be closing small businesses that didn't comply with the requirement to upgrade tanks by the 1998 deadline. So I that case I think the concern was that we would be doing the kind of thing that seems to be the focus of

criticism at today's hearing, which is coming down hard on businesses that basically had no options.

Senator INHOFE. Also perhaps this is my observation, perhaps not yours, that that was in 1998 right before an election, and that would involve literally thousands of gas stations and made a lot of people mad. Was that a consideration, do you think?

Mr. SCHAEFFER. No, I don't think so. I never heard that at all at EPA. Any time you are in an even year, you, it is an election year and people raise that as a motivation.

Senator INHOFE. Yes.

Mr. SCHAEFFER. But I don't believe it was at all in that case. I certainly never heard that.

Senator INHOFE. Mr. Paylor, I think you pretty much covered everything in your suggestions. We will take those suggestions. You testified to the 45 percent increase over the last 10 years of States with delegated authority, yet the EPA still has the same amount of employees, 18,000. Do you think the EPA regional staff should be reduced?

Mr. PAYLOR. Mr. Chairman, the primary thing that we believe is that the functions of EPA need to be better coordinated with the States. We believe there are opportunities to reduce redundancy. There are some things that EPA regional offices are doing that are duplicative of the State rules.

Senator INHOFE. Yes.

Mr. PAYLOR. So there is at least an opportunity to redeploy resources in a different way, and that has become more of a concern for all of the States within the last year because of reduction in EPA funding, and those reductions translate in the reduction from the States without a reduction in the expectations of the States.

Senator INHOFE. Well, what we are talking about and the purpose of this hearing is to get some uniformity. Let me just assure you this isn't one of these eating, meeting, and retreating type of situations. We are going to take these recommendations. We are going to watch the performance of not just Region V but all the regions to look for that uniformity and that fairness, a sense of fairness, and the recognition that there are people out there that are working hard, taking risks, and paying for all this stuff up here, and they've got to be considered in a more thoughtful way.

Is there anything that any of you are just dying to say before we close this thing? Let's start with you, Mr. Schaeffer?

Mr. SCHAEFFER. No. I thank you for the opportunity to testify.

Maybe one last thing, which is on the matter of consent decrees and whether they were required. My understanding was ultimately they weren't in the Region V situation. If I am wrong about that, then I would like to know.

Senator INHOFE. All right.

Dr. WATERMAN.

Dr. WATERMAN. Yes.

Senator INHOFE. Now, I have never seen a professor that didn't want one last shot.

Dr. WATERMAN. We are known for talking a lot.

I think when the laws were originally passed that much more of the activity was perceived as occurring at the national level instead of the regional offices were seen as a way of representing. With the

Reagan administration and onward we have seen more movement toward the States, so it may be time to rethink the role of the regional offices, themselves. I mean, do we really need to have so much autonomy in the regional offices? Do we really need to have ten regional offices?

If most of the activity is occurring in States and not at the national level, and essentially the national level is oftentimes a watchdog on the States, we may just want to go back and think about whether or not the regional offices are still a valid means of operating today. I know that is kind of a bold proposal, but, you know, this was created in 1970, EPA, so we might just want to look at it and see whether those make sense any more.

Senator INHOFE. I think that is fairly reasonably. I have always said—and I would ask if you agree with this generally in concept—that, having served as the mayor of a major city, which is the hardest job in America, and served in the State Legislature, then served up here, it appears to me that the closer you are to the people, the more responsive you are, and I think the more thoughtful you are and effective you are, cost effective.

Do you agree with that?

Dr. WATERMAN. Absolutely.

Senator INHOFE. You know, in Tulsa, Oklahoma, when I was mayor, if they didn't like the trash system it ended up in my front yard. That got my attention.

Dr. WATERMAN. I mean, what we have seen is a movement much more toward the local level in terms of enforcement and in terms of the way that EPA operates. So kind of the regional offices are now stuck in the middle. You have got the States on the local level, you have got the national office that is kind of overseeing everything, you have the regional offices in the middle, and I think originally they were kind of perceived as more along the local level.

Senator INHOFE. Yes.

Dr. WATERMAN. So now they've kind of become this intermediary between the States and the national office, and, as we have heard, there is no coordination and communication, so it just creates a tremendous amount of uncertainty and confusion.

I agree with what Senator Obama said, that most of the people who work in EPA are hard working, they try to do their job. There are some people who obviously step over the line and don't do their job appropriately, and that is why we are here today talking about this situation with Region V. But I think one of the problems is that even if you are a hard working person working in a region and you don't have proper coordination, quite honestly what is happening in Region VIII isn't going to be what is happening in Region II. Even if people think they are doing the same job, you don't have the coordination. The staff aren't talking to each other, even if the regional administrators are.

I think this structure, itself, may be a problem.

Senator INHOFE. You know, it is not unique to the EPA. I agree with Senator Obama, too. There are literally thousands of people really dedicated in public service that are out there working. One of my occupations in the past was aviation. I can remember with the FAA that 98 percent of the inspectors they have in the field are people who are really there to serve and really there to help and

look after safety and try to assist people in a very competitive world. However, that 1 or 2 percent of the others, you have to step in and correct it because some people can't handle power. I believe that.

Dr. WATERMAN. And you are never going to have national consistency as long as you separate things up this way.

Senator INHOFE. Yes.

Dr. WATERMAN. If you want flexibility, the States can provide that. The States can provide how they want to enforce the law, and that is a more appropriate method in terms of saying, "OK, this State here wants to be very aggressive in enforcing the law, this State here wants to work in a different way." Citizens can have an impact in terms of how they vote on that. But this regional structure, again, just kind of puts a middle layer in there that seems to be creating a lot of confusion within the Agency and obviously here today.

Senator INHOFE. I am going to read your book.

Ms. Payne, any last thoughts?

Ms. PAYNE. I really appreciate, Mr. Chairman, having the last word on this. I wanted to answer Mr. Schaeffer's question on the consent agreements. We would have had consent agreements, again, had it not been for your inquiry. Region V reissued certificates of compliance which our members have to sign under threat of perjury that they are in full compliance with the RMP—and these are due by July 1st and they have a great deal of heartburn about signing that document because they still don't know exactly what Region V wants from them on some of these alleged violations. So we are the only State in the country that has to sign a certificate of compliance for the RMP. I just wanted to make each of you aware of that.

On the Wabash Valley case, if I may, that is an Illinois-based cooperative, as well. It has been kind of a rough year in Illinois this year. That was a spray drift incident. The Illinois Department of Agriculture has the authority under FIFRA to take authority to issue penalties for spray drift violations, which they did in this situation. Five years later, Region V pursued this—and the important thing is that this is a criminal case. Despite what people might think, this is the first time in our industry that criminal charges have ever been filed against an agricultural retailer or its employees. Criminal.

I mean, they wanted to put these pesticide applicators in jail for supposedly maybe sitting in the fertilizer shop that day and deciding, "Let's go take the spray rig out and let's really try to hurt somebody." I mean, that is not what happened in this case. In a month from now I am going to be out here with Wabash Valley Service Company because they won a national environmental respect award from our industry, who only issues six of those a year, of all the retailers in the country, because that is the kind of good company they are.

Senator INHOFE. Out of how many retailers is that?

Ms. PAYNE. In the country?

Senator INHOFE. Yes.

Ms. PAYNE. I think 5,000 to 6,000.

Senator INHOFE. So they would be one of six?

Ms. PAYNE. Yes. So, I mean, I just feel like they haven't been portrayed fairly here. The manager of that company is not going to let his guys with 20 years of employment history, very good gentlemen—I know both of them—go to jail for this. And the judge completely agreed.

Senator INHOFE. Yes.

Ms. PAYNE. So, I mean, they didn't have the grounds to try to prove that these people set out with some kind of evil intent to harm someone. We have spray drift violations periodically. Illinois is a windy State and we have a compressed planting season. It can happen. But our Department of Agriculture steps in and penalizes spray drift violations. That happened and it should have been settled. That is why we were so shocked by the U.S. EPA filing criminal charges. It is not a common thing. It is the only time it has ever happened.

Senator INHOFE. Thank you, Ms. Payne.

Ms. PAYNE. Thank you.

Senator INHOFE. I want to thank each of the members for being here today.

We are adjourned.

[Whereupon, at 11 o'clock a.m., the committee was adjourned.]

[Additional statements submitted for the record follow.]

STATEMENT OF GRANT NAKAYAMA, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE AND DONALD WELSH, REGIONAL ADMINISTRATOR REGION III, U.S. ENVIRONMENTAL PROTECTION AGENCY

Good morning Mr. Chairman and members of the committee. I am Grant Nakayama, Assistant Administrator for Enforcement and Compliance Assurance, U.S. Environmental Protection Agency (EPA). I am joined by Donald Welsh, Regional Administrator for Region III. I appreciate the opportunity to discuss with you how EPA meets the challenge of ensuring consistent implementation of Federal environmental laws and regulations.

SCOPE OF THE CHALLENGE

The United States encompasses a wide range of geographies, climates, and economic conditions, with a wide array of industries, agricultural enterprises, and commercial and Governmental entities. EPA's mission is to protect both human health and the natural environment across this varied landscape.

It is not a simple task. EPA must accomplish these protections by implementing 28 different environmental programs contained in eleven separate environmental laws, each statute with its own mechanisms for achieving its goals. In addition, because most of these laws allow EPA to authorize States and tribes to carry out the statutory ensuring the effectiveness of the State and tribal programs.

The Agency has responded to this complex situation by developing fundamental principles, a framework of management systems, and a range of policies that provide nationwide consistency in environmental and human health protections. Within this structure, Regions, States and tribes are actively engaged in both the planning and the implementation of EPA's programs. A critical strength of this system is the balance and flexibility that has been built in to accommodate, as appropriate, the inevitable variations in environmental, economic and other circumstances that arise.

Let me be clear, flexibility is not an excuse for disparity. EPA does not condone enforcement activity that is arbitrary, that results in vastly different responses depending upon the location as opposed to the nature of the violation, or that springs from animosity toward a business, sector or individual. Disparity of this type is counterproductive, and does not lead to increased compliance or a level playing field for regulated entities.

While individual cases are composed of specific facts and circumstances, differences in enforcement responses do not necessarily equate to disparities. After taking these case-specific factors into account, what may appear to be a disparity in EPA's response to a violation may, in fact, simply reflect those facts and cir-

cumstances. Managed flexibility allows EPA to maintain consistency while accommodating case-specific differences, as may be appropriate.

EPA's Strategic Plan, developed in accordance with the Government Performance and Results Act of 1993, is the foundation used by EPA managers nationwide to determine the highest priority environmental issues that the Agency must address. Developed by EPA after input from stakeholders, it articulates measurable goals and objectives against which the Agency's performance is measured, and describes the means and strategies that will be used to achieve results. Routine measurement of the progress being made under each goal enables the Agency to identify and make any needed adjustments to achieve better results.

Our Plan is built around five annual goals, centered on the themes of clean air and global climate change; clean and safe water; land preservation and restoration; healthy communities and ecosystems; and compliance and environmental stewardship. It discusses the strategies that the Agency applies across the five goals, in areas such as science, human capital, innovation, information, homeland security, partnerships, and economic and policy analysis. The Office of Enforcement and Compliance Assurance (OECA) supplements the Strategic Plan's goals with National Enforcement and Compliance Priorities.

The key mechanism for implementing EPA's Strategic Plan is the National Program Managers Guidance and Annual Commitment System, administered Agency-wide by EPA's Chief Financial Officer. It orients all of EPA's activities to meet a single set of strategic goals and objectives. The Guidance and Commitment System contains solid waste, toxics and pesticides and enforcement and compliance assurance), effectively governing the activities of 95 percent of EPA's personnel. Within the system, EPA programs make detailed commitments to conduct certain activities over a three-year time frame (e.g., fiscal years 2005-2007). For the enforcement and compliance assurance program, there are commitments to undertake activities such as the number and type of inspections that each EPA Regional office will perform. These activities are reviewed twice each year by Headquarters.

CONSISTENCY: THE REGIONS

Most EPA programs are carried out through ten Regional offices, with Headquarters responsible for national program oversight and direction. Given the breadth of environmental issues across the country, EPA must balance both national consistency and Regional flexibility in program implementation.

With respect to specific enforcement cases, the Regions conduct inspections, make initial compliance determinations and provide compliance assistance. EPA's Regional offices function as specialists on the environmental concerns within their jurisdictions; their strength is in supporting the national programs while tailoring their expertise and work in response to regional issues. They are also highly effective in working with their State counterparts to ensure that their work, as appropriate, complements State environmental priorities.

The Regions and Headquarters collaborate on policy applicability and

interpretation issues; this collaboration is required on issues of national significance. Although the Regions have the authority to conclude most cases independent of Headquarters, approval by Headquarters is required when settlement terms deviate from policy or when the settlement addresses a precedential legal issue.

EPA Headquarters ensures that national priorities are met and that the Regions adhere to national program goals, standards, practices and policies. To this end, the formal mechanism used by Headquarters is the National Program Managers Guidance and Annual Commitment System, as I mentioned earlier. In the Enforcement and Compliance Assurance program, national consistency is achieved on a less formal, continuous and interactive basis. Along with senior members of my management team, I travel to each Region at least once a year to conduct management reviews.

The Enforcement and Compliance Assurance program employs a host of national policies and guidance that ensure consistency across the Regions. Statute-specific policies address compliance monitoring, enforcement responses to violations, penalties and responsibility for cleanup of hazardous waste sites, all of which were created to provide consistency across the Regions and Headquarters.

Cross-statutory policies include EPA's Audit Policy, the Supplemental Environmental Projects Policy, our Small Business Policies, and model administrative orders and judicial consent decrees. EPA's Audit Policy, for example, encourages companies to implement self-audits for compliance with all environmental laws by promptly reported and corrected. EPA encourages multi-facility companies to enter into auditing agreements that provide for the review of corporate-wide compliance, while providing certainty about liability for self-disclosed and corrected violations.

EPA also has special compliance incentive programs that reduce or eliminate penalties for small businesses and municipalities that discover, disclose, and correct environmental violations. In fiscal year 2005, based on the national plan and program guidance, Region III's resolved 37 Audit Policy cases involving self-disclosed and corrected violations at 156 facilities. In addition to mitigating 100 percent of the penalty in most cases, each of the companies corrected its violations, and committed to improve its management procedures to prevent recurrences of the violations.

For several years, EPA's enforcement program has used National Enforcement Priorities to achieve some of our most significant environmental and human health benefits. Three criteria are used in selecting national priorities: there is a pattern of non-compliance; there is the potential to achieve significant environmental or human health benefits; and there is an appropriate Federal role in addressing the problem. The selection process involved input from EPA Headquarters, the Regions, States and tribes.

Each national priority has an implementation strategy and a national team to carry out the strategy and accomplish consistent results. Quarterly, a nationally based Planning Council of senior managers reviews the progress on each strategy and accommodate any unanticipated developments.

We also maintain national "core" program activities: the day-to-day work of ensuring compliance with the environmental laws. In this context, flexibility actually provides the enforcement program with the ability to recognize unique or differing circumstances. As an example, two ordinary actions to enforce failure to install pollution control equipment, taken in different Regions resulted in markedly different penalties. Is there necessarily an inconsistency or disparity in treatment? No, a lower penalty amount may reflect mitigation for supplemental environmentally beneficial projects that a settling party agreed to undertake. It could reflect the fact that one violator was a small business, whose financial resources are taken into account in our policies for determining appropriate penalties. There may be exacerbating circumstances, such as the severity of the environmental damage caused or the duration of the violation.

The ultimate goal of our program is to obtain compliance with the environmental laws of the United States. To achieve this, we use a range of compliance assistance techniques, from web-based information to workshops and site visits. We actively engage in compliance monitoring, such as collecting and reviewing compliance information reported by facilities, conducting inspections and performing compliance evaluations. We offer compliance incentives, such as favorable settlements through EPA's Audit Policy or its Small Business Policy. And we take enforcement actions.

upon our assessment of the severity of a problem and the technique that is most likely to achieve the most effective results. New tools and techniques are often piloted on a limited basis before they are employed nationally. In any event, we do not expect that every Region will address each compliance situation simultaneously using the same tool. However, our policies and management systems are designed to ensure a reasonable level of consistency nationwide.

At the Regional level, the importance of consistency as well as the value of flexibility are clear. Consistency is essential to provide fairness to the regulated community and citizens, as well as ensure progress toward national goals. Occasionally, flexibility is necessary to allow us to be responsive to individual States' needs, as well as to address issues that are unique to specific geographic areas.

THE NEED FOR FLEXIBILITY

As mentioned, the vast majority of Regional activities are undertaken to achieve specific national commitments. However, there are circumstances in which the flexibility that was mentioned earlier has been crucial in addressing environmental concerns unique to a Region or State. For example, in dealing with the extraordinary regional challenge of restoring the Chesapeake Bay, Region III is working closely with the Commonwealth of Virginia to carry out an Integrated Storm Water Initiative for the Bay. The purpose of this initiative is to accelerate environmental results in this area by combining several regulatory and voluntary approaches in a targeted fashion. EPA is recognition tools to promote Low Impact Development to achieve greater pollutant reductions from the developing areas of the State.

In addition to helping address unique State needs, flexibility is often needed to address Regional environmental problems. One example of this is the Vinyl Chloride Project. In order to reduce exposure to a known carcinogen, Region III developed a region-specific plan to address an environmental problem identified by technical staff, presented to management and coordinated through Headquarters. Interest in this project began when observations were made by field inspectors of movement of this particular pollutant, a known carcinogen, between air, soil and water at facili-

ties in the Region. Based on these observations, further research was conducted using environmental, public health, industry and other data to identify the top chemicals of concern in our Region. Vinyl chloride was identified as one of these chemicals of concern. The Region next evaluated which industries had the greatest risk for pollutant transfers and for which non-compliance could be an issue. The field observations and data analysis were presented to EPA Headquarters. The data showed that several other Regions were likely to have similar issues with vinyl chloride. Based on Region III's information, Headquarters selected the Vinyl Chloride Project as a national pilot that would directly address a recommendation by the General Accountability Office (GAO) to employ strategic approaches to resource deployment in the compliance and enforcement program. The Project was selected because it addresses a significant that demonstrates flexibility in sharing resources across regions, and can achieve measurable reductions in harmful air, water and hazardous waste pollution.

Region III led this effort, working in conjunction with four other regions, the National Enforcement Investigations Center of the Office of Enforcement and Compliance Assurance and our Headquarters Office of Civil Enforcement. To date, EPA has assessed the multi-media compliance status of more than 80 percent of the twenty-three PVC facilities nationwide. Inspections conducted under this Project focus on regulatory compliance and, when appropriate, seek innovative and measurable reductions in harmful air, water and hazardous waste pollution. In one case alone, a settlement has been reached that reduced vinyl chloride emissions by 26 tons. Without the flexibility to develop a Region-specific approach, this project, which is making significant progress in environmental improvements in reducing the presence of a known carcinogen, would not have happened.

CONSISTENCY: THE STATES

EPA oversees State implementation of Federal environmental programs through policy, guidance and effective working relationships between States and EPA Regional offices. The major environmental statutes have a mechanism for authorizing State implementation of environmental programs. States must demonstrate that they have the capacity to carry out program implementation. We use joint planning and priority setting to provide States resource flexibility and to foster use of innovative strategies for and traditional activity measures for managing programs and measuring results.

With respect to enforcement, EPA is now implementing the State Review Framework, which was developed jointly with the Compliance Committee of the Environmental Council of the States, to ensure consistency both in State environmental enforcement program performance and in Regional oversight. It utilizes existing program guidance (such as national enforcement response and penalty policies) to evaluate State performance and help EPA determine the adequacy of a State's enforcement program.

Essentially, the Framework assesses a State's compliance monitoring, enforcement response and data management using agreed-upon performance metrics. Reviews are conducted by EPA Regions as cooperative efforts that describe a State's strengths and weaknesses under each element and make recommendations with respect to areas needing improvement. An additional element of the review provides the opportunity to give States credit for innovative approaches to achieving results in their programs. The Framework includes national tracking of recommendations for improvement, to ensure that they are timely made.

THE IMPORTANCE OF DATA

Consistency would be extremely difficult to achieve in the complex world of environmental protection without sophisticated data systems. EPA has invested heavily in modernizing its data systems in order to improve our ability to identify compliance problems and trends; help inform our decisions about program direction; enhance our ability to monitor results achieved across the EPA Regions; track progress toward achieving specific commitments; and improve the quality of the data we report to Congress, OMB and the public.

CONCLUSION

Differences in enforcement responses do not necessarily equal enforcement disparities. An enforcement and compliance assurance program that is so rigid that it fails to acknowledge and allow for the diversity in our Nation's environmental and demographic conditions would be counterproductive. EPA's enforcement program is designed to produce consistent and fair results that achieve compliance, cure noncompliance, deter future violations, and benefit human health and the environment.

We accomplish this through a system of policies, procedures, and plans that achieve a high degree of national consistency while also allowing a necessary degree of flexibility. EPA remains committed to continuing to improve compliance. If disparities exist, we are committed to removing them, while retaining the flexibility we need to address differences.

Thank you for allowing me to appear before you. I would be happy, now, to take any questions you might have.

RESPONSES BY GRANT NAKAYAMA TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. In the history of the EPA, how many times have criminal charges been filed against a pesticide applicator? Please break down the cases by year, State of occurrence, and offer a brief fact summary.

Response. EPA has identified 56 criminal cases against commercial or private pesticide applicators through a search of the criminal enforcement docket and case files. Summaries of these cases are included in Appendix A. The cases are arranged by the year in which EPA's criminal investigation division opened the case. We were unable to identify all cases charged since the beginning of the program because of the record retention and destruction policy. While case files were unavailable prior to 1996, we were able to obtain case information from criminal enforcement databases; news releases and articles; and copies of pre-1996 case files that were retained for reasons unrelated to the case.

Summary of Criminal Cases against Pesticide Applicators:

FY 1982

Bryce Anderson/Randy Zimmerman (Nebraska)

A criminal information was filed charging the defendants with Federal insecticide, Fungicide, and Rodenticide Act (FIFRA) violations for applying a restricted pesticide without certification by the Environmental Protection Agency (EPA) as an applicator. Anderson pled guilty and charges against Zimmerman were dropped. The magistrate sentenced Anderson to a fine of $100. Anderson had been a certified applicator and let his certification lapse. He had been recertified by EPA prior to sentencing.

FY 1984

A.C. Supply (Wyoming)

The defendant, John Michael Anderson (doing business as A.C. Supply) was prosecuted jointly by the Federal Government and the State of Wyoming for misapplication of a pesticide. He pled guilty and in November 1984 was sentenced to a fine of $5,000 and 36 months probation.

FY 1987

Orkin Extermination (Virginia)

The case involved the misapplication of the pesticide Vikane by the company. In 1988, Orkin Exterminating was convicted at trial and was later sentenced to pay a $500,000 fine and was placed on 24 months probation.

FY 1988

Ronald Rollins (Oregon)

Ronald Rollins used a restricted-use pesticide (Mobay Furadan 4F) in proximity of a waterfowl nesting area and on fields where waterfowl fed in a wetland area of the Snake River. In a joint investigation with the U.S. Fish and Wildlife Service (FWS), a two count information was filed charging the defendant with one count of illegal use of a registered pesticide, in violation of FIFRA and one count of unlawfully taking migratory birds (Canadian Geese) in violation of the Migratory Bird Treaty Act. A Federal District Court jury handed down a verdict, which dismissed one count of violating FIFRA, and convicted Rollins of one count of violating the Migratory Bird Treaty Act. Rollins was sentenced to one year in jail (with all of the time suspended) and one year probation.

FY 1991

Humane Coyote Getters, Inc.

Raymond Hall, doing business as Humane Coyote Getters, Inc. pled guilty following the discovery of numerous dead animals, including red tail hawks, on his property. Tests conducted indicated the carcasses contained excessive Carbofuran/Furadan levels. Hall was fined $2,050 and received 36 months probation. The company was fined $2,375 and received 12 months probation.

Lake Doctors, Inc. (Florida)

Lake Doctors illegally applied pesticides to aquatic areas in the State of Florida. The company and 14 defendants pled guilty. The company was sentenced in September 2003 to a fine of $100,000 and 60 months probation. The individual defendants were assessed fines ranging from $505 to $20,000. Two defendants received 30 months probation and the rest each received 6 months probation.

FY 1992

Omni Applicators (Arizona)

Omni Applicator, a pesticide aerial applicator, and its President, Mark Stewart, pled guilty to RCRA and FIFRA violations, including knowing endangerment, transportation of a hazardous waste without a manifest, and misuse of a pesticide. Stevens was sentenced in February 1994 to one year and one day in prison and five years probation during which time he was not permitted to engage in the pesticide business. He forfeited to the Government all assets, including two airplanes (estimated cost $60,000) to pay fines and cleanup costs.

Full Circle, Inc. (Washington)

Full Circle, Inc., a wholly-owned subsidiary of Cenex Limited, disposed of the contents of a cement lined containment pond containing pesticides and pesticide reinstate that contained listed hazardous wastes by spraying it on 100 acres of ground that they rented from a local farmer. Full Circle also pushed over the sides of the containment pond and covered them with dirt. The company was charged with three counts of FIFRA violations: knowing distribution of an unregistered pesticide; knowing use of a registered pesticide in a manner inconsistent with its labeling and; knowing production of a pesticide without registering the pesticide as required. In June 1995 the company was sentenced to 12 months probation and ordered to pay a $10,000 fine. The company was further ordered to supply the City of Quincy with $3,000 worth of chemicals and to report to EPA any impoundment containing pesticides at any Cenex Limited location.

Ronald Heward (Wyoming)

The defendant pled guilty to three counts of unlawful uses of pesticides. In October 1993, he was sentenced to a fine of $30,075 and 12 months probation.

FY 1993

Florida Waterways Management (Florida)

Florida Waterway Management (FWM) operated as an aquatic management company throughout the State of Florida from 1986. Steve Weinsier, President/owner, was indicted on 17 counts of violating FIFRA-unlawful use of a registered pesticide. Weinsier pled guilty to counts 8 through 17. With his plea the Government moved to dismiss the first seven counts. Weinsier was sentenced to 36 months non-reporting probation on each of the 10 counts, to run concurrently. He was assessed a $50 special assessment fee and fined $2,000 on each of the counts he pled guilty to, for a total fine of $20,000.

Harry Saul Farm (Indiana)

The case was charged after the U.S. FWS reported that the pesticide FURADAN had been misapplied. The defendant used the pesticide to kill migratory birds that fed on his minnow farm. Harry Saul pled guilty and paid a $5,000 fine, while another defendant pled guilty and was sentenced to pay a $5,000 fine.

FY 1994

Y. George Roggy (Minnesota)

The defendant, the owner/operator of Fumicon, Inc., was a licensed pesticide applicator who was under contract with General Mills, Inc. to apply the pesticide Reldan 4e to stored oats. Instead the defendant applied an unauthorized pesticide, Dusban 4e to the oats, but billed General Mills for Reldan 4e application. The de-

fendant was charged with 11 counts of mail fraud, one count of adulteration and one count of FIFRA misuse of a pesticide. In February 1995, the defendant was sentenced to 12 months probation, 80 hours of community service and a $25 special assessment fee. The defendant appealed his conviction to the Eight Circuit Court of Appeals. The Appeals Court affirmed his conviction and sentence. The defendant then applied to the U.S. Supreme Court, for a writ of certiorari. The Supreme Court denied his petition.

Aquatics Unlimited (Indiana)

Aquatics Unlimited applied a powerful herbicide, Karmex, to hundreds of lakes and ponds in Indiana. Karmex's label specifically forbids aquatic use. The company's owner, Carl Klene, pled guilty to three counts of mail fraud and one count of misuse of a pesticide. He received a sentence of $7,950 in fines, 6 months incarceration and 36 months probation.

FY 1995

Lutellis Kilgore & Sons (Ohio)

Kilgore sprayed methyl parathion in over 60 residences, in order to exterminate pests. Mehtyl parathion is a restricted use pesticide approved only for agricultural uses. As a result of the spraying, EPA conducted a Superfund emergency removal at numerous residences in Cleveland at the cost of approximately $20,000. Kilgore was charged with four counts of violating FIFRA-unauthorized commercial application of a restricted use pesticide in a manner inconsistent with its labeling and illegal distribution of a pesticide. He was also charged with making false statements. Kilgore pled guilty to the four counts of violating FIFRA. In September 1997, Kilgore was sentenced to 37 months incarceration, 24 months probation and ordered to pay $125 in Federal fines.

S & M, Inc. (Arkansas)

Marvin M. Allison was charged with one count of using a pesticide in a manner inconsistent with its labeling in violation of FIFRA and one count of unlawfully killing migratory birds under the Migratory Bird and Treaty Act (MBTA). He applied the pesticide Furadan to his rice crops in order to kill migratory birds. The application resulted in the death of several hundred birds. In September 1997, he was sentenced to a $5,000 fine and 24 months probation.

FY 1996

Margaret Stewart (Mississippi)

Margaret Stewart worked at Spray Lady in Clarksdale, MS. She sold the pesticide Endosulfan in improperly marked containers. Endosulfan is highly toxic to the nervous system. When Endosulfan is mixed with water it turns a milky white color. Minnie Lou Rudd of Batesville, MS died after she mistakenly drank from a milk container purchased from Stewart that contained a mixture of Endosulfan and water. Stewart was charged with two counts of violating FIFRA; and for knowingly violating that provision. Stewart pled guilty to the first count and was sentenced to 12 months incarceration and 12 months probation.

Baird Valley Fish Kill (California)

EPA assisted the FBI in this case in which overspray from the application of the pesticide Endosulfan by Baha Applicators killed approximately 5,000 fish along a six mile stretch of a drain which leads to the Colorado River. Rick Tilley, the owner of Baha Applicators was sentenced in August 1998 to 48 months probation, a $2500 fine and $15,519 in restitution.

Farm Air Services (California)

Farm Air Services aerially applied the pesticide Endosulfan on an alfalfa field adjacent to the drain which flows through the Salton Sea National Wildlife Refuge. A large fish kill was discovered in the drain and company employees were seen dumping the contaminated fish at two sites along the New River and Alamo River in an attempt to cover up the incident. Farm Air Services pled guilty to a felony of the unlawful discharge of pollutants into the Waters of the United States. The company was sentenced to 12 months probation, a $2500 fine, and $42,388 in restitution. No individuals were prosecuted.

FY 1997

Reuben Brown (Illinois)

Ruben Brown, an unlicensed exterminator in Chicago, Illinois, sprayed thousands of homes with Methyl parathion, a restricted use and highly toxic pesticide. Brown used it as a roach killer. Methyl parathion, when exposed to rain and sun, breaks down but may last for years in a protected environment, like a home. EPA inspected hundreds of homes Brown sprayed, to determine if dangerous levels of the pesticide existed. More than a hundred homes were identified as needing some clean-up, which involved replacement of walls and other surfaces. Some residents had to be relocated during the clean-up of their homes. Brown was charged with two FIFRA counts of misusing a restricted use pesticide. In December 1997, Brown was sentenced to 24 months incarceration and a special assessment fee of $50.

Paul Walls/Dock Eatman (Mississippi)

In July 1997, Paul F. Walls, Sr. was sentenced to 6 years and 6 months in prison on 45 counts of knowingly spraying methyl parathion without a license and three counts of illegally distributing methyl parathion in violation of FIFRA. Walls did not have a license for commercial pesticide application, and he had been ordered to cease his commercial activities. A co-defendant, Dock Eatman, Sr., also of Moss Point, received a sentence of 5 years and 3 months for his conviction on 21 counts of illegal pesticide application.

Oscar Miller (Louisiana)

Several complaints were received regarding the purchase of a roach spray from Oscar Miller. The complainants had applied the spray in their homes. Samples taken from the homes revealed the presence of methyl parathion. Miller was charged with violating FIFRA. The defendant pled guilty to the charges and was sentenced to 13 months incarceration, 60 months probation and ordered to pay restitution in the amount of $61,000 to the U.S. EPA Superfund and pay a victim $1,500.

Emanuel Johnson (Louisiana)

The defendant sold methyl parathion to individuals who were not trained or certified to us the pesticide. The defendant also sold methyl parathion for the unlawful purpose of eradicating household insects. The defendant was charged with two counts of violating FIFRA. The defendant was convicted on both counts and was sentenced to 24 months incarceration, 12 months supervised probation and ordered to pay $128,939 in restitution to the U.S. EPA Superfund account and $2,165 to a victim.

Lee Poole (Louisiana)

Poole was an uncertified pesticide applicator who illegally sprayed methyl parathion in homes in the Houma area in February 1996, despite two previous enforcement actions taken against him by the State of Louisiana for improper and unlicensed use of methyl parathion. Because of Poole's actions, the Emergency Response Branch of EPA Region VI conducted a $2.1 million emergency clean up of methyl parathion contaminated homes in the Houma area. Poole was indicted on one count of violating FIFRA. Poole pled guilty to the charge and was sentenced to 12 months incarceration, 12 months probation, ordered to pay a $200,000 Federal fine and restitution in the amount of $2,189,175 for the Federal emergency clean up costs.

Kelly Spraying Services (Tennessee)

Robert E. Kelly, Jr., who operates Kelly Spraying Service in Memphis, Tennessee, was arrested on a 42-count Federal indictment which alleged that he illegally applied the pesticide methyl parathion inside homes. The charges alleged that Kelly purchased at least 280 gallons of methyl parathion in Mississippi between 1992 and 1996. In April, 2004, Kelly was fined $250,000 and received 20 months incarceration. A second defendant was acquitted of all charges.

Casa Famoso Packing (California)

John F. Clement of McFarland, CA, owner and operator of Casa Famoso Packing, was charged with violating FIFRA by improperly exposing migrant workers to pesticides. In April 1997, Clement contracted with a labor company to provide field workers. While the workers were in the field, Clements directed the spraying of the pesticide Agri-Mycin 17. In violation of the pesticide label not to re-enter the sprayed area for 12 hours, Clements ordered workers to continue working imme-

diately after the pesticide was applied. A number of the exposed workers sought medical attention. In October 1998, Clement pled guilty and was fined $1,000.

Richard Witzke (Michigan)

The defendant was charged with misusing methyl parathion in his house. He was acquitted following a trial in March 1999.

FY 1998

Trehey Termite and Spraying (Kansas)

The defendant, Daniel Trehey, is the owner and operator of Trehey Termite and Pest Control in Kansas City, Kansas. Trehey misapplied the restricted use pesticide Rid-a-Bird to the attic above the third floor of a building occupied by employees of EPA's Region VII office in Kansas City. Rid-a-Bird contains Fenthion which is a highly toxic chemical whose use is prohibited in areas near human habitation. Immediately following the alleged misapplication of the pesticide by the defendant, several EPA employees became ill and sought medical attention. This forced the entire third floor of the building to be evacuated. Trehey was indicted on one count of violating FIFRA for misuse of a registered pesticide. In March 1999, Trehey was sentenced to 12 months probation and ordered to pay a $2,000 Federal fine.

Robert Bell (Louisiana)

Bell sold approximately 62 gallons of methyl parathion to residents of a low-income apartment. Eighty of the approximately 96 units in the apartment complex tested positive for methyl parathion. Methyl parathion is only legal for use in agricultural fields where sunlight quickly breaks it down into less harmful substances quantities. Bell was charged with violating FIFRA-distribute or sell or to make available for use or to use any registered pesticide classified for restricted use. In April 1999, Bell was sentenced to 24 months probation and ordered to pay a Federal fine of $171.

Glen Dee Taft (Utah)

Taft was the water master for the Fremont Irrigation Company and part of his responsibilities include the de-mossing of irrigation ditches. Taft was instructed by his employer to secure an applicator's certification to lawfully apply the pesticide. Taft made about six applications of the pesticide without having obtained the certification. While making one of these applications to the Loa Town Ditch, Taft failed to notify the Road Creek Fish Farm and Road Creek Rod and Gun Clubs that are adjacent to this ditch. As a result, approximately 44,000 fish were killed at an estimated loss greater than $100,000. Taft was charged with one count of violating FIFRA-knowing application of a restricted use pesticide not in accordance with its label. Taft pled guilty to the charges and was sentenced to 6 months incarceration, 24 months probation and ordered to pay a $2,000 Federal fine.

FY 1999

Kerry Pace (Utah)

Investigators for the Utah Department of Natural resources contacted EPA's criminal enforcement division regarding the poisoning of four bald eagles with Temik, a restricted use pesticide. The defendant, Kerry Pace, had put the poison on deer carcasses in order to kill coyotes on his property. In October 2001, he was charged with three misdemeanor counts for the Eagle Protection Act, Migratory Bird Treaty Act, and FIFRA. He received a sentence of $1,000 in criminal fines and 6 months probation

Ray Okelberry (Utah)

A special agent with the U.S. FWS contacted the EPA criminal investigations division regarding the poisoning of three golden eagles with temik, a registered, restricted use pesticide. Misdemeanor information was filed charging Okelberry with one count of knowingly possessing and transporting a Golden Eagle carcass in violation of the Eagle Protection act. In September 2000, he was sentenced to a $75 fine.

Kap Dong Kim (Hawaii),

Kim, the owner of a ginger root farm in Hilo, HI, was sentenced in February 2000 to 4 months in prison and a $5,000 fine and was ordered to pay $6,113 in restitution after having previously pleaded guilty to illegally using the restricted use pesticide, nemacur, on his crop in violation of FIFRA. Kim directed workers to apply it on the crop without following required standards for worker protection, even though nemacur is prohibited for use on ginger root. One worker was poisoned and had to

be hospitalized. Kim then deliberately failed to disclose the pesticide application when questioned by a Government official.

Jaime Rodriguez (California)

Jaime Rodriguez plead guilty to charges resulting from his application of Thimet 20-6, one of the most toxic restricted use pesticides on the market, to his fields. At least 200 ducks died after ingesting the pesticide. In February 2001, Rodriguez was sentenced to 12 months probation, a $500 fine and $1000 in restitution.

Delmar Follis (Indiana)

Follis was a landlord who allegedly used Diazinon, an outdoor pesticide, inside apartments that he owned. The apartments were located in low income/minority neighborhoods. Charges were filed and the case was ultimately resolved as a pretrial diversion in June 1999.

Two Feathers Bison Ranch (Tennessee)

The company pled guilty to illegally applying pesticides resulting in domestic pets dying. In April 2000, the defendant paid $2,000 in fines and received 24 months probation.

Pineland Plantation (Georgia)

Defendants pled guilty to misapplying pesticide to kill quail predators. In July 2001, the defendants were fined between $500 and $5000 each.

FY 2000

Pied Piper Pest Control, Inc. (Maryland)

The company discharged pesticides containing cypermethrin into Rock Creek Park in the District of Columbia and Maryland. The discharge resulted from the company's attempt to wash down a pesticide spill in its parking lot by hosing the pesticide into a storm drain, which then discharged into the park. The pesticide killed thousands of fish along an eight mile stretch of Rock Creek. In July 2003, after pleading guilty to Clean Water Act and FIFRA violations, the company paid a $15,000 fine and $5,000 each in restitution to the Maryland Dept. of Agriculture and Montgomery County. An employee of the company served 2 years probation, plus 6 months home detention.

Gary LeBlanc and Paul Vidrine (Louisiana)

The two defendants pled guilty to one count of FIFRA and one count of the Migratory Bird Treaty Act after using the restricted use pesticide Furadan on pieces of fish for the purpose of killing vermin that were disturbing their crawfish traps. In the process of attempting to kill the vermin, they killed at least 12 Federally protected migratory birds. In July 2000, each received a $700 fine and 12 months probation.

FY 2001

Wabash Valley Services (Illinois)

In 2005, Wabash Valley Service Co. (Wabash) and two employees were criminally charged with violating FIFRA by allegedly mis-applying two restricted use pesticides on a farm field in Illinois in May 2000 that, through the pesticide "drift" from the farm field, caused harm to an adjacent neighbor, animals and property. The defendants were originally charged with failing to follow three different labeling precautions prohibiting application when drift might occur. The court concluded that the labeling language provided no clear guidance as to how much drift was too much, the labeling which prohibited "spray drift" did not clearly apply to the application method used in this case, and that the labeling which prohibited application under "windy" conditions was too vague. The court initially found all three labeling provisions unconstitutionally vague. The court vacated that opinion and the case was dismissed.

Joseph Howard (Kentucky)

A special agent of the U.S. FWS informed EPA criminal investigations division that Joseph Howard was under investigation by the Kentucky Department of Fish and Wildlife for using Carbofuran to poison owls and hawks that were killing his fighting chickens. He pled guilty and was fined $3,500 and 12 months probation.

Nelson County Bird Poisoning (Kentucky)

A special agent of the U.S. FWS informed EPA criminal investigations division agents that over forty animals, including migratory birds and Red-Tailed Hawks

had been killed by Furadan, a restricted use pesticide whose use in poisoning any type of animal violated FIFRA. Joseph LaFollette pled guilty to a $2,500 fine, 30 days home detention, and 12 months probation.

Donald Ray Keel (Tennessee)

The defendant baited animal carcasses with Temix and killed several protected species under the Migratory Bird Protection Act, including Red-Tailed Hawks. He was convicted following trial, and in August 2003 was sentenced to a $1,000 fine, 7 months incarceration, and 12 months probation.

FY 2002

Menifee County Kill (Kentucky)

Darce Lee Hudson pled guilty to killing a dog and vulture with Furadan, which he was using to kill predators of his fighting chickens. In February 2003, Hudson pled guilty to one count of unlawfully taking a migratory bird and one count of knowingly using a restricted-use pesticide in a manner inconsistent with its label. He paid a criminal fine of $1,000.

Albert Doege (Kansas)

Allegations were made that a certified pesticide applicator was misusing a restricted-use pesticide (Thimet) as a poison, resulting in the poisoning of several neighborhood dogs. In March 2005, Doege paid restitution in the amount of $1,977.

Aldicarb Misuse (Texas)

Charles and Paul Hajovsky pled guilty to the unlawful application of the toxic restricted sue pesticide Aldecarb. Corn saturated with the Aldecarb was placed in a freshly planted cornfield in order to kill and or drive away feral hogs which had destroyed previous crops. Each defendant paid $1,000 in fines and restitution.

Bald Eagles Kill (Nebraska)

Three individuals pled guilty to intentionally lacing animal carcasses with a restricted use pesticide in order to kill coyotes. Each defendant paid $1,000 in fines and $4,000 in restitution.

Robert Barnes (Indiana)

Charges were brought regarding allegations that people were being exposed to methyl parathion within homes owned by Robert Barnes. The case was resolved as a pre-trial diversion

FY 2003

Simpson County Poison (Kentucky)

The U.S. Fish and Wildlife Service received information that Landis Franklin was illegally using Furadan to bait and poison predators of his cattle on his farm. A search warrant obtained 38 migratory bird carcasses. In May 2003, Franklin pled guilty to one count of violating the Migratory Bird Treat Act and one count of violating FIFRA. He was sentenced to a $1,250 fine and ordered to pay $10,181 in restitution.

Kahn Angus Farm (Georgia)

The State of Georgia and the EPA criminal investigation division investigated complaints that dead birds were found in a citizen's yard near Kahn Angus Farm. A pile of poisoned corn was found on the farm and its owner, Roger Kahn, admitted to poisoning corn with the pesticide Warbex. Over 3,300 birds died from ingesting the corn. Two large ponds had to be sampled and remediated and several thousand pounds of contaminated soil were generated as a result of the cleanup. Roger Kahn, another individual, and the company all pled guilty to violations of RCRA and the Migratory Bird Treaty Act. The company paid $95,664 in restitution and a $156,000 fine. Roger Kahn and the other defendant each paid a $15,000, as well as 60 days home confinement and the performance of 160 hours of community service.

Arnold Sturgill (Virginia)

Landowner Sturgill, who was not a certified pesticide applicator, purchased the restricted-use pesticide Vydate-L by misrepresenting his authority to purchase it. He then misapplied the pesticide by "baiting" meat on his property. A significant number of poisoned animals were found on the property. The case was investigated jointly by EPA and the U.S. FWS. Sturgill was served with three USFWS notices (two for the illegal taking of hawks and one for FIFRA misapplication of a pesticide). The defendant paid a total of $1,500 in fines.

Springville Bird Kill (Utah)

EPA's criminal investigation division was contacted by the U.S. FWS regarding a kill of about 700 birds along a highway adjacent to Harward Farms. The owner, L. Jud Harward admitted to putting out "bait" on his property to kill blackbirds. The pesticide used was identified as Carbofuran. Harward pled guilty to one count of killing migratory birds (red tailed hawks) and was sentenced to pay a $1,000 criminal fine and $1,000 in restitution.

Henry County Furdan Case (Kentucky)

The Kentucky Fish and Wildlife Agency advised the EPA criminal investigation division that Gary Pohlman set out venison covered with the pesticide Furdadan that had killed both domestic animals and Red-Tailed Hawks in violation of both RCRA and the Migratory Bird Treaty Act. The defendant pled guilty to violating both statutes and was fined a total of $2,000—$1,500 in Federal fines and $500 in State fines.

FY 2004

Big Bend Resort California)

The Big Bend Resort is a lessee of the U.S. Bureau of Land Management (BLM). The defendant, James Colleasure is a part-time resident of Big Bend Resort. He mixed pesticide with bird seed and spread it on the ground around trailers (leased from BLM) to stop damage from rabbits. A number of migratory birds were killed as a result of these actions. In June 2005, Colleasure pled guilty to one FIFRA count of misapplication of a pesticide. He received one year of probation and was required to pay $6,715 in restitution to the BLM.

Alfred Craft (Louisiana)

An agent of the U.S. FWS requested assistance from the EPA criminal investigation division regarding the alleged poisoning of a bald eagle through the use of TEMAC. Alfred Craft was convicted at trial and was sentenced in February 2006 for violations of the Bald Eagle Protection Act, Migratory Bird Act, FIFRA (unlawful use of a restricted pesticide) and two counts of witness tampering. He received 12 months on each of the five counts, with the sentences to run concurrently. He also was assessed $124,000 total in fines and restitution.

Log Creek Properties (Kentucky)

Testing on a dead bald eagle discovered on a section of Log Creek on the Log Creek Ranch confirmed that it had ingested Carbofuran. In January 2004, a Federal search warrant recovered more poisoned animals and Furadan in an unlabeled container. In May 2004, Log Creek Properties pled guilty to one count of taking a Bald Eagle illegally. The company paid a $15,000 fine.

Kenneth Schaffer (Missouri)

The defendant, a rice farmer, mixed the pesticide Bidrin with bird seed and spread it on the levy surrounding his rice crop in order to kill feeding birds. He was charged under FIFRA (misapplication of a pesticide) and the Migratory Bird Act, and was fined a total of $4,000.

Question 2. Please estimate the cost the Government invested in all resources applied to the Wabash Valley prosecution, including but not limited to the costs of investigation, case evaluation, and trial preparation measured in FTE's and dollars.

Response. Since the Wabash Valley Service Company case was opened in February 2001, EPA has invested approximately .5 FTE and $63,700 for activities supporting this case. This includes approximately $61,700 for special agent and regional criminal enforcement counsel payroll costs and $1,000 for associated travel.

Question 3. Please describe the EPA evaluation process a criminal case is subjected to from investigation to the filing of criminal charges.

Response. Headquarters evaluates and monitors criminal investigations throughout the case process, which includes the following major steps.

Cases start with leads: A lead is opened when an EPA Special Agent learns of a potentially illegal event or receives information of a potential crime. Generally, Special Agents gather preliminary information to decide whether further action is warranted. Leads that clearly do not involve potential Federal environmental crimes are closed without further action or, if appropriate, may be referred to EPA's civil enforcement office or a State for further action.

Leads may evolve into formal investigations: EPA is guided by the 1994 memorandum, "The Exercise of Investigative Discretion" in determining whether to open

a criminal case and evaluates (1) the presence or threat of significant environmental harm and (2) culpable conduct.

Case agents have legal and technical support at all stages of the case development process: In addition to legal analyses by EPA criminal enforcement attorneys, the Department of Justice (DOJ) provides assistance throughout the criminal investigative and case development process. Case agents have ongoing discussions with DOJ prosecutors and EPA criminal enforcement attorneys about the merits of the proposed case. The criminal program also relies on a team of forensic engineers, chemists, biologists and attorneys to help determine whether prosecution is warranted.

The decision to prosecute an alleged environmental crime and the filing of charges resides with the Department of Justice: If the criminal enforcement program decides that the evidence is sufficient to prove criminal culpability "beyond a reasonable doubt," it will request DOJ to charge defendants. Both the decision to indict and the choice of statutory charges and number of counts rests with the DOJ.

EPA evaluates a criminal case, through all steps through the following mechanisms: (1) Headquarters reviews new cases; (2) Criminal Investigation Division (CID) desk officers conduct day-to-day oversight with frequent communication with field agents; (3) Headquarters monitors case development via interactive online databases; (4) EPA legal counsel ensure legal sufficiency; (5) field agents report weekly to Headquarters; and (6) CID's Assistant Director for Investigations conducts quarterly case reviews with each field office to ensure that the regional offices are consistent in their case selection criteria, that cases are chosen in accordance with guidance and the investigations are proceeding appropriately.

Question 4. EPA Region V interpreted the RMP requirements differently than other regions across the country. Does the EPA authorize regions to interpret laws differently in terms of requirements of the regulated community?

Response. EPA does not authorize its regions to interpret the environmental laws and implementing regulations differently. Region V did not interpret the Risk Management Plan (RMP) regulations differently. Region V's interpretation of the RMP regulations is consistent with national program policy and guidance.

EPA developed and issued numerous guidance documents, including, but not limited to, program and industry specific Questions and Answers, sector-specific model RMPs, and general guidance documents pertaining to the Clean Air Act Section 112(r) program. These materials were distributed to regional offices and made available to the public. In addition, EPA has developed a written RMP enforcement penalty policy, and issued general enforcement and program-specific guidance documents to the regions. EPA also holds an annual RMP Regional Enforcement meeting and EPA Headquarters conducts monthly RMP enforcement conference calls with the regions.

Question 5 What is the EPA doing to ensure that Federal environmental laws are subject to the same interpretation across the country?

Response. EPA works to ensure that environmental laws and their implementing regulations are interpreted uniformly nationwide by distributing issue-specific policies and guidance and conducting training. EPA also holds annual statute-specific national program managers meetings and monthly program implementation conference calls, in addition to the constant contact that is maintained through the daily interaction of EPA Headquarters program offices with their Regional counterparts.

Question 6. In the last decade, there has been a 45 percent increase in States' delegated authority yet the EPA has maintained a consistent level of 18,000 employees. Why does this decrease in EPA responsibility not correspond to a decrease in EPA regional employees?

Response. The 45 percent increase to States' delegations does not equate to a 45 percent increase in workload or staffing for States or a decrease in workload or staffing for EPA. Many of the States were already doing much of the base program work prior to 1996 before they were delegated. Most of the delegations that occurred since 1996 have been to augment the basic delegation such as adding a pollutant or an industry to the base program.

EPA continues to have the responsibility of accelerating our nation's environmental pace. In a recent Environmental Council of States study, from 1996 to 2003, State spending on air, water, and waste programs declined from $9.6 billion to $8.5 billion, or 11 percent. With this decreased spending at the State levels, States increasingly have looked to EPA to provide technical or other assistance with delegated programs.

Additionally, targeted projects have increased over the past decade. As the numbers of special projects have increased, EPA must devote more regional personnel and resources to oversight. These earmarks require more oversight and technical as-

sistance than standard grants since many recipients are unprepared to spend or manage the funds, and projects generally take several years to complete, requiring EPA regional resources for an extended period of time.

RESPONSES BY GRANT NAKAYMA TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. This hearing included testimony from a representative of the Illinois fertilizer and Chemical Association about their interaction with EPA with respect to risk management plans for anhydrous ammonia retailers. Can you discuss why EPA Region V decided to focus on Illinois fertilizer retailers?

Response. Illinois fertilizer retailers store anhydrous ammonia. Anhydrous ammonia is released at the greatest frequency and quantity of any reported chemical in the Emergency Response Notification System database. Anhydrous ammonia's extremely hazardous nature was acknowledged when Congress listed it as one the substances to be specifically regulated under Clean Air Act Section 112(r). Anhydrous ammonia can be harmful to individuals who come into contact with it. Accidental releases of the gas can cause injuries to emergency responders, law enforcement personnel, and the general public. Inspections of the agricultural anhydrous ammonia industrial sector, therefore, fit into the inspection goals of EPA Region V and the Agency.

In April 2002, EPA Region V looked into partnering with State departments of agriculture to conduct inspections of anhydrous ammonia facilities. EPA Region V contacted the State departments of agriculture in the region that had oversight responsibility for agricultural anhydrous ammonia: The Illinois Department of Agriculture expressed an interest in partnering with Region V and conducting federally enforceable inspections. Almost half of the 1,531 agricultural ammonia facilities in Region V are located in Illinois. The Region regarded this effort as a pilot program. If the Illinois Department of Agriculture project proved successful, and if funding were available in subsequent years, the pilot could be extended to other States.

Question 2. Is theft an issue at these facilities? Are there possible illicit uses of anhydrous ammonia?

Response. Yes. Anhydrous ammonia is frequently targeted by thieves to use in the illegal production of methamphetamine. Theft of anhydrous ammonia is a serious environmental and health concern because it becomes a toxic gas when released to the environment. The substance can be harmful to individuals who come into contact with it or inhale airborne concentrations of the gas. When unintentionally released during attempted and actual thefts, the gas can cause injuries to emergency responders, law enforcement personnel, the public and the criminals themselves.

A March 2000 "Chemical Safety Alert" highlighted the potential environmental harms posed by the theft of anhydrous ammonia. A review of the Emergency Response Notification System database documents 67 reported thefts of anhydrous ammonia in Region V States from January 1, 2003, to July 18, 2006.

Question 3. What types of compliance assistance does EPA offer? What types of assistance did the Agency offer or make available in the Illinois example?

Response. EPA's compliance assistance includes activities, tools or technical assistance that help (1) the regulated community understand and meet its obligations under environmental laws and regulations; or (2) compliance assistance providers to aid the regulated community in complying with environmental regulations. Compliance assistance may also help the regulated community find cost-effective ways to comply with regulations or go "beyond compliance" by pollution prevention, environmental management practices and innovative technologies.

The Office of Enforcement and Compliance Assurance (OECA) manages the EPA-sponsored Compliance Assistance Centers and the National Environmental Compliance Assistance Clearinghouse—a web-based repository of compliance assistance information. Since 1996, EPA has sponsored partnerships with industry, academic institutions, environmental groups, and other Federal agencies to launch 14 sector-specific Compliance Assistance Centers. The Centers offer updates on regulatory developments, sector-specific regulatory explanations, compliance tools and training, a place to ask questions and get answers, databases on technologies and techniques, and pollution prevention tips and ideas.

EPA also has created 33 sector notebooks, which are a series of plain language books that describe a specific industry and the major environmental regulations that apply to its activities. EPA has produced several industry-specific and regulatory-specific compliance guides such as The Micronutrient Fertilizer Industry: From Industrial Byproduct to Beneficial Use.

Other typical activities include developing and distributing regulatory guidance materials, developing and conducting workshops and training courses, developing web-based tools, operating telephone "hotlines" and responding to questions from the regulated community and trade associations. EPA also develops compliance guides to accompany certain new rules.

For RMP programs, EPA worked with industry groups to develop model programs. Initially, these model programs were created for ammonia refrigeration, propane handling, and water treatment operations. In addition, EPA wrote a number of guides to assist the regulated community in developing, filing and implementing RMP programs. These materials were available to the regulated community in both electronic and hard copy formats in advance of the initial compliance date of June 20, 1999.

At the time the Final RMP Rule was published in 1996, Region V conducted outreach to industry and trade associations, including making 10 to 15 presentations on the RMP regulations. In 1998, Region V contracted with a private consultant to develop and conduct an RMP basic training course for industry, which focused on the basic requirements of the program. In 1998 and 1999, the contractor and Region V staff made approximately 15 presentations of the RMP course to industry and the public. Region V staff also made presentations regarding the RMP program at conferences and meetings throughout the Region at the request of various trade groups.

Question 4. Can you please describe EPA's interaction with the States during these types of inspections?

Response. For RMP inspections, of the six Region V States, only Ohio is authorized to implement and enforce the Clean Air Act 112(r) program. Therefore, absent a special program such as the pilot initiated with the Illinois Department of Agriculture, there would be no State involvement in these inspections. EPA's agreement with the Illinois Department of Agriculture was established, in part, to foster EPA—State collaboration with respect to agricultural sources.

Illinois Department of Agriculture inspectors completed EPA's Basic Inspector Training Course, RMP Program Specific Training, and Health and Safety Training in order to obtain EPA inspector credentials. For each inspection, the State inspectors obtained a copy of the facility's process hazard review and compliance audit. They reviewed operating procedures, offsite consequence analysis, incident investigations, training given to employees, and the facility's emergency response plan. The inspectors documented findings in a format developed by EPA, and prepared and submitted a written inspection report. The inspectors documented their observations; they did not determine whether a violation existed. EPA Region V staff reviewed the observations and made violation determinations. EPA Region V staff conducted a quality control review of the initial inspections. The Region discussed their findings with the Illinois Department of Agriculture to ensure that the Region's comments were incorporated in subsequent inspections.

Question 5. Can you discuss the process each region uses to determine its enforcement priorities for a given year?

Response. When setting new priorities, the regions take into account existing national enforcement and compliance priorities, existing regional priorities, areas where they are responsible for direct implementation, and grant and work agreements with the States when setting new priorities. All regions consult their State regulatory partners as part of this process.

Question 6. Did the actions of Region V in this instance deviate from this practice?

Response. No, Region V did not deviate from this practice in this instance.

Question 7. How do you think the Office of Enforcement and Compliance's incomplete and/or inaccurate data on the universe of regulated entities impacts the consistent implementation of Federal environmental laws and regulations across regions?

Response. OECA's ability to consistently apply Federal environmental laws and regulations is not dependent upon having a complete knowledge of the regulated universe. Consistency is a function of having clearly defined and communicated policies (e.g., enforcement response and penalty policies) that describe the appropriate range of responses to types of noncompliance, and that set expectations for how to address individual noncompliance problems and patterns of noncompliance. Complete knowledge of the regulated universe is not necessary to ensure consistent implementation.

Question 8. How do you plan to coordinate with the Office of Environmental Information to address the issue of limited knowledge of EPA's universe of regulated entities?

Response. OECA recognizes and uses the Office of Environmental Information's Facility Registry System (FRS) as the official Agency data base that identifies facili-

ties subject to environmental regulations or of environmental interest, and uses Agency data standards to integrate information from multiple sources giving a unique identifier. Using FRS, the overall number of regulated entities is approximately 1.5 million, and these records are linked with permit or environmental interest records in Permit Compliance System (PCS), Air Facility System (AFS), Resource Conservation and Recovery Act Information (RCRAInfo), Integrated Compliance Information System (ICIS), Safe Drinking Water Information System (SDWIS) and multiple other systems. OECA regularly updates its ICIS and the Integrated Data for Enforcement Analysis (IDEA) system using FRS data on regulated entities. As FRS makes system and data changes, OECA will adapt in response.

RESPONES BY GRANT NAKAYAMA TO ADDITIONAL QUESTIONS FROM SENATOR VOINOVICH

Question 1. Does Region V intend to approve Ohio's request to transfer the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations (CAFO) permitting to the Ohio Department of Agriculture? Why or why not?

It is my understanding that the Ohio Department of Agriculture has been in communication/consultation with Region V while developing this package. Can Region V make a determination in 6 months or even 3 months?

Response. Ohio has not asked Region V to approve a revision to the Ohio National Pollutant Discharge Elimination System (NPDES) program to transfer the concentrated animal feeding operations (CAFOs) element from the Ohio Environmental Protection Agency to the Ohio Department of Agriculture. The Region would approve a revised program that meets the requirements the Clean Water Act and the Code of Federal Regulations (CFR). Federal regulations allow two or more State agencies to share NPDES authority and the Act and regulations contemplate EPA approval of revised programs that meet the applicable requirements.

Region V and EPA's Office of Water have been providing advice and assistance to help Ohio revise its program. We anticipate requiring 6 months to make a decision once Ohio submits a request with appropriate documentation. This period will include an opportunity for the people of Ohio to comment. It would be difficult to make a decision in a shorter period of time while giving the people of Ohio a chance to participate and fulfilling our obligations under the Act.

Question 2. Over the years, EPA has published numerous guidance manuals that provide valuable information for the industry to consider voluntarily complying. It is the observation of some that—at times—the guidance documents are treated as law, though the first page of one such document entitled "Managing Manure Nutrients at Concentrated Animal Feeding Operations December 2004" States "This is a guidance document and is not a regulation. It does not change or substitute for any legal requirements the obligations of the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements. This guidance manual is not a rule, is not legally enforceable, and does not confer legal rights or impose legal obligations upon any member of the public, EPA, States, or any other Agency. In the event of a conflict between the discussion in this document and any statute or regulation this document would not be controlling. The word 'should' in this document does not connote a requirement, but does indicate EPA's strongly preferred approach to assure effective implementation of legal requirements."

Has Region V or any region ever used the failure of a State to comply with such guidance, which is not law, as the basis to reject State proposed standards or informed States that if they do not incorporate such guidance documents and standards in the development of regulations, that it is likely that the new regulations will not be approved, even if they meet Code of Federal Regulations (CFR) requirements?

If, for example, a State like Ohio decides to use a practice approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), such as practice standards 633 for application of waste versus EPA's guidance as outlined in Appendix L of the "Managing Manure Nutrients at Concentrated Animal Feeding Operations" Guidance Document, would EPA's regional office deny the Ohio Department of Agriculture package to transfer the National Pollutant Discharge Elimination System permitting authority from Ohio EPA to the Ohio ODA?

Response. The Region has not rejected State proposed standards that meet Clean Water Act and CFR requirements. Region V is working with Ohio EPA, Ohio Department of Agriculture, USDA Ohio Natural Resources Conservation Service (NRCS) and other partners to resolve issues related to the Ohio NRCS Waste Utilization Standard (633) for application of wastes from agricultural livestock oper-

ations. We would approve a revised Ohio program that meets the requirements of section 402(b) of the Clean Water Act and 40 CFR part 123.

Question 3. Under EPA's CAFO rule, what is the definition of "discharge?" Do all regions share the same definition? How do you interpret this definition to apply to livestock farms?

Response. EPA's CAFO rule does not define "discharge." The Clean Water Act includes concentrated animal feeding operations (CAFOs) in the definition of the term "point source." Section 502(12) defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." All EPA Regions share this definition. EPA's preamble to its proposed, revised CAFO rule recognizes that some CAFOs have a higher likelihood of discharging and suggests that large CAFOs falling into certain categories consider seeking permit coverage. EPA is seeking comments on the completeness and accuracy of the preamble list of situations where a discharge may occur.

Question 4a. There is a constant push within the States to be faster in issuing permit authorizations. Businesses demand the ability to meet changing consumer demands by making quick modification or changes to their plants and facilities. Associated with this pressure is the desire by business to work within construction seasons to meet their time frames for completion of projects. Businesses push States to allow as much construction of new or modified facilities prior to receiving final permits. Unfortunately, the U.S. EPA has been inconsistent in how much construction it will allow prior to receiving either a water or air permit for a new facility. Many States seem to allow significant amounts of construction prior to final issuance of permits. Meanwhile, in States like Ohio, I understand Region V has issued letters and taken enforcement actions against facilities that initiated construction prior to receiving final permits. For example, Indiana has a State rule that allows significant amount of construction prior to receipt of a final air permit. I understand that when Ohio inquired about that rule the U.S. EPA indicated that they would not approve another rule like that in another State. The U.S. EPA should be consistent in the standard it holds States to relative to pre-permit construction activities. A lack of consistency can put States that are more conservative in what they will allow at a competitive disadvantage to neighboring States.

Response. The Clean Air Act and implementing regulations for construction permitting set minimum requirements for permitting programs, but do not require that they all be the same. This preserves State flexibility to tailor programs to meet their own circumstances, as long as they meet the Clean Air Act minimum requirements. The minimum requirements assure that proposed changes at sources that could have an adverse impact on air quality are available for public and Agency review and are permitted prior to initiation of on-site construction activities. EPA strives to preserve States' flexibility, but must assure that minimum requirements are met.

The requirements for allowable pre-construction activity provide flexibility for minor sources of air pollution, but allow very limited pre-permit construction for major sources. Within this framework, EPA has worked to assure a consistent approach to approving State permit requirements. The Indiana rule you discuss is currently being reviewed by EPA and we will consider consistency as we complete our analysis and finalize our determination.

Question 4b. All the States should be held to similar requirements when it comes to public participation in permitting actions. It appears that permits are issued in some States with almost no public participation while others have more intensive involvement. If States are simply implementing Federal requirements for public involvement, then those requirements should be clearly identified and enforced across all regions. Otherwise, States with more involved public participation will be at a competitive disadvantage because they will have longer permitting processing time frames.

Response. As noted above, the Act and EPA regulations spell out the minimum elements of a permitting program. State approaches to public participation need not be identical, particularly for smaller sources, where the regulations allow for various approaches that have evolved over many years of State permitting experience.

For example, all States in EPA Region V require full public participation for construction actions that trigger Federal air permitting requirements. EPA is not aware of any States that exclude all minor actions from public participation. However, EPA has approved various de minimis emission levels below which minor sources can be exempt from public participation requirements. When States have established public participation threshold levels, EPA analyzes such requirements for consistency with other States.

EPA has become aware of some concerns with existing State rules that may not meet minimum requirements for public participation. We agree that this could

present a consistency issue, and we would take action to ensure that minimum participation requirements are met. However, we are still evaluating these concerns.

Question 4c. Continued: Clarity and simplicity of permits should also be consistent. Given that all States should be following the same requirements set forth in the Clean Air Act, why are States treated differently within the region with regard to length and detail of permits. For example, Title V permits in some States may be hundreds of pages long while in another State for a similar facility it is not even a hundred pages. Another example would be permits for ethanol facilities. Permits for an ethanol facility in one State are 60 to 70 pages while—within the same region—a similar sized facility requires a permit more than 200 pages in length. The 200-page permit is reviewed by the regional office, and the State is told it is meeting the minimum required permit content. Why is there a difference?

Response. Title V contains minimum requirements for permit content, which are required as minimum elements of State programs, and EPA ensures that all State programs meet these requirements. However, States have flexibility in how they actually translate these requirements into permit terms, and have, over the years, developed permitting approaches that are tailored to their specific circumstances and that their permittees are familiar with. This results in varying permit length, while still meeting Title V content requirements.

Permit length varies across States for a variety of reasons. Even if Federal requirements are the same for similar facilities, State requirements can vary. States also have different approaches to permit-writing and permit organization. Some States may repeat all the State and Federal laws verbatim in the permit, which can make permits lengthy. Other States may use a citation approach in which the basic emission limits, monitoring and recordkeeping requirements are identified, but other details of the regulations are identified through citations to the underlying regulations. Other States may format their permits differently, using larger print or more blank space. All of these variations are permissible under Title V provided they meet the permit content requirements. While we recognize there are reasons a shorter permit may be desirable, EPA believes it would be inappropriate to force States to choose one approach simply because it makes the permit shorter.

STATMENT OF JEAN PAYNE, PRESIDENT, ILLINOIS FERTILIZER AND CHEMICAL ASSOCIATION

Dear Mr. Chairman and members of the committee, my name is Jean Payne. I am here today on behalf of the Illinois Fertilizer & Chemical Association (IFCA). IFCA represents and assists the retail agrichemical dealers, who in turn provide agricultural inputs and application services to the farmers of Illinois. We have over 1,000 members, 700 of which are ag retail locations in Illinois. Agriculture is the largest industry in our State.

Illinois is a State where regulations governing the storage, handling and application of agrichemicals are extensive, more so than in many other States. IFCA supports the majority of these regulations, in fact our Association drafted and secured passage of many of these laws to improve the stewardship of the crop input industry. Our regulatory agencies in Illinois actively enforce these regulations and we work closely with them and with our members to ensure that our industry complies with over 70 different Federal and State environmental, health, safety and transportation regulations that affect agrichemical dealers.

Our interaction with the U.S. EPA Region V over the years has been fairly cooperative, even though we do not work with them on a daily basis. That's because the majority of the Federal environmental regulations are handed to the State agencies to enforce, and we do work daily with State agencies in a very open and fair manner. But I am here to share with you a troubling situation that our industry now finds itself in with Region V U.S. EPA. Our members are suddenly on the receiving end of an enforcement policy that is not justified in opinion, was not applied uniformly, was not well communicated and does not treat industry in a fair or equitable manner.

THE RMP REGULATION AND ILLINOIS AMMONIA FACILITIES

In 1998, the U.S. EPA promulgated the Clean Air Act Risk Management Plan regulations that affect agricultural retailers who store anhydrous ammonia as nitrogen fertilizer. The rule requires our facilities to document the management and safety of their ammonia systems and to calculate the worst case scenario for the surrounding community if a catastrophic release occurs. To give you an idea of the scope of the agricultural ammonia industry, Illinois fertilizer dealers take delivery of, store and apply an average of 500,000 tons of this nitrogen fertilizer each year.

Since 1999, when the RMP regulation went into effect, we have safely handled and applied over 4.2 million tons of anhydrous ammonia with not a single catastrophic release attributed to non-compliance with the RMP regulations. Many Illinois corn and wheat growers prefer this form of nitrogen because it can be directly injected into the root zone and it is the most economical form of nitrogen. Our industry is very proud of our safety record.

Prior to the compliance date for this regulation, IFCA hosted training sessions throughout the State to help our members prepare their RMP. We utilized materials provided by The Fertilizer Institute and Asmark, Inc., a regulatory compliance company who specializes in ag retail regulations. Back in 1998 when this regulation was promulgated, the only guidance from the U.S. EPA was provided mostly on their website. It was somewhat helpful but keep in mind that eight years ago, the majority of our ag retailers did not have access to the Internet due to their rural location. The only training classes on the RMP regulation sponsored by Region V were classes to help people determine IF the regulation affected them. At the time Region V offered these sessions, the RMP submit computer program was not yet available and so many of our members did not attend but relied instead on more specific guidance from TFI, Asmark and IFCA. Our industry already knew that this would affect our ammonia facilities and so this EPA session would have done little to help us prepare to comply with this very complex regulation. In our opinion, there was no specific, hands-on U.S. EPA outreach or training program enacted by Region V for our industry and our State EPA was not commissioned by Region V to act as the State enforcement Agency for this rule either. We really were on our own.

In January 1999, IFCA conducted a RMP training session at our IFCA convention, which was attended by several hundred ag retail managers. Since then, we have conducted additional courses, almost yearly as part of our annual ammonia safety training, to review the requirements of this rule and assist our members with compliance. Again, we had little guidance to go from, only the federal regulation itself which is not easy to interpret and apply in a practical manner. In addition to attending IFCA training classes, many of our members utilized the compliance services of the Asmark Institute to fulfill the requirements of the RMP.

With help from industry groups like TFI and IFCA along with organizations like the Asmark Institute, our members filed their RMPs and re-filed them again in 2004 as is required by the rule. During the entire time this regulation has been in effect, we have periodically reminded our dealers of their RMP obligations such as the three year compliance audit and the need to update the plans if changes are made at the facility. During all this time, we heard nothing from Region V indicating that we were not keeping up with our compliance obligations.

REGION V & ILLINOIS DEPT OF AG RMP PILOT PROGRAM

It was 4 years after the effective date of this regulation when Region V first expressed an interest in the RMP program as it relates to agricultural anhydrous ammonia. Region V approached the Illinois Department of Agriculture in 2003 with a pilot program in which the U.S. EPA would essentially hire the State of Illinois Dept of Ag inspectors to check 500 ammonia facilities for compliance with the RMP rule. Immediately, the Illinois Dept of Ag contacted me to attend to a meeting with them and Region V to discuss this pilot program. Had the Dept of Ag not informed me of this meeting, I would not have known of it as Region V did not reach out to IFCA. But this was the first communication our industry had with Region V on this program since its enactment in 1999, and so IFCA welcomed their involvement because we often wondered when or how compliance would be assessed given that no State Agency had been given oversight of this regulation.

It was important to the Illinois Dept of Ag that IFCA support this pilot program. In the meeting with IDA and Region V, EPA staff told us that the Dept of Ag inspectors would utilize a RMP compliance checklist during their inspections. We had the opportunity to review the checklist and we submitted comments on the phrasing of several of the questions. Region V staff informed us that they would use the checklists to review the facilities? overall compliance with the RMP and if areas of weakness were discovered, it would allow the Agency and industry to target specific training to improve these areas. We took them at their word and with that being the premise of the pilot program, IFCA supported Region V utilizing the services of our State Dept of Ag to assess compliance with the RMP. After all, we had a lot invested in the RMP program and we too wanted to know how our members were doing and what areas may need to be improved. We were also comfortable with the Dept of Ag inspectors because they interact frequently and professionally with our dealers and with IFCA.

We informed our members of this inspection program and urged them to work cooperatively with the inspectors. We viewed this program as way to establish a closer relationship with the U.S. EPA on RMP compliance issues. Two years went by and the inspections proceeded. Per EPA instructions the inspection reports were not provided to the fertilizer dealers but we had no reason to worry, we thought. There were no ammonia incidents or blatant violations of the RMP that we knew of or were told about.

SIGNS OF TROUBLE

IFCA RMP Workshop

In January 2005, at the IFCA convention which is attended by over 1800 people in our industry, IFCA with the cooperation of the IL Dept of Ag conducted yet another RMP compliance workshop. Approximately 150 fertilizer dealers attended this training class. The purpose of the workshop was to once again review the RMP requirements and help answer questions about compliance.

A few days after the IFCA convention, Region V staff person Silvia Palomo called me. She was upset that IFCA and the Dept of Ag had offered this program at our convention. She said we had no business informing the facilities of the RMP requirements and that I should have sought approval from Region V to offer this class. She also told me that only the U.S. EPA personnel were qualified to teach RMP compliance and no one else. I was actually being scolded for helping our members comply with a complex regulation, something we had already been doing for seven years with no help from Region V. I found out later that Ms. Palomo had also called Jim Larkin, head of the fertilizer bureau at the IL Dept of Ag, with the same message. Jim and I were in disbelief. After listening to Ms. Palomo's scolding, I politely told her thanks for calling but in my opinion industry had every right to help our members with compliance since that is one of IFCA?s mission statements. Honestly, I think she was upset because she didn't want our members to learn more about the regulation while the inspections were going on. I believe now that enforcement was Region V?s objective all along and not outreach and education as they had indicated to us. This was the first sign of trouble.

Inspections End, Enforcement Begins

In July of 2005, the Dept of Ag told us that they were finished inspecting the facilities. We heard nothing from Region V. At the request of the Asmark Institute, I worked to set up a meeting with Mr. Mark Horwitz and Silvia Palomo at Region V to discuss Asmark's concerns with an Expedited Settlement Agreement (ESA) that an agrichemical facility in Michigan had received from Region V for alleged RMP violations. Asmark was very troubled by the ESA because this facility was their client and no one other client in the country who had utilized the Asmark RMP compliance tools had been issued any kind of monetary penalty for non-compliance.

It was while we were discussing our concerns with the Michigan ESA that Region V staff changed the subject and informed me and Allen Summers of Asmark that in their opinion, over 90 percent of the 500 Illinois ammonia facilities inspected were also in violation of the RMP rules, would be formally cited for violations of the Federal Clean Air Act, would be fined a minimum of $500 per facility and be required to attend a EPA training course. It was inferred to me that the Agency was treating the Illinois facilities kindly because they can fine the facilities substantially more or issue ESA?s as was done in the Michigan case.

I have never been more shocked in my professional life. We have had no ammonia releases in Illinois attributed to non-compliance with RMP regulations. Our ammonia facilities have an enviable safety record considering the hundreds of thousands of tons of ammonia fertilizer that is stored and applied yearly in Illinois. After six years of getting no help whatsoever from the U.S. EPA on compliance with this rule, we thought we would be working with the U.S. EPA to identify areas of uncertainty in RMP compliance and work to improve them; we were stunned to learn that the Agency intended to go straight to enforcement and that our fertilizer dealers would all be on record of being in violation of the Federal Clean Air Act.

While a $500 penalty may not seem like much to some, it is substantial to many fertilizer dealers who in many cases are family-owned small businesses. To get a letter from the U.S. EPA that States you are in violation of federal law with penalties up to $32,500 per day if you do not comply with the Agency's directives is frightening to our members, especially when they all felt that their RMP inspections had actually gone quite well. I immediately sent a letter to Mark Horwitz, to the Acting Director of Region V and to the U.S. EPA headquarters outlining our concerns with this enforcement approach and asking them not to proceed down this track. This was on July 26, 2005.

Receiving no immediate reply to my letter, for the remainder of the summer of 2005 I continued to urge the U.S. EPA to sit down with our industry to review the alleged violations so that we could understand what our members had done so wrong prior to the violation letters going out. I probably called them or emailed them on almost a weekly basis requesting this meeting. Finally, in September 2005 Mark Horwitz called me to tell me that they had decided not to issue the $500 per facility penalties, but that they would require our members to attend a mandatory training class as well as enter into a Consent Agreement Final Order (CAFO). I thanked him for dropping the monetary penalties but again requested a meeting to discuss the alleged violations and the CAFO process. Finally, on November 30, 2005 Region V staff agreed to meet with IFCA and several other industry representatives who represent the vast majority of ammonia facilities in Illinois. This is now 4 months after the July meeting in which we learned of the enforcement initiative.

At the November 30, 2005 meeting, Region V personnel did review the alleged violations with us. While we did not agree with the majority of their reasoning for the violations which were by far mostly paperwork discrepancies, we still felt it was a very worthwhile meeting. At the meeting Region V agreed to offer one of their mandatory training classes at the IFCA convention in January 2006. They also agreed to let our industry submit sample RMP compliance forms that they could use as training tools and they expressed an interest in allowing us to review their training program to offer constructive suggestions on how it might be presented so that most fertilizer dealers would understand the content. Region V told us that the letters to our members would be phrased in a non-threatening manner and would cite "deficiencies" instead of the word "violation." We were told that the letters were in the mailroom already, and would be going out in a few days. I immediately prepared our members to receive these letters and assured them that IFCA would be working closely with them to help them respond to the "deficiencies." In early December 2005, IFCA printed and mailed out 1,500 IFCA convention programs to our members and in the program we listed the U.S. EPA RMP Training Session to be held on January 23, 2006 during the convention. Our members began registering to attend this training session.

Hamson Ag Receives First Letter

When no letters had yet been received by our members by the end of the second week in December, I called Region V to inquire about the status. My phone calls were not returned. On December 19, 2005 I received a call from Ronnie Hamson at Hamson Ag in Dahlgren, IL. Dahlgren in a small community in deep Southern Illinois. Ronnie is the definition of a small business as he runs the fertilizer plant with his wife and a handful of employees. He had shut down the facility the week prior to Christmas so that they could use the company shop to help some members of their community frame up the walls for an addition to their church. When he picked up his mail that day, he was shocked. In it was a letter from the U.S. EPA and it was not non-threatening. Instead, it stated that he had "violated" provisions of the RMP, would be required to enter into a Consent Agreement and had to respond within 10 days as to which training class he would attend. If he did not reply to the Agency within 10 days (that would be by December 26, 2005) he would be subject to $32,500 per day penalties and possible criminal penalties or imprisonment. Ronnie said to me "Jean, what have I done wrong?" I thought my Dept of Ag inspection went fine. I have never received a letter from the U.S. EPA in all my years at this plant. Am I going to jail? He was sick at heart and I was sick for him. Again, this was less than 10 days before Christmas.

Ronnie's inspection was performed on December 7, 2004 so it was over a year before he received any indication that he was not in full compliance with the RMP, and yet he had only 10 days during the Christmas holidays to respond or face monetary penalties that would put him out of business. If this is not bad enough, the RMP class that EPA committed to teach at the IFCA convention was NOT listed on the letter. Ronnie asked me why the IFCA class was not an option on the letter, because I had told our members, based on EPA's verbal commitment on November 30, that it would be. I had no answer for Ronnie but told him I could contact Region V immediately. His was not the only phone call we received at IFCA. Our phones began to ring in earnest and the concerns expressed by the dealers were as serious as Ronnie's and worse. I wondered how things could have gone so wrong after the positive meeting we had with Region V on November 30. In sending out these letters, they did not uphold any of the commitments they made to us at that meeting nor did they extend IFCA the courtesy of informing us ahead of time that they would not be good to their word.

For nearly all of our dealers, this was the first violation letter they had ever received from the U.S. EPA and they are not used to the legal language and stern

wording in the letters. They were stunned, upset, angry and confused. From the tone of the letter you would think our entire industry was on the brink of catastrophic and on-going ammonia releases. I was very worried that some of our members wouldn't pick up their mail until after Christmas and would miss the 10 day turn-around and be fined or worse. If nothing else, where was the common sense on behalf of the Agency?

Immediately, that day on December 19, 2005 I called Mark Horwitz at Region V to talk to him about these letters, why they were being sent right before Christmas, to express concern about their enforcement tone and ask why they did not list the IFCA training class as one of the choices. I got his voice mail stating he would be out of the office until January. I then reached out to Tom Skinner, the Administrator of Region V, by email literally begging him to have his staff stop sending the letters until after Christmas and until after we could address the missing IFCA training class. Thankfully, he had the Deputy Director call me back the next day and we got a temporary reprieve. After a few more phone calls with Region V staff the IFCA training class was added to the list of classes and the U.S. EPA had to re-send the letters after Christmas with the IFCA class offered as an option for training.

Keep in mind that our members would also have to enter into Consent Agreements within 90 days, something which troubled me greatly. I felt, as did others in our industry, that we had legal grounds to challenge the CAFO requirement if nothing else. Region informed me that CAFOs were "the least onerous tool in their enforcement toolbox" and that was the best they could do. But I still felt it was not justified. However, with our small budget IFCA does not have the resources to hire an attorney to take on the Federal Government. Our members also do not have these resources. IFCA is a three-person Association and the majority of our members are small businesses. As such, it is difficult if not impossible to defend our industry against the Government in a court of law without bankrupting ourselves. Therefore, we rely on our good name and our solid reputation to try to work things out and that is exactly what I did, working often with Tom Skinner and Deputy Director Bharat Mathur to try to come to some kind of reasonable resolution to this issue. I have great respect for these two gentlemen and in my conversations with them, I always felt that they did understand our concerns. Unfortunately, so much damage had been done by the time they intervened that the perception of the U.S. EPA by our members was that of a renegade Agency out to shut down their businesses. In one short year, we went from a cooperative industry/Agency effort to a complete meltdown of trust and unfortunately a lack of belief by our members in the U.S. EPA's ability to ever treat them fairly. It will be hard to undue the damage and you can sense the on-going frustration of our members in the statements they have submitted for the committee record.

The Alleged Violations

If all this were not bad enough, the violations cited by the U.S. EPA and listed in the letters were based on the Agency's interpretation of the State Dept of Ag reports. The majority of the violations were procedural or paperwork discrepancies at best; at worst, and in many cases, the violations did not match up with the findings of the Dept of Ag inspection report. Copies of the inspection reports were not provided to our members, only a letter listing their violations. Our members who utilized the compliance services of Asmark were cited as well, even though other U.S. EPA regions have reviewed the Asmark RMP model and found it fully meets the requirements of the RMP rule. But in Illinois, Region V found it deficient. Where is the consistency in that? I honestly don't believe any of our facilities could have met the expectations of the staff in Region V; the violations cited were vague and in many cases completely incorrect. I also feel that the IL Dept of Ag was not kept informed of how their reports were interpreted or utilized. The good name and reputation of Illinois Dept of Agriculture and its inspectors have also been tarnished by the way Region V managed this pilot program. But what happened was not the fault of the Department of Agriculture nor does our industry blame them for the unfortunate role they played in what was supposed to be a cooperative program.

Being found out of compliance with a Federal regulation is one thing, but being singled out for enforcement is quite another. Region V did not contract with the Department of Ag in any other State to conduct inspections. Ammonia facilities in the other Region V States of Wisconsin, Minnesota, Indiana, Michigan and Ohio were not, and have not, been subject to whole-sale inspection or enforcement in this manner by Region V. In Ohio, the State EPA administers the RMP compliance programs, and in Ohio similar types of RMP deficiencies were treated like this: The manager got a simple and unthreatening letter asking him to work to improve a

certain part of the RMP; the Ohio EPA would then follow-up to check his progress. This is a fair, respectable and cooperative approach that works well.

But because the Illinois dealers and IFCA cooperated with the U.S. EPA and supported this pilot RMP inspection program in Illinois, we were threatened with monetary penalties, received violation notices, and our dealers would be required to submit to a Consent Agreement Final Order and be on record as being in violation of the Clean Air Act. This is how our facilities who filed their RMPs were treated, while the Agency, in my opinion, made no real effort to locate and inspect facilities in Illinois that DID NOT file an RMP, they only ordered inspections for facilities that did their best to comply with this regulation because they know who they were, thus making them easy to inspect and easy to target for enforcement.

Congress Intervenes

Word of what was going on in Illinois made its way through our industry. Many of my counterparts and fertilizer dealers in other States observed what was happening in Illinois with a sense of shock as well as a sense of relief that it wasn't them. I felt at the time I had done all I could do as a representative of the industry to work with the U.S. EPA on a reasonable approach for compliance. We had, after all, talked them out of the $500 per facility penalties, but certainly many issues remained including the CAFOs.

In late December 2005, I became aware that Senator James Inhofe had made an inquiry into the issue of Region V enforcement of the RMP and the impact on the Illinois fertilizer dealers. I believe it was due to the intervention of Senator Inhofe and his staff that Region V reconsidered the CAFO provision and withdrew this regulatory enforcement requirement. Instead, they provided our ammonia facility managers with a "Certificate of Compliance" that requires them to certify, under threat of perjury, that to the best of their reasonable knowledge and belief, they are in compliance with all provisions of the RMP. While this Certificate is a less threatening enforcement requirement than a CAFO, many of our members still have concerns with signing the Certificates of Compliance because they still do not fully understand the violations they were cited for nor do they completely understand what Region V expects them to do to fully satisfy the requirements of the RMP. Again, it goes back to lack of education, outreach and communication with industry.

I have to share with you, after months of feeling run over by the U.S. EPA it was very uplifting to know that there was someone in Washington DC who did care about the agricultural industry and the small business person. I have no doubt that without Chairman Inhofe's inquiry into our situation, the Illinois fertilizer dealers would have been forced into the CAFO process and had a permanent blot on their otherwise clean compliance records for handling anhydrous ammonia.

IS THE END IN SIGHT?

In March 2006 IFCA requested that Region V extend the compliance date for our members to complete and return their Certificate of Compliance. We made this request because otherwise, the requirement falls right in line with the spring planting and post-emerge spraying season which is the busiest 6 months for our industry. Given the fact that this RMP pilot program has been going on now for 3 plus years, extending the compliance date to December 31, 2006 was reasonable in our opinion. Region V instead extended it to July 1, 2006 which has still caused stress for our members in that the spray season is still going strong.

SUMMARY

Over time, with substantial effort on our part and by making direct and constant appeals for nearly a year to Region V staff and management and with the intervention of Katherine English, we were able to avoid monetary penalties and consent agreements. All the while, our Association, The Fertilizer Institute and the Asmark Institute have worked diligently to further improve RMP compliance tools for our industry. No doubt many ammonia dealers in the country will benefit from this unfortunate situation in Illinois and will also utilize our improved compliance tools, but the fact remains that Illinois fertilizer facility managers are still dealing with the vague instructions given by Region V personnel and are spending days revising their RMPs to try to address violations that in most cases never existed in the first place.

Our Illinois dealers will always be on record in Region V as not meeting the standards of the RMP when in fact Illinois dealers are in fact among the most responsive in the country to the mandates of this and other regulations. At times I blame myself for being so open to this pilot program; had IFCA opposed this process our Dept of Ag would likely have refused to participate and our ammonia facility

managers would be going safely about their business as are others in the country instead of worrying about $32,500 per day possibilities. Situations like this certainly erode trust in the regulatory process. That is perhaps the MOST unfortunate outcome of this event.

The greatest flaw in the U.S. EPA's enforcement program, I believe, is that it is not uniform, and in many cases the Agency personnel are not familiar with the industry they are trying to regulate. The RMP is not the only example, there are other examples I can provide including the U.S. EPA filing criminal charges against an Illinois pesticide applicator for a spray drift incident. This is the first time that we know of that the U.S. EPA has filed criminal charges against an ag retailer and its employees for a pesticide application event. The federal judge in the Southern Illinois District recently dismissed this case in its entirety but only after our member spent a quarter of a million dollars defending their employees from criminal prosecution in a case that should never have been filed by the U.S. EPA in the first place. For nearly a year, two hard-working certified pesticide applicators at Wabash Valley Service Company spent sleepless nights worried about going to federal prison and wondering how they would support their families. While all of this was going on with the RMP, it was doubly disconcerting to learn of the Wabash Valley case. It has not been a good year in Illinois with regard to industry and the U.S. EPA enforcement initiatives in our State.

Some Agency staff seem to be trained only to respond with enforcement and penalties while industry is begging for outreach, for cooperation, and for clear guidance. It is not clear to me if the U.S. EPA headquarters is fully aware of what is going on until industry is forced to go to the top to try to secure fair treatment. Going to the top is not something we like to do. We prefer to work with staff and the Regions because they are the ones we have the most communication with on many issues. I will say that when we managed to get the attention of the Region V Administrator and Deputy Administrator, they were responsive and easy to talk to. I have great respect for Tom Skinner and Bharat Mathur as I have known and worked with both of them for many years, back to the days when they were at the Illinois EPA. But at the point when they got involved, so many poor decisions had already been made and executed by their staff that it was difficult even for them to stop the train of miscommunication and enforcement because the damage had already been done.

When people outright ignore or violate a regulation or cause injury or harm, enforcement is justified and we support its swift application. In our case, we did our best to comply with a complex regulation, we welcomed the U.S. EPA's pilot inspection program and the Illinois fertilizer dealers got severely penalized for our efforts.

We want the industry to be responsive to Government, but we want Government to be responsive as well. Among all levels of Federal Government it seems that U.S. EPA Regions are notoriously independent and can initiate enforcement for alleged violations that other Regions do not consider violations at all. Industry asks only for the Government to communicate with us in a sensible manner, and to give us the benefit of the doubt, particularly when our safety record warrants that respect. We do know what we are doing despite the complexity of the regulations issued by the Agency.

Thank you for this opportunity today.

STATEMENT RICHARD W. WATERMAN, CHAIR DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF KENTUCKY

I would like to begin by thanking Senator Inhofe for inviting me to speak before the Senate Environment and Public Works Committee. I have been asked to testify regarding regional variations in EPA enforcement, a subject that I have studied in relationship to the National Pollutant Discharge Elimination System (NPDES). My testimony will address three basic themes. First, I will examine whether there is evidence that regional variations exist in EPA water enforcement. Second, I will discuss the role of EPA Regional Administrators and third I will discuss what I believe is the legitimate role of elected official in overseeing or controlling the bureaucracy. I should note that I have examined each of these areas in my research, with, respectively, Susan Hunter of West Virginia University, Robert Wright and Amelia Rouse, formerly of the University of New Mexico, and B. Dan Wood of Texas A&M University.

The first question is whether there is evidence that regional variations can be found in the way the Environmental Protection Agency enforces the law. We expect variations to exist simply because there are vast regional differences in what Susan Hunter and I called the nature of the "regulatory environment." As we wrote, "In

addition to its diverse sources of water and equally, if not more so, diverse sources of pollution, the United States is a conglomeration of geographical regions with differing environmental situations and problems. Each region has different geography, economic basis, population densities, and political pressures." Thus, considerable variation is expected in the overall enforcement numbers. In fact, when asked for and were provided with enforcement data from the EPA NPDES (covering the years 1975-1988) we indeed found wide variations in the number of enforcement actions from region to region. These variations may have been the result of some of the factors we described above. When, however, we controlled for a variety of these factors including the budget for each region, as well as measures of House and Senate oversight and court penalties assessed in each region, we still found variations in EPA inspection activity in 7 out of the 10 regions. Likewise, when we examined EPA referrals to the Justice Department, a higher level enforcement activity, we still found variations in four out of the ten regions. Hence, our results provided empirical evidence that regional variations exist, even when we control for other relevant economic and political factors. Again, it is important to note that some of this variation is understandable, given the different circumstances that EPA enforcement personnel face in each region. We therefore should not expect uniform enforcement across all regions. But variations do exist.

One reason why they exist could be found in the then operative 1986 NPDES Enforcement Manual. The manual advised EPA NPDES enforcement personnel that, "While it would be difficult, but not necessarily effective, to have identical enforcement responses for identical violations in different States, the enforcement should be directly related to the severity of the violation." The manual then continued, "Given the decentralization of authority and responsibility in carrying out the NPDES program, implementation of the basic EMS principles should produce national consistency, while still accommodating differences between Regions and States." The enforcement manual therefore called for promoting two contradictory goals: "national consistency" while "accommodating" State and regional differences. Given this contradictory goal, it is not surprising that many EPA enforcement personnel, as well as bureaucrats working at the State level who have primacy to enforce the NPDES permit program, have approached enforcement in substantially different ways. In some States and regions, where there is more local pressure for aggressive enforcement, enforcement has reflected these goals. In other States and regions where there is an expectation that enforcement should be based on a negotiated approach with the regulated industry enforcement has been less aggressive. Thus, as a result of these differing regulatory expectations, combined with the very real geographical and other issues I described above, regional variations are bound to occur. If Congress is committed to limiting such discretion it will have to ensure that environmental laws are written more specifically so that it limits the potential for such discretion. More consistent oversight of EPA officials, not merely in Washington, but throughout the country is appropriate, as well. But it should be recognized that some variations in enforcement will continue to exist, even if all of these measures are adopted. Congress can reduce the level of regional variations, but it cannot eliminate them entirely.

Beyond the factors promoting regional variations that I have just described, there is another important reason for variations in EPA enforcement. To my knowledge this has been a largely overlooked area in academic studies of the EPA. Scholarly work tends to focus their attention on the activities of States with primacy or on the EPA officials in Washington, DC. Yet, most EPA employees operate not in Washington, but in various regional offices around the country. These regional offices represent a major reason for variations in enforcement. EPA officials that I spoke to at the Washington or national office, during the Presidencies of both George H. W. Bush and Bill Clinton, described considerable frustration with the enforcement activities of the regional EPA offices. This suggests to me that this is not a Democratic or a Republican problem, as frustration with regional variations was expressed during periods when both Democrats and Republicans controlled the White House, as well as when Democrats and Republicans controlled Congress. Both parties appear to be interested in a more uniform style of enforcement, even if they don't ultimately agree on what that style should be; that is, whether it should reflect a strict enforcement approach or a style that emphasizes a greater level of negotiating with business.

With regard to regional variations one particular appointive position stood out as the subject of concern. Most memorably, several years ago when I asked one top Agency official in the EPA Water Office why there was so much variation in enforcement from region to region, I was surprised to be treated to a rather candid and colorful exposition of how a particular regional administrator was enforcing the law, not in accordance with the wishes of the then current presidential administration,

but rather in accord with the desires of the "political culture" of that region. When I asked for more detail on this point I was informed that some regions are naturally more aggressive in their enforcement zeal, while others are not. I was told that regional administrators represented one of the last vestiges of the practice of "senatorial courtesy" and that often the administrators represented the political viewpoints of the region rather than national interests.

As a result of this and other discussions with EPA, State enforcement personnel, and members of environmental groups, I ultimately conducted two surveys with two of my graduate students from the University of New Mexico. One was a survey of the attitudes of EPA NPDES personnel, the other of State bureaucrats working for the New Mexico Environment Department. Among the many questions on our surveys, we asked how much influence do various policy actors have over how your office enforces the law. We asked bureaucrats to rank these policy actors on a five-point-scale from "no influence" to "a great deal of influence." Among EPA officials regional administrators narrowly ranked first (in terms of their perceived mean level of influence) with the EPA Administrator ranking second. It should be noted that they ranked much higher than the Federal courts (third), Congress (fourth), environmental groups (fifth), public opinion (sixth), and the president (seventh). When we asked State officials the same question they ranked the New Mexico Governor first, the State legislature second, the U.S. EPA Administrator third, the U.S. Congress fourth, the New Mexico Finance Committee fifth, and then the Region Six administrator sixth. It is not surprising that State officials would rank EPA officials lower (even though New Mexico does not have primacy over its water program). What was surprising to us, however, was that Regional Administrators were seen as having essentially the same level of influence as the EPA Administrator among EPA enforcement personnel, and that both were seen as having more influence than either Congress or the president, though a few people did note the obvious point that the president appoints the EPA Administrator and the Regional Administrators. Among State NMED personnel, however, they were more likely to look to their State officials and then to the national EPA office for guidance, though regional administrators were still seen as exerting considerable influence.

What our results suggest, then, is that particularly among EPA bureaucrats, Regional Administrators are perceived as exerting considerable influence. Given the obvious frustration expressed by U.S. EPA officials regarding Regional Administrators, it is also clear that this is a point of contention within EPA itself. In particular, there is a sense that EPA Regional Administrators tend to reflect the viewpoints of their regional offices and personnel rather than the national office. One EPA official in the national office said that Regional Administrators tend to be co-opted by personnel in their offices, as well as by the political culture of their region. Again, I want to note that this level of frustration has been expressed to me in conversations that I had with EPA officials during both Democratic and Republican administrations.

What then is the solution? As I noted earlier, it is unreasonable to expect enforcement to be precisely the same in each region. There are some valid reasons for regional variations and it would not be appropriate to force a one-size fits all approach on all regions. We want some flexibility in order to prevent the problem of what two prominent scholars, Bardach and Kagan, referred to as the problem of "regulatory unreasonableness," where regulations that simply do not fit are forced to apply to businesses simply to promote the goal of uniform enforcement. A stricter enforcement approach may be required in some settings and in some regions, while negotiation may be appropriate in others. These decisions should be based on the existing regulatory needs of each region (and subject to congressional oversight) rather than merely the decision of a particular Regional Administrator.

In this process it is clear that elected officials have a legitimate role in overseeing the bureaucracy. First, while presidents often pay close attention to the qualities of their national EPA officials, past experience suggests that they are less attentive to the types of individuals they appoint to the regional EPA offices. This may be due to the fact that they inherently believe that such officials will follow directives from US EPA. Since my research suggests this is not the case, the first recommendation is that presidents should be more attentive when they appoint Regional Administrators. As noted, these ten officials are perceived by EPA officials to have slightly more influence than the EPA Administrator. Presidents of both parties should be aware of this point when they make these appointments.

Beyond appointments, which is clearly identified in the Constitution as a means of presidential oversight of the bureaucracy, is it appropriate for elected officials to have continuing oversight of the bureaucracy? I believe the answer here is yes. In an extended research agenda that I conducted with B. Dan Wood, we found that not only can presidents can influence the bureaucracy through the appointments

they make, but also that the budget is a powerful means of controlling the bureaucracy. We also found that congressional oversight of the EPA exerted some influence, as well, though the impact was more temporary. In fact, what we refer to as "political control of the bureaucracy" can be conceptualized as part of our necessary system of checks and balances. While our Constitution is largely silent on the bureaucratic State, it is clear that elected officials can and should exert influence over the bureaucracy. Bureaucrats have a wide array of expertise that should not be ignored, but elected officials represent the public interest in a different way. They can make sure that bureaucrats are applying the law fairly and in accordance with the intent of Congress, as well as representing public opinion. Each is an important attribute. Thus, while bureaucrats clearly have a legitimate role in enforcing laws as enacted by Congress, Congress and the president have an equally legitimate right to make sure that the law is being enforced as intended. Here, of course, there will always be debate as to what did the law intend and is it being implemented fairly. These are political questions that will be decided according to the political interests of a particular time. The fundamental point, however, is that elected officials have a legitimate role in this process and in fact they shirk their responsibility if they do not act to oversee the bureaucracy's performance.

In this particular case, given the prominence of Regional Administrators in the enforcement process, and the existence of regional variations in EPA enforcement (and it should be noted that these variations exist beyond the NPDES program), Congress has a legitimate role in determining how much variation should be permissible and whether Regional Administrators should be more loyal to the regional offices in which they serve or the national EPA office.

RESPONSE BY RICHARD W. WATERMAN TO ADDITION QUESTIONS FROM SENATOR JEFFORDS

Question 1. In 2005 you wrote, "What we can say for sure is that some level of discretion is required for bureaucrats to perform their jobs. The more technical the job is, the more discretion they are likely to require." In your opinion, how does this assertion apply to EPA's enforcement regime?

Response. Some level of discretion is indeed required. As I noted in my testimony it is unreasonable to consider a one-size fits all approach to EPA enforcement. The problem that I noted was that there is considerable variation in EPA enforcement at the regional level, particularly with regard to the NPDES program. In work that I published with Susan Hunter (Enforcing the Law: The Case of the Clean Water Acts) we empirically examined variations in EPA enforcement. We found that factors such as the population size of each State, the population density of each State, the amount of surface water in each State, and sources of non-point pollution—all factors that are factors related to what we call the "regulatory environment"—explain a large part of the variation in EPA enforcement (e.g., permits issued, enforcement actions taken). These are factors that explain why we cannot expect consistent enforcement to occur all the time across all EPA regions. However, even when we control for these factors (with regard to EPA enforcements) we still found statistically significant variations in the enforcement behavior of three EPA regions (3, 6, and 9). In short, while regulatory environmental factors explain many of the variations in EPA enforcement, some structural factors also account for variation. This then leaves us with a normative question. Is this structural variation, evidence of discretion, acceptable? Again, as I noted in my testimony, when I have spoken to EPA officials during both Democratic and Republican administrations I have been told that there is concern with these regional variations in EPA enforcement. Obviously, during Democratic administrations there is a greater desire for more consistent and vigorous enforcement, while Republican administrations generally favor a less aggressive regulatory approach. Thus, the answer to how much discretion is acceptable is a political question. I can only point out that (1) it does exist and (2) there are genuine reasons why we want some level of EPA bureaucratic discretion to continue.

Question 2. You discuss in your testimony data gathered between 1975 and 1988 with which you conclude there existed a significant regional variation in EPA enforcement on the National Pollutant Discharge Elimination System. Have you analyzed any data on the subject collected after 1988?

Response. Yes. Susan Hunter and I analyzed data from 1988 to 1994 in our book. In addition, Amelia Rouse, Robert Wright and I examined survey data which we collected on the EPA NPDES enforcement program from May to September 1994.

Question 3. You mention in your testimony that EPA officials you spoke with during the presidencies of George H.W. Bush and Bill Clinton expressed considerable

frustration with the enforcement activities of the regional EPA offices. Is this anecdotal evidence that speaks merely to the dissatisfaction of a few individuals or have you conducted a systematic survey of EPA employees leading you to conclude that feelings of frustration with regional enforcement are widespread throughout EPA?

Response. The conversation with individuals from the administration of George H. W. Bush were preparatory to the writing of Enforcing the Law: The Case of the Clean Water Acts. Susan Hunter and I were interested in explaining how bureaucrats themselves perceive the regulatory process. We therefore did a number of interviews with officials at the EPA (including a visit to the U.S. EPA Water Office), as well as individuals from the environmental community at large. The results from this book then led to a second project which I conducted with Amelia Rouse and Robert Wright. We again interviewed a number of individuals in EPA regional offices as we put together a survey instrument on EPA enforcement. The object here was to understand how bureaucrats see the political world around them. Our work was published in two articles in the Journal of Public Administration Research and Theory as well as in our book Bureaucrats, Politics, and the Environment.

Question 4. Which enforcement activities have you monitored over the last 18 years?

Response. I have analyzed EPA enforcement in several projects over the past two decades. My dissertation, which was published in 1989 as Presidential Influence and the Administrative State included a chapter on EPA. I then examined the EPA air, water, hazard waste, and pesticide divisions in work published in various journals, as well as in the book Bureaucratic Dynamics, with my co-author B. Dan Wood. This then led to work published with Susan Hunter, Amelia Rouse, and Robert Wright.

Question 5. In the past 10 years, how many scholarly books or articles have you published on the subject of regional variation in EPA enforcement activity? Please provide citations.

Response. I have examined EPA and its activities extensively throughout my career. Many of these deal with regional variations in EPA enforcement, or variations in enforcement between different organizational units with EPA. My publications in this area include the following:

Waterman, Richard W. 2005. "The Myth of the Envirocrat." The Environmental Forum. 22 (2) March/April 18-23.

Waterman, Richard W., Amelia Rouse, and Robert L. Wright. 2004. Bureaucrats, Politics, and the Environment. Pittsburgh: University of Pittsburgh Press.

Waterman, Richard W. and Amelia A. Rouse.1999. "The Determinants of the Perceptions of Political Control of the Bureaucracy and the Venues of Influence." Journal of Public Administration Research and Theory. 9 (October): 527-569.

Waterman, Richard W., Amelia A. Rouse, and Robert L. Wright. 1998. "The Venues of Influence: A New Theory of Political Control of the Bureaucracy." Journal of Public Administration Research and Theory. 8 (January): 13-38.

Hunter, Susan and Richard W. Waterman. 1996. Enforcing the Law: The Case of the Clean Water Acts. Armonk, NY: M. E. Sharpe.

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Question 6. You wrote in Bureaucratic Dynamics that the bureaucracy has a responsibility to the American people to provide some bureaucratic resistance in order to ensure the policy decisions and laws of previous Congresses and administrations are honored. When you say in your testimony that "some regions are more aggressive in their enforcement while others are not", do you attribute this zeal to positive bureaucratic resistance?

Response. It may be. In some cases, as I note above, variations may be the result of responses to variations in the nature of the regulatory environment in different States and regions. Obviously, there is a simplistic tendency to blame bureaucrats

whenever we see variations in enforcement. This should not be the case. We are better served when we understand the nature of these variations.

Question 7. You mention in your testimony that an EPA official told you that regional administrators tend to be co-opted by personnel in their offices, as well as by the political culture of their regions. Was this a singular conversation or have you conducted extensive research across EPA regions on this subject?

Response. This was a single conversation with top official from the EPA Water Office at the U.S. EPA. It was, in fact, one of the top EPA officials.

Question 8. In response to follow-up questions, you suggested that the EPA regional "structure itself might be the problem" and that perhaps elimination of the regional management structure should be considered. You said, "If you want flexibility, the States can provide that." Which of your published works would lead you to make this assertion?

Response. There has been a move in recent decades toward greater State enforcement of environmental regulation, with the national EPA acting as the watch dog when States have primacy. Under this arrangement States must act consistent with national laws, but they have greater flexibility in terms of how they do so. This opens the door for variations in enforcement, but there are essentially capped by EPA oversight. If States are not doing there job then EPA can intervene. In addition, EPA does spot inspections and enforcements to ensure that States are doing there job. This system is not perfect, but it does suggest that there now may be some redundancy in the EPA organizational structure. Regions originally connected the U.S. EPA to the States. With the States doing more of the job themselves, it may be time to rethink how the regional structure works. The alternative of creating yet another layer of bureaucracy at the EPA national level to keep an eye on the regional EPA bureaucracy is unlikely to work. It will create more bureaucracy without necessarily creating better bureaucracy. I am merely suggesting that all options be put on the table. I am not recommending that this option be adopted. I would not do so without considerable study and a clearer sense of the implications of this structural reform. But I do think it is worth considering.

Question 9. In your testimony, you refer to a study that you conducted in the 1990s which surveyed US EPA regional employees in New Mexico. How many U.S. EPA employees did you survey, and does this number represent a statistically viable sample of all U.S. EPA employees in that year?

Response. We surveyed the universe of EPA NPDES enforcement personnel and NMED enforcement personnel. The response rates in both cases were in the 30 percent range. Obviously, we would have preferred higher response rates, but the primary means of doing so (conducting telephone interviews) was not available to us because many enforcement personnel in EPA regions share the same desk and anonymity therefore could not be protected under these circumstances. Some EPA regional administrators also would not allow us to conduct the survey under these circumstances. Thus, the survey results must be considered with these limitations in mind. They do provide a valuable insight into the minds of Federal and State bureaucrats regarding how they see the political world around them. But the survey results are far from perfect. Clearly with better resources and more cooperation from central EPA we would love to do a survey again that would allow us to increase the survey response rate.

STATEMENT OF ERIC SCHAEFFER, DIRECTOR ENVIRONMENTAL INTEGRITY PROJECT

Thank you, Mr. Chairman and members of the Senate Environment Committee, for the opportunity to testify today on the need for greater consistency in enforcing federal environmental laws. My name is Eric Schaeffer, and I am currently the director of the Environmental Integrity Project, a nonprofit organization dedicated to more effective environmental enforcement. Until March of 2002, I was Director of the U.S. Environmental Protection Agency's Office of Civil Enforcement, so the topic of today's hearing is a familiar one.

EPA has been charged by Congress with enforcing nineteen environmental laws in fifty States that regulate the discharge of pollution from a wide range of economic activity. Responsibility for most enforcement activity—including inspections, and the levying of fines and penalties for violations—has been delegated to State agencies that also issue and review the federal permits that are supposed to limit pollution from refineries, power plants, animal feedlots, and thousands of other large sources.

Not surprisingly, in a country as large and diverse as our own, States vary widely in both the competence and the philosophy that they bring to bear on these important responsibilities. In practice, that means that violators can flout federal environ-

mental law in some States without fear of penalty, or having to worry that their violations will be detected at all. This divergence between States is the greatest source of inconsistency in the enforcement of federal law—if we want to provide law abiding companies with a level playing field, this problem needs to be addressed head on.

The Inspector General and the U.S. General Accounting Office have painstakingly documented the failure of some States to enforce our environmental laws in a series of reports issued over the past decade. Their findings are sobering, and worth reviewing.

On April 14, 1997, the Inspector General's review of enforcement of federal hazardous waste laws advised that, "State penalty policies are inconsistent from State to State," and pointed out that some State agencies did not bother to recover the economic benefit that companies realized by ignoring federal hazardous waste laws. Separate IG reviews in 1999 found that Virginia, "rarely classified violators with serious RCRA violations as 'Significant Non-Compliers,'" while Rhode Island's Department of Environmental Management did not, "(1) issue appropriate and timely enforcement actions; (2) ensure that violators complied with enforcement schedules, and (3) identify significant non-compliance." In Rhode Island, the IG concluded that the problems resulted from "a lack of management commitment to enforcement."

On September 25, 1998, the IG concluded that its audits of air enforcement in Alaska, Maryland, Massachusetts, New Mexico, Pennsylvania, and Washington had, "disclosed fundamental weaknesses with State identification and reporting of significant violations of the Clean Air Act. This occurred because States either did not want to report violations or the inspectors were unable to detect them. Numerous significant air violations went undetected, and many of these were not reported to EPA." Where the 6 States identified only 18 significant violators, the Inspector General's office found 103 in the same fiscal year, after examining only a fraction of State records.

A similar audit of Idaho's air enforcement program in 1998 reached similar conclusions, finding that the State's "enforcement actions were not appropriate and penalties not enough to deter violations; enforcement activities did not result in a timely return of sources to compliance; inspection procedures did not ensure that significant violators were identified, and data was not reported accurately."

The beat goes on. In 2002, the U.S. General Accounting Office found that, "over one half of the States do not inspect all of the tanks frequently enough to meet the minimum rate recommended by EPA, at least once every 3 years." In 2003, the IG issued a particularly scathing report on Louisiana's implementation of Federal programs, finding that the State's RCRA database contained many errors, and that, "Louisiana did not know whether facilities were in compliance because self-monitoring reports were either not submitted by facilities or could not be located." Just last year, the IG documented wide variations in monitoring of Clean Air Act sources between Texas, New York, North Carolina and Ohio.

To be sure, not all of these reviews have been negative. For example, the IG applauded the Illinois EPA's enforcement of hazardous waste laws in a 1999 audit, and noted efforts by North Carolina to improve Clean Water Act permitting of large animal feedlots. State attorneys general from New York and a handful of other States have sometimes shown that they are more than willing than EPA to crack down on some of the country's most powerful polluters.

Nor can all the inconsistency in environmental enforcement be charged to States. The U.S. EPA shares the responsibility for enforcing most federal environmental statutes, and is the exclusive authority for enforcing a handful of laws, like the Toxic Substances Control Act, Federal right to know laws that established the Toxics Release Inventory, and tailpipe standards for cars and trucks in every State but California. While headquarters determines policy and manages a few key cases, most federal enforcement is carried out by staff in 10 different regional offices who report to 10 different Regional Administrators, each separately appointed by the President. This fragmentation of responsibility has led to significant variations in regional enforcement, although I think it's fair to say these differences are not as dramatic as they are between States.

Like many other problems in Government, inconsistent federal enforcement is easier to diagnose than it is to cure, and has persisted through various changes in Administration. As long as responsibility is shared by EPA and State agencies, we are going to need to tolerate some diverse approaches to environmental enforcement, which is not necessarily a bad thing. States need room to innovate, and in any case, divided Government is part of our constitutional framework.

But so is the idea that citizens deserve equal protection under the law, which becomes meaningless if polluters can virtually ignore Federal environmental laws in some parts of the country. Although we will never achieve perfection, we need to

do our best to provide both the regulated industry and the public with a level playing field.

Although there are no silver bullets, there are some actions that could help to improve the consistency of environmental enforcement. Both EPA and State agencies are understaffed relative to their workload, which means that some of the largest facilities can go years without ever seeing an inspector. Permit fees provide a source of revenue that can be more reliable than annual appropriations, and both Congress and State legislatures should assess whether these are sufficient to meet program needs.

Both the IG and the GAO have recommended that major sources of pollution be required to use State of the art monitoring to track emissions, instead of the inaccurate accounting still in use at many facilities, which amount to little more than guesswork. Instead, the U.S. EPA has rolled back emissions monitoring to accommodate industry lobbyists, despite having been reprimanded twice for such actions by the DC Circuit Court of Appeals.

EPA needs to make enforcement expectations clearer for States running Federal programs. Some States may welcome this clarity; the GAO reported in 2002 that 40 of the States it surveyed would support a Federal mandate to inspect all underground storage tanks periodically, since that could provide the leverage to secure adequate funding from their State legislatures.

Unfortunately, there is no substitute for regular oversight of State programs, and this is probably EPA's toughest job. Nobody likes to be audited, and the Agency will have to exercise this responsibility with sensitivity and skill. Outstanding efforts need to be recognized, but the Agency must have enough leverage to step in and at least temporarily manage enforcement activity where a State's program is clearly deficient.

Congress can help by asking the right questions and sending the right signals to both EPA and State agencies. Unfortunately, I cannot think of a single hearing that either the Senate or the House has scheduled in the last 10 years to address any of the repeated concerns that the IG or the GAO have raised about uneven enforcement of Federal environmental laws. Unless I am mistaken, today's hearing was prompted by complaints from a trade association that EPA was not polite enough when offering to waive all penalties, if its member companies would be kind enough to voluntarily comply with risk management requirements that have assumed particular importance after 9/11.

Such voluntary programs can be a valuable adjunct to enforcement, and perhaps EPA was not as tactful as it could have been when describing the terms of the amnesty it was offering in exchange for compliance. But if Congress is concerned about inconsistency, I would respectfully suggest that the biggest problem by far is the lack of any meaningful environmental enforcement at all in some of the most heavily polluted parts of our country. This shortfall has been thoroughly documented by the Government's own auditors over the last decade, and I hope you will give their work the serious attention it deserves.

RESPONSES BY ERIC SCHAEFFER TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Can you discuss a few recent examples where a lack of any meaningful EPA enforcement has jeopardized human health and the environment?

Response. The failure to enforce environmental laws leaves the public exposed to pollution that is both dangerous and illegal. Most obviously, the U.S. EPA's decision to stop enforcing Clean Air Act New Source Review rules against some of the nation's dirtiest power plants mean that these "grandfathered" facilities continue to release millions of tons of sulfur dioxide, nitrogen oxide, and particulate matter every year. Companies like Cinergy, which had announced an agreement to clean up its power plants in December of 2000 to resolve New Source Review violations, abandoned that commitment in 2001 when EPA reversed direction. Other companies that had expressed an interest in settlement decide to litigate instead.

Emissions from coal-fired power plants contribute to acid rain, smog, and fine particle pollution that EPA estimates contributes to hundreds of thousands of asthma attacks and more than twenty thousand premature deaths every year. New Federal standards for reducing exposure to fine particle pollution will help reduce this appalling toll over the next ten years, but enforcement of NSR rules could have helped reduce needless exposure to these contaminants much earlier.

Millions of Americans live within breathing distance of large petrochemical plants that every year release large volumes of toxic pollutants like butadiene and benzene, as a result of accidents, maintenance activity, and plant startup and shutdown. For

example, the BASF plant in Port Arthur, Texas, released a combined total of 175,000 pounds of butadiene in 2003 during "malfunctions" and related maintenance activities. Both pollutants are known human carcinogens. In theory, unpermitted emissions during such events are prohibited by law, but in practice, the law is almost never enforced. The Environmental Integrity Project asked the U.S. Environmental Protection Agency to investigate a disturbing pattern of "upsets" at petrochemical plants in Port Arthur in March of 2003.

For the last 5 years, the U.S. EPA has refused to enforce laws that require large animal feeding operations to account for their air emissions, and to control such pollution where it is significant. Unlike family farms, modern livestock operations warehouse hundreds of thousands of animals in close quarters, where they can be a major source of both air and water pollution in rural communities. EPA has stopped enforcing right-to-know and Clean Air Act laws since 2001, instead opting to provide the industry with long-term amnesty pending further research and data collection. This refusal to act means that those unlucky enough to live near these factory farms will continue to inhale hydrogen sulfide, ammonia, particulate matter, and other noxious pollutants that ought to be monitored and controlled.

Question 2. Can you discuss an example where an industry-wide enforcement approach led to positive results for the regulated industry and for the environment?

Almost 8 years ago, the U.S. EPA developed a strategic initiative to target chronic and serious violations of the Clean Air Act at the Nation's largest oil refineries. The strategy identified four types of violations that seemed to have the most significant impact on human health and the environment: expansion of "grandfathered" units without New Source Review permits, benzene released illegally from wastewater treatment, volatile organic compounds off-gassed from valves and flanges, and sulfur dioxide and other pollutants released from flares at sulfur recovery units and other operations. The Agency publicized its concern about these violations through Enforcement Alerts and at industry trade conferences, invited industry representatives to negotiate consent decrees that would establish an enforceable framework and schedule for fixing these problems, and made clear that the underlying requirements would be enforced.

To date, 85 refineries representing 85 percent of U.S. capacity are operating under one of these consent decrees, leveraging several billion dollars of investment in scrubbing, flare recovery systems, and other clean technologies that will greatly reduce the pollution that was too long accepted as an inevitable byproduct of the refining process. The U.S. EPA expects that the consent decrees will eventually eliminate more than 80,000 tons of nitrogen oxide annually, and 235,000 tons of sulfur dioxide per year. These investments in cleaner refining have obviously not hurt the industry, which continues to report record profits, but should make a measurable difference in the quality of the air that people breathe in the neighborhoods around these plants. The EPA's refinery initiative is proof of what can be accomplished when the Agency targets the most serious violations within an industry sector, and pursues a consistent and determined enforcement strategy.

STATEMENT OF DAVID PAYLOR, EXECUTIVE DIRECTOR, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICER, ENVIRONMENTAL COUNCIL OF STATES

Thank you, Mr. Chairman, for providing the Environmental Council of the States (ECOS) the opportunity to present testimony on the interactions between the State environmental agencies and EPA's Regional Offices. My name is David Paylor, and I am the Director of the Virginia Department of Environmental Quality and an officer in our national association ECOS. Today I am speaking on behalf of the environmental agencies in our member States as well as my own State.

BACKGROUND

The Environmental Council of States is the national non-partisan, non-profit association of State and territorial environmental commissioners. Each State and territory has some Agency, known by different names in different States, that corresponds to the U.S. Environmental Protection Agency. Our members are the officials who manage and direct the environmental agencies in the States and territories. They are the State leaders responsible for making certain our nation's air, water and natural resources are clean, safe and protected.

States have the challenging job of front-line implementation of our Nation's environmental pollution laws. States have increased their capacity and as environmental protection has become increasingly important to the general public, more and more responsibilities have been moved to the level of Government best able to carry them out—State and local Governments—which are best able because they are

closest to the problems, closest to the people who must solve the problems, and closest to the communities which must live with the solutions.

Today States are responsible for:

- Managing more than 75 percent of all Federally delegated environmental programs;
- Instituting 95 percent of all environmental enforcement actions;
- Collecting nearly 95 percent of environmental monitoring data; and
- Managing all State lands and resources.

These responsibilities have become even more challenging in the face of severe budget deficits. About two thirds of the $15 billion States spend annually on environment and natural resources originate from non-federal sources.

RELATIONSHIP BETWEEN EPA'S REGIONAL OFFICES AND THE STATES

The State environmental agencies' primary contact with the U.S. EPA is via one of the ten Regional Offices. Former members of ECOS, including a former ECOS President and the former Executive Director of the organization, currently lead five of these offices. For the most part, State relationships with these offices are good.

Most of the major national environmental programs are delegated to the States, and we regularly work with the regions on these matters. As part of this delegation, States negotiate a "Performance Partnership Agreement" or a "State-EPA Memorandum of Understanding" with the regional office each year, or in some cases every few years. This PPA or MOU leads to a grant from which the typical State gets about 20-33 percent of its operating funds to implement the national programs, such as the Clean Air Act, the Clean Water Act, and so on.

Another significant contact that States have with the EPA regional offices is receiving new federal rules to implement. Since 2000, States have received about 40 new rules each year (in air, wastewater, drinking water, waste, etc.) to add to the already formidable list of environmental responsibilities that the States have.

Yet another significant contact between States and the regional offices is on enforcement issues. Enforcement of the environmental laws is a responsibility of the States to which EPA has delegated the programs. EPA's role should be to assist the States when requested and to oversee the efficacy of the States' programs, and to assure that there is a "level playing field" of enforcement among all the States and all the EPA regional offices.

While State relationships with the regional offices are usually good, they have failed to perform as expected on occasion. ECOS often hears about these problems from our members, and we can summarize our observations into four areas:

1) Enforcement problems
2) EPA is slow to provide grants to State environmental agencies
3) Difficulties that States and regions have with NPM guidances
4) Failure to reduce regional staff after delegations

1. Consistency in Enforcement Among Regional Offices and Related Issues

In January 2004, the ECOS Compliance Committee outlined its concerns about inconsistencies among EPA's regional offices in the Agency's review of State enforcement and compliance efforts. Among the States' concerns was the belief that EPA's oversight of State enforcement programs was not consistent or predictable from one region to the next. This dialogue led to the EPA-ECOS "State Review Framework," which is a significant commitment of both the Agency and the States to revise the manner in which EPA reviews State enforcement efforts.

This effort is currently underway and remains an active joint project of ECOS and EPA. ECOS appreciates Congress' interest in this subject, but we do not think this subject is ripe for Congressional action.

However, States continue to have difficulties with EPA inspectors who conduct inappropriate actions within delegated States. For example, in Nebraska EPA staff from the regional office recently showed up at the State environmental Agency to look through NPDES files for "cases so we can get our enforcement numbers up." When the State staff suggested that it needed assistance with basic inspections in a part of the State, the EPA staff declined to assist.

Recommendation. ECOS recommends that Congress ask the Agency for a joint report from it and the States on progress being made in implementing the State Review Framework, with the report due on March 1, 2007.

2. Grant Problems

States rely on Federal STAG funding—the Categorical Grants and the Infrastructure Grants—to assist them in implementing the delegated programs. In a typical State environmental Agency budget, about 25 percent of the income is from Categor-

ical Grants, but this can vary from a low of about 5 percent to a high of about 50 percent depending on the program and the State. States particularly rely on federal funds for support of certain parts of their programs.

When EPA fails to provide federal grant funds in a timely manner, States may find it difficult to operate the programs due to cash flow problems. For example, in the current fiscal year, Region IV was unable to provide all the STAG grants to Tennessee within the first 3 months of the current Federal fiscal year. Of 12 major grants, only 3 were awarded within the first 3 months of the fiscal year, even though the State's application had been submitted before the new fiscal year began. EPA took over 6 months to award four of the grants, and one grant has still not been awarded, as of June 23, 2006. As you might imagine, the lack of timely Federal funds to operate various delegated programs in air, water, drinking water and waste puts a significant stress on the cash flow of the State Agency and its ability to operate these programs.

This is by no means an isolated case. On June 6-7, 2006 States and EPA staff met to discuss this very issue. The summary report stated: "An issue of great importance to the workgroup (and the States in general) is grant timeliness. When the grant cycle suffers delays, it affects the States' ability to promptly implement the programs. The group discussed several approaches to resolving this problem, including better defining the roles and responsibilities of the State grant managers and the EPA program managers, allowing flexibility, and promoting consistency across the regions." A similar conclusion was present in EPA's December 23, 2005 memorandum entitled "Timely Award of State and Tribal Continuing Environmental Program Grants."

Recommendation. ECOS recommends that Congress instruct the Agency to issue continuing grants (i.e., the Categorical Grants in the STAG account) to States and tribes no later than 90 days after the passage of EPA's budget, and to provide authorization for States and tribes to draw on those accounts at least every 90 days during the fiscal year.

3. NPM Guidances

As we indicated in the above issue, States negotiate with EPA regional offices each year on a work plan that leads to the STAG Categorical Grants. These negotiations are very extensive, covering every delegated program that States have taken from EPA in water, drinking water, waste and air. States rely on "National Program Manager Guidance" to assure that rules are implemented similarly across the nation.

Unfortunately, the guidances are not always communicated in a clear manner as they move from EPA headquarters to the Regional offices and to the States. Our experiences show that interpretations of the guidance that have sometimes led to confusion about how States should implement the rules.

For example, Oklahoma recently determined that the cooling water discharge from a facility was exempt from a certain rule. EPA initially agreed with the facility that asked the Agency's opinion. However, when the State Agency contacted EPA to confirm this, the Agency hedged. The result was that it is not clear from the guidance whether the facility is exempt or not.

In another example from the same State, a facility petitioned the State that it should be treated as two separate facilities under PSD (an air rule). The State tended to agree, but asked the region to confirm that the interpretation was consistent with existing EPA guidance on the subject. However, the Agency did not respond and the State therefore was forced to act unilaterally.

Inconsistencies from State to State occur when (1) EPA does not interpret its rules in a timely manner, (2) it excessively interprets them, and/or (3) it adds additional requirements to the rules so as to change them or make them unimplementable.

4. Size of Staff in Regional Offices

In 1992, EPA conducted a study that determined that about 45 percent of the delegated programs had been actually delegated to the States. At that time, EPA had about 18,000 employees.

By 2002, about 75 percent of the programs had been delegated to the States—a considerable shift of the workload. However, EPA's staff was still about 18,000.

During this 10-year period only one new environmental program was created, the Safe Food Act of 1996.

While we understand that EPA has many responsibilities, many States are unsure why the number of staff at the Agency remained the same while the bulk of the Agency's responsibilities for implementation of its programs was being handed to the States. At the same time, States do not have sufficient information to rec-

ommend to you whether EPA's regional staff should be reduced, not has ECOS taken such a position.

Recommendation. ECOS suggests that Congress review the relationship between the rules and programs delegated to the States from the period 1992 through current and the size of the Regional Office staff required to continue other Agency responsibilities.

RECOMMENDATIONS

In addition to the recommendations listed in our testimony above, ECOS recommends the following delineation of appropriate roles as an approach to appropriate roles:

EPA HEADQUARTERS	***EPA REGIONAL OFFICES***	***STATES/TRIBES/LOCALS***
• Advise Congress and the administration on national legislation	• Advise EPA Headquarters on regional/State needs and concerns in national legislation	• Advise EPA on State needs and concerns in national legislation
• Issue regulations implementing national legislation	• Participate, representing regional and State interests, in the development of national regulations	• Participate representing State interests in the development of national regulations
• Delegate national programs as defined by law and implementing regulations;	• Implement non-delegated programs	• Implement delegated programs
• Develop/set minimum national standards for -media air and water quality, -protection of public health, and -technology-based pollution prevention and control	• Provide technical assistance in standard setting to address regional variability--geological, ecological, natural resource, in standard setting	• Provide State specific/unique information for standard setting; implement minimum national standards and determine when State standards should be more stringent than Federal standards
• Issue guidance, develop tools, and conduct training to enable program implementation	• Enable delegations and implementation of delegated programs -provide training, technical and policy assistance as needed -respond to requests for assistance, including developing permit terms and conditions	• Apply guidance and tools; ensure training/certification of State staff; advise EPA of unmet needs in tools and training
• Ensure compliance with and enforce Federal laws and implementing regulations; oversee delegated programs	• Assist delegated States and national programs to ensure compliance and enforce Federal laws	• In delegated programs: provide compliance assistance; conduct inspections, and take enforcement actions

• Conduct/fund scientific research needed to support program implementation	• Advise national programs on scientific research needs, representing regional and State interests	• Identify scientific research needs for in the implementation of delegated and/or special programs
• Identify/anticipate/respond to emerging public health, environmental, and natural resource issues and emergencies nationally	• Identify/anticipate/respond to regional/State specific emerging public health, environmental, and natural resource issues and emergencies	• Identify/anticipate/respond to State specific public health, environmental, and natural resource issues and emergencies
• Facilitate and enable programs to address multi-state trans-boundary issues and protect multi-state ecosystems of national concern	• Facilitate and enable programs to address multi-state trans-boundary issues and protect multi-state ecosystems of regional concern	• Represent State interests in multi-state trans-boundary issues and protect multi-state ecosystems
• Facilitate and enable programs to address international issues and protect global ecosystems	• Facilitate and enable programs to address regional international issues and protect regional ecosystems	• Represent State interests in regional international issues and protect regional ecosystems
• Accountable to Congress and the American public on the state of the nation's health and air, water, and lands	• Accountable to the States and public in the Region, contributing to the overall health of the nation's public, air, water, and lands	• Accountable to State legislatures and State residents, contributing to the overall health of the nation's public, air, water, and lands

Thank you, Mr. Chairman, for this opportunity to testify.

RESPONSES BY DAVID PAYLOR TO ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. In discussions with the EPA Inspector General and GAO, both organizations have referenced the new "State Review Framework." Your organization partnered with EPA to draft the framework. While your testimony mentions the program, can you discuss in greater detail you current impressions of the program? Is it working?"

Response. The States partnered with EPA on the "State Review Framework" (the Framework) to address two principal concerns. First, the States find that EPA's oversight of delegated State programs is inconsistent between EPA Regions and between States in the same EPA Region. Second, the States want EPA's oversight to be predictable, repeatable and unbiased. Oversight should also eliminate redundancy.

The "State Review Framework" (the Framework) is a management tool designed to provide consistent oversight of State performance in enforcement and compliance assurance programs. Developed by EPA with input from the States, its purpose is to ensure compliance with the nation's environmental laws, and maintain fair and consistent enforcement of those laws across the country. Delegation agreements between EPA and the States govern State implementation and enforcement of core environmental programs under Federal statutes. The Framework identifies 12 areas for EPA's evaluation of State compliance and enforcement performance in these core programs. A 13th area evaluates "uniqueness" in State programs, highlighting how States are providing for flexibility and innovation—often needed to address environmental or administrative problems not envisioned in the law.

The Framework relies on existing guidance and policies, avoids the creation of new requirements, and is not inconsistent with performance partnership agreements and grants. By design it should improve resource allocation, allow for reduced oversight of many States based on performance, and facilitate and monitor continuous program improvement. It should also provide EPA with the foundation necessary to evaluate it's own enforcement activities as well as reevaluate it's guidance and policies. EPA piloted the Framework in 10 States, one in each EPA Region. After completion of the pilots, the Framework was evaluated and revised, and EPA provided training to State and Federal employees on the Framework methodology. To date an additional 20 States have participated in reviews by EPA's Regional offices.

EPA's goal is to complete the reviews and conduct a full evaluation of the Framework in 2007.

We agree with GAO that it is too early to determine the actual effectiveness of the Framework. We do know, based on the pilots and the reviews conducted to date, that there is a considerable amount of work to be done. The ECOS Compliance Committee is refocusing its efforts on the core program components, Elements 1-12. The reductions in the State and Tribal Grant Programs, Federal funds provided to the States to implement core programs, are making it critical to use the Framework to identify opportunities to reduce duplicative work, deploy our workforces differently, and engage in more effective work sharing. It remains to be seen if we can accomplish all of these efficiencies given the changes which will be required in both the Federal and State workforces and their management. However, both EPA and the States remain committed to our goals.

Question 2. Can you discuss from a State perspective the process for determining annual enforcement targets for delegated programs? Who determines those targets? EPA regional offices, the States, or both? Is the focus primarily on a few large violators or several smaller ones?

Response. The States are responsible for the enforcement of environmental programs as they are defined in delegation agreements. For example, if a State is delegated the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act, then the State issues permits governing discharges to waters of the State and enforces the terms and conditions of the permits. Annual enforcement targets can address priorities within, or focus for, such delegated programs. In the water example, the issuance and enforcement of NPDES permits for sources of a particular pollutant into the Chesapeake Bay by the bordering States could be an annual target. Difficultly can arise when nationally-set annual targets impact State delegated programs in unintended ways.

For example, national program managers (NPMs)—Senate confirmed Assistant Administrators in EPA Headquarters—in the air, water, waste, pesticide and toxics programs issue annual guidance establishing national program priorities as does EPA's enforcement program. Not infrequently, national guidance can redirects critical resources to national emergencies like Hurricane Katrina recovery. Such redirection of resources can undermine a State's ability to manage a delegated program. For example, not too long ago, EPA's enforcement program conducted a "national dry cleaners initiative" to address human health risk associated with the industry; for some States, however, dry cleaners were simply not sufficiently numerous to be a priority—air emissions from other major sources were.

The NPM guidance is directed to EPA's Regional Offices, which are responsible for the oversight of delegated State programs as well as implementation of national priorities in different areas of the country. The Regions address national and annual targets in their work planning negotiations with the State through memoranda of/or performance partnership agreements and grants. As we noted in our testimony, difficulties arise when national guidance is not always clearly communicated as it moves from Headquarters to the Regions, and through the Regions to the States. Problems can also arise in the interpretation of national guidance by the Region and/or regional staff. And, although the States have been provided opportunities to comment on NPM guidance, and the EPA Regions have the authority to approve work plans that do not follow national guidance, neither mechanism appears to have any real impacts on annual targets.

Work plan negotiations may also include Regional priorities that layer additional requirements on State programs. While the negotiations between the Region and the State continue, Federal funding can be, and frequently is, "held hostage. States rely on grant programs established by Federal statutes to partially fund implementation of delegated programs. Our testimony provides specific examples of the impacts of the lack of timely grant awards on State programs. These problems exacerbate the current trend of declining State grants in a tight Federal fiscal environment, including a fairly recent practice of directing the use of State grant funds for national priorities, without sufficient or any additional funding. In the most recent example, funding provided to the States under section 106 of the Clean Water Act was awarded contingent on the implementation of a new requirement—that already stressed State water quality monitoring programs be expanded to include freshwater lakes.

Question 3. GAO and the EPA Inspector General often site data gaps as a reason for inconsistent enforcement. Can you discuss the States' role in collecting and reporting environmental data?

Response. At a minimum, the States collect and report environmental data in accordance with delegation and grant agreements, and other cooperative initiatives.

Forty-three States responding to a recent ECOS survey reported data from more than 3 million regulated facility sites in 2003. Much of the data is submitted to the States by regulated facilities in compliance with permits, and is generated by the States through inspection and monitoring activities. In most cases, the States have additional data collected pursuant to State programs not mandated by Federal law and/or standards that are more stringent than the required Federal minimum.

Most States have their own databases to manage and analyze the information they collect. They also maintain their own applications to provide for integration of data to produce annual reports, and to look across both program and industry lines for compliance trends. In these cases, the States use proprietary applications to "upload" or crosswalk data from their databases to EPA's. (Note: EPA's databases are not fully integrated.) Over the years, this has been problematic because each national program has had different approaches for submitting electronic data to EPA and data systems' crosswalk applications have failed when respective system upgrades were delivered. This has resulted in significant historic data gaps. There are also perceived real time data gaps because while the States have up to date information in their own systems, EPA usually has only received data at prescribed intervals. Therefore, a query to an EPA system of record is likely to result in data results which are not as up to date as it appears it should be. The development of the National Environmental Information Exchange Network (Exchange Network) is being developed to eliminate the interoperability issue between State and EPA systems and should allow for the synchronization of data between EPA and States on a more frequent basis. The Exchange Network is also enforcing the use of data standards.

Where and when EPA has been able to dedicate sufficient resources to a project, both itself and for the States, and has taken the lead and worked collaboratively with the States, the quality of national data systems and the data they manage improves. The States participated in the Environmental Data Standards Council that identified and developed data standards and develop data exchange standards for enforcement and compliance. This has helped improve the quality of data over the years. Even with the data accessibility, data synchronization and data standards issues, the "data gaps" that impact our ability to characterize the enforcement of the nation's environmental laws are the direct result of any number of factors including agreement on how to measure performance in enforcement programs. As GAO noted in its testimony, EPA's key management indicators continue to be the number of inspections conducted and the penalties assessed for noncompliance. In contrast, many States are focusing on the quality and content of inspections and the training of staff conducting the inspections. GAO, EPA's Inspector General, and recently the Office of Management and Budget have all noted that EPA's performance measures need to characterize changes in compliance, including compliance rate and other outcome data.

In addition, EPA performance measures need to acknowledge and capture State-specific limitations or approaches which may not conform to standard performance or tracking metrics, such as lack of State authority to pursue a particular case or action, or referral of cases to other State agencies with superior jurisdiction. Finally, EPA needs to develop performance measure methodology to quantify the use of compliance assistance or other incentive strategies, undertaken in lieu of or in conjunction with more traditional punitive enforcement strategies. These programs are more likely to eliminate a source or prevent pollution, thereby achieving environmental results sooner. We are working closely with EPA to develop better measures to for these programs so that we can better characterize our successes.

STATEMENT OF JOHN STEPHENSON, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. Chairman and members of the committee, I am pleased to be here today to discuss our work on the Environmental Protection Agency's (EPA) difficulties in ensuring consistent and equitable enforcement actions among its regions and among the States. Our testimony today is based on reports we have issued on EPA's compliance and enforcement activities over the past several years,[1] and provides some

[1] See GAO, Environmental Protection More Consistency Needed Among EPARegions in Approach toEnforcement, GAO/RCED-00-108 (Washington, DC: June 2, 2000); Human Capital: Implementing an Effective Workforce Strategy Would Help EPA to Achieve Its Strategic Goals, GAO-01-812 (Washington, DC: July 31, 2001); and Clean Water Act: Improved Resource Pan-

Continued

observations from the ongoing work that we are performing at your request and that of the Subcommittee on Interior, Environment and Related Agencies, House Committee on Appropriations. As you know, we are assessing how EPA, in consultation with regions and State agencies, sets priorities for compliance and enforcement and how the Agency and the States determine respective compliance and enforcement roles and responsibilities and allocate resources for these purposes. As part of this effort, we are assessing EPA's initiated and planned actions to address key factors that result in inconsistencies—identified in our previous work—in carrying out its enforcement responsibilities. We expect to complete this ongoing review on EPA and State enforcement and issue our report in March 2007.

EPA seeks to achieve cleaner air, purer water, and better protected land in many different ways. Compliance with the nation's environmental laws is the goal, and enforcement is a vital part of the effort to encourage State and local Governments, companies, and others who are regulated to meet their environmental obligations. Enforcement deters those who might otherwise seek to profit from violating the law, and levels the playing field for environmentally compliant companies.

EPA administers its environmental enforcement responsibilities through its Office of Enforcement and Compliance Assurance (OECA). While OECA provides overall direction on enforcement policies, and occasionally takes direct enforcement action, many of its enforcement responsibilities are carried out by its 10 regional offices (regions). These regions, in addition to taking direct enforcement action, oversee the enforcement programs of State agencies that have been delegated authority for enforcing federal environmental protection requirements.[2]

In my testimony today, I will describe the (1) extent to which variations exist among EPA's regions in enforcing environmental requirements, (2) key factors that contribute to any such variations, and (3) status of the Agency's efforts to address these factors.

In summary, as we previously reported on regional efforts to enforce provisions of the Clean Water Act and the Clean Air Act, the regions vary substantially in the actions they take to enforce environmental requirements. These variations show up in key management indicators that EPA headquarters officials have used to monitor regional performance, such as the number of inspections performed at regulated facilities and the amount of penalties assessed for noncompliance with environmental regulations. For example, in fiscal year 2000, the number of inspections conducted under the Clean Air Act compared with the number of facilities in each region subject to EPA's inspection under the act varied from a high of 80 percent in Region III to a low of 27 percent in Regions I and II.

We also reported that it is important to understand the reasons for some of these variations, such as a regional determination to conduct more in-depth inspections at a fewer number of facilities instead of conducting less intensive examinations at many more facilities. Accordingly, we recommended that EPA clarify which enforcement actions it expects to see consistently implemented across the regions and direct the regions to supplement its reporting with information that helps explain why variation occurred. We did not focus our work on the effects of inconsistent enforcement on various types of businesses, including small businesses, the particular focus of the committee's hearing today. However, in performing our work we noted that a recent study for the Small Business Administration,[3] as well as other studies, have suggested that environmental requirements fall most heavily on small businesses. To the extent that this is the case, small businesses could be especially disadvantaged by any inconsistencies and inequities in EPA's enforcement approach. EPA has made progress toward resolving challenges in its enforcement activities that we have previously identified. Nonetheless, each of the challenges is complex and will require much more work and continued vigilance to overcome.

Our work has identified several factors contributing to regional variations: (1) differences in the philosophy of enforcement staff about how to best achieve compliance with environmental requirements; (2) incomplete and inadequate enforcement data, which hamper EPA's ability to accurately determine the extent of variations; and (3) an antiquated workforce planning and allocation system that is not adequate for

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ning Would Help EPA Better Respond to Changing Needs and Fiscal Constrains, GAO-05-721 (Washington, DC: July 22, 2005).

[2] For many Federal environmental programs, EPA either authorizes States to administer the Federal program or retains authority to administer the program for the State. The State programs that have been approved by EPA are described as "delegated" in this testimony for clarity and consistency with EPA program terminology.

[3] W. Mark Crain, The Impact of Regulatory Costs on Small Firms, a report prepared at the request of the Small Business Administration's Office of Advocacy (Washington, DC, September 2005).

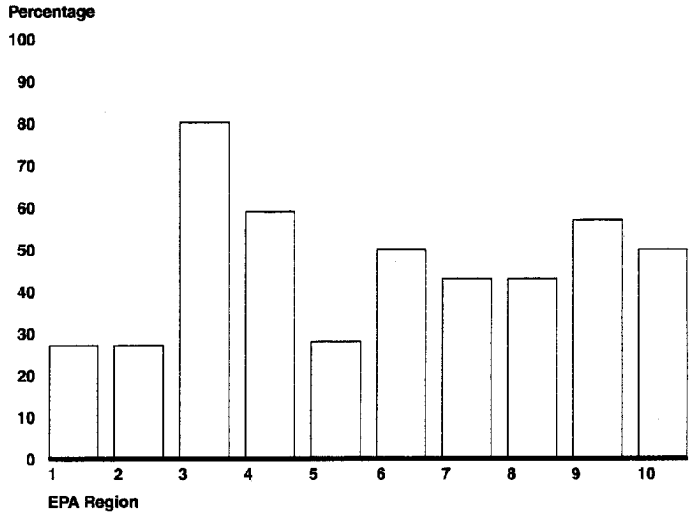
deploying staff to ensure greater consistency and effectiveness in enforcing environmental requirements.

Finally, EPA recognizes that to ensure fair and equitable treatment, core enforcement requirements must be consistently implemented so that similar violations are met with similar enforcement responses, regardless of geographic location. Accordingly, and in response to our findings and recommendations, the Agency has initiated or planned actions that are intended to achieve greater consistency in regional and State enforcement activities. These actions include the following:

- Developing the State Review Framework. This framework involves a new process for conducting reviews and measuring the performance of core enforcement programs in States with delegated authority (as well as nondelegated programs implemented by EPA regions). Although the process is a promising means for ensuring more consistent enforcement actions, it is too early to assess whether the process will result in more consistent enforcement actions and a level playing field for the regulated community across the Nation.
- Improving management information. EPA has a number of ongoing activities to improve the Agency's enforcement data, but the data problems are long-standing and complex. It will likely require a number of years and a steady top-level commitment of staff and financial resources to substantially improve the data so that they can be effectively used to target enforcement actions in a consistent and equitable manner.
- Enhancing workforce planning and analysis. For the past several years, EPA has taken measures to improve its ability to match its staff and technical capabilities with the needs of individual regions and States. For example, EPA developed a human capital strategy and performed a study of its workforce competencies. Nonetheless, the Agency still needs to determine how to deploy its employees among its strategic goals and geographic locations so that it can most effectively use its resources, including its compliance and enforcement resources.

EPA's enforcement program depends heavily upon inspections by regional or State enforcement staff as the primary means of detecting violations and evaluating overall facility compliance. Thus, the quality and the content of the Agency's and States' inspections, and the number of inspections undertaken to ensure adequate coverage, are important indicators of the enforcement program's effectiveness. However, as we reported in 2000, EPA's regional offices varied substantially on the actions they take to enforce the Clean Water Act and Clean Air Act. Consistent with earlier observations of EPA's Office of Inspector General and internal Agency studies, we found these variations in regional actions reflected in the (1) number of inspections EPA and State enforcement personnel conducted at facilities discharging pollutants within a region, (2) number and type of enforcement actions taken, and (3) the size of the penalties assessed and the criteria used in determining the penalties assessed. For example, as figure 1 indicates, the number of inspections conducted under the Clean Air Act in fiscal year 2000 compared with the number of facilities in each region subject to EPA's inspection under the act varied from a high of 80 percent in Region 3 to a low of 27 percent in Regions 1 and 2.

Figure 1: Percentage of Total Regulated Facilities Inspected Under the Clean Air Act During Fiscal Year 2000, by EPA Region



Source: GAO's analysis of EPA data.

While the variations in enforcement raise questions about the need for greater consistency, it is also important to get behind the data to understand the cause of the variations and the extent to which they reflect a problem. For example, EPA attributed the low number of inspections by its Region V, in Chicago, to the regional office's decision at the time to focus limited resources on performing detailed and resource-intensive investigations of the region's numerous electric power plants, rather than conducting a greater number of less intensive inspections.

We agree that regional data can be easily misinterpreted without the contextual information needed to clarify whether variation in a given instance is inappropriate or whether it reflects the appropriate exercise of flexibility by regions and States to tailor their priorities to their individual needs and circumstances. In this regard, we recommended that it would be appropriate for EPA to (1) clarify which aspects of the enforcement program it expects to see implemented consistently from region to region and which aspects may appropriately be subject to greater variation and (2) supplement region-by-region data with contextual information that helps to explain why variations occur and thereby clarify the extent to which variations are problematic.

Our findings were also consistent with the findings of EPA's Inspector General and OECA that regions vary in the way they oversee State-delegated programs. In this regard, contrary to EPA policy, some regions did not (1) conduct an adequate number of oversight inspections of State programs, (2) sufficiently encourage States to consider economic benefit in calculating penalties, (3) take more direct federal actions where States were slow to act, and (4) require States to report all significant violators. Regional and State officials generally indicated that it was difficult for them to ascertain the extent of variation in regional enforcement activities, given their focus on activities within their own geographic environment. However, EPA headquarters officials responsible for the air and water programs noted that such variation is fairly commonplace and does pose problems. The director of OECA's water enforcement division, for example, told us that, in reacting to similar violations, enforcement responses in certain regions are stronger than they are in others and that such inconsistencies have increased.

Similarly, the director of OECA's air enforcement division said that, given the considerable autonomy of the regional offices, it is not surprising that variations exist in how they approach enforcement and State oversight. In this regard, the director noted, disparities exist among regions in the number and quality of inspec-

tions conducted and in the number of permits written in relation to the number of sources requiring permits.

In response to these findings, a number of regions have begun to develop and implement State audit protocols, believing that having such protocols could help them review the State programs within their jurisdiction with greater consistency. Here, too, regional approaches differ. For example:

- Region 1, in Boston, has adopted a comprehensive "multimedia" approach in which it simultaneously audits all of a State's delegated environmental programs.
- Region 3, in Philadelphia, favors a more targeted approach in which air, water, and waste programs are audited individually.
- In Region V, in Chicago, the office's air enforcement branch chief said that he did not view an audit protocol as particularly useful, noting that he prefers regional staff to engage in joint inspections with States to assess the States' performance in the field and to take direct federal action when a State action is inadequate.

We recognize the potential of these protocols to achieve greater consistency by a region in its oversight of its States, and the need to tailor such protocols to meet regional concerns. However, we also believe that EPA guidance on key elements that should be common to all protocols would help engender a higher level of consistency among all 10 regions in how they oversee States.

While EPA's data show variations in key measures associated with the Agency's enforcement program, they do little to explain the causes of the variations. Without information on causes, it is difficult to determine the extent to which variations represent a problem, are preventable, or reflect appropriate regional and State flexibility in applying national program goals to unique circumstances. Our work identified the following causes: (1) differences in philosophical approaches to enforcement, (2) incomplete and inaccurate national enforcement data, and (3) an antiquated workforce planning and allocation system.

While OECA has issued policies, memorandums, and other documents to guide regions in their approach to enforcement, the considerable autonomy built into EPA's decentralized, multilevel organizational structure allows regional offices considerable latitude in adapting headquarters' direction in a way they believe best suits their jurisdiction. The variations we identified often reflect different enforcement approaches in determining whether the region should (1) rely predominantly on fines and other traditional enforcement methods to deter noncompliance and to bring violators into compliance or (2) place greater reliance on alternative strategies, such as compliance assistance (workshops, site visits, and other activities to identify and resolve potential compliance problems). Regions have also differed on whether deterrence could be achieved best through a small number of high-profile, resource-intensive cases or a larger number of smaller cases that establish a more widespread, albeit lower profile, enforcement presence. Further complicating matters are the wide differences among States in their enforcement approaches and the various ways in which regions respond to these differences. Some regions step more readily into cases when they consider a State's action to be inadequate, while other regions are more concerned about infringing on the discretion of States that have been delegated enforcement responsibilities. While all of these approaches may be permissible, EPA has experienced problems in identifying and communicating the extent to which variation either represents a problem or the appropriate exercise of flexibility by regions and States to apply national program goals to their unique circumstances.

OECA needs accurate and complete enforcement data to determine whether regions and States are consistently implementing core program requirements and, if not, whether significant variations in meeting these requirements should be corrected. The region or the State responsible for carrying out the enforcement program is responsible for entering data into EPA's national databases. However, both the quality of and quality controls over these data were criticized by State and regional staff we interviewed.

Internal OECA studies have also acknowledged the seriousness of the data problem. An OECA work group, the "Targeting Program Review Team," stated that key functions related to data quality, such as the consistent entry of information by regions and States, were not working properly and that there were important information gaps in EPA's enforcement-related databases. Another OECA work group concluded in 2006, "OECA managers do not have available to them timely, complete, and detailed analyses of regional or national performance." A third OECA work group asserted that the situation has deteriorated from past years, noting:

"managers in the regions and in OECA headquarters have become increasingly frustrated that they are not receiving from [the Office of Compliance] the reports and data analyses they need to manage their programs. . . [and there] has been less at-

tention to the data in the national systems, a commensurate decline in data quality, and insufficient use of data by enforcement/compliance managers."

Consistent with our findings and recommendations, EPA's Office of Inspector General recently reported that, "OECA's 2005 publicly-reported GPRA [Government Performance and Results Act] performance measures do not effectively characterize changes in compliance or other outcomes because OECA lacks reliable compliance rates and other reliable outcome data. In the absence of compliance rates, OECA reports proxies for compliance to the public and does not know if compliance is actually going up or down. As a result, OECA does not have all the data it needs to make management and program decisions. What is missing most, the biggest gap, is information about compliance rates. OECA cannot demonstrate the reliability of other measures because it has not verified that estimated, predicted, or facility self-reported outcomes actually took place. Some measures do not clearly link to OECA's strategic goals. Finally, OECA frequently changed its performance measures from year to year, which reduced transparency." For example, between fiscal years 1999-2005, OECA reported on a low of 23 performance measures to a high of 69 measures, depending on the fiscal year.

Although EPA is working to improve its data, the problems are extensive and complex. For example, the Inspector General recently reported that OECA cannot generate programmatic compliance information for five of six program areas; lacks knowledge of the number, location, and levels of compliance for a significant portion of its regulated universe; and concentrates most of its regulatory activities on large entities and knows little about the identities or cumulative impact of small entities. Consequently, the Inspector General reported, OECA currently cannot develop programmatic compliance information, adequately report on the size of the universe for which it maintains responsibility, or rely on the regulated universe data to assess the effectiveness of enforcement strategies.[4]

As we reported, EPA's process for budgeting and allocating resources does not fully consider the Agency's current workload, either for specific statutory requirements, such as those included in the Clean Water Act, or for broader goals and objectives in the Agency's strategic plan. Instead, in preparing its requests for funding and staffing, EPA makes incremental adjustments, largely based on historical precedents, and thus its process does not reflect a bottom-up review of the nature or distribution of the current workload. While EPA has initiated several projects over the past decade to improve its workload and workforce assessment systems, it continues to face major challenges in this area

If EPA is to substantially improve its resource planning, we reported, it must adopt a more rigorous and systematic process for (1) obtaining reliable data on key workload indicators, such as the quality of water in particular areas, which can be used to budget and allocate resources, and (2) designing budget and cost accounting systems that are able to isolate the resources needed and allocated to key enforcement activities.

Without reliable workforce information, EPA cannot ensure consistency in its enforcement activities by hiring the right number or type of staff or allocating existing staff resources to meet current or future needs. In this regard, since 1990, EPA has hired thousands of employees without systematically considering the workforce impact of changes in environmental statutes and regulations, technological advances in affecting the skills and expertise needed to conduct enforcement actions, or the expansion in State environmental staff. EPA has yet to factor these workforce changes into its allocation of existing staff resources to its headquarters and regional offices to meet its strategic goals. Consequently, should EPA either downsize or increase its enforcement and compliance staff, it would not have the information needed to determine how many employees are appropriate, what technical skills they must have, and how best to allocate employees among strategic goals and geographic locations in order to ensure that reductions or increases could be absorbed with minimal adverse impacts in carrying out the Agency's mission.

Over the past several years, EPA has initiated or planned several actions to improve its enforcement program. We believe that a few of these actions hold particular promise for addressing inconsistencies in regional enforcement activities. These actions include (1) the creation of a State Review Framework, (2) improvements in the quality of enforcement data, and (3) enhancements to the Agency's workforce planning and analysis system.

The State Review Framework is a new process for conducting performance reviews of enforcement and compliance activities in the States (as well as for nondele-

[4] EPA Office of Inspector General, Limited Knowledge of the Universe of Regulated Entities Impedes EPA's Ability to Demonstrate Changes in Regulatory Compliance, Report No. 2005-P-00024, September 19, 2005.

gated programs implemented by EPA regions). These reviews are intended to provide a mechanism by which EPA can ensure a consistent level of environmental and public health protection across the country. OECA is in the second year of a 3-year project to make State Review Framework reviews an integral part of the regional and State oversight and planning process and to integrate any regional or State corrective or follow-up actions into working agreements between headquarters, regions, and States. It is too early to assess whether the process will provide an effective means for ensuring more consistent enforcement actions and oversight of State programs to help ensure a level playing field for the regulated community across the country. Issues that still need to be addressed include how EPA will assess States' implementation of alternative enforcement and compliance strategies, such as strategies to assist businesses in their efforts to comply with environmental regulations; encourage businesses to take steps to reduce pollution; offer incentives (e.g., public recognition) for businesses that demonstrate good records of compliance; and encourage businesses to participate in programs to audit their environmental performance and make the results of these audits and corrective actions available to EPA, other environmental regulators, and the public.

Regardless of other improvements EPA makes to the enforcement program, it needs to have sufficient environmental data to measure changes in environmental conditions, assess the effectiveness of the program, and make decisions about resource allocations. Through its Environmental Indicators Initiative and other efforts, EPA has made some progress in addressing critical data gaps in the Agency's environmental information. However, the Agency still has a long way to go in obtaining the data it needs to manage for environmental results and needs to work with its State and other partners to build on its efforts to fill critical gaps in environmental data. Filling such gaps in EPA's knowledge of environmental conditions and trends should, in turn, translate into better approaches in allocating funds to achieve desired environmental results. Such knowledge will be useful in making future decisions related to strategic planning, resource allocations, and program management.

Nevertheless, most of the performance measures that EPA and the States are still using focus on outputs rather than on results, such as the number of environmental pollution permits issued, the number of environmental standards established, and the number of facilities inspected. These types of measures can provide important information for EPA and State managers to use in managing their programs, but they do not reflect the actual environmental outcomes that EPA must know in order to ensure that resources are being allocated in the most cost-effective ways to improve environmental conditions and public health.

EPA also has worked with the States and regional offices to improve enforcement data in its Permit Compliance System and believes that its efforts have improved data quality. EPA officials said that the system will be incorporated into the Integrated Compliance Information System, which is being phased in this year. According to information EPA provided, the modernization effort will identify the data elements to be entered and maintained by the States and regions and will include additional data entry for minor facilities and special regulatory program areas, such as concentrated animal feeding operations, combined sewer overflows, and storm water. Regarding the National Water Quality Inventory, the Office of Water recently began advocating the use of standardized, probability-based, statistical surveys of State waters so that water quality information would be comparable among States and from year to year.

While these efforts are steps in the right direction, progress in this area has been slow and the benefits of initiatives currently in the discussion or planning stages are likely to be years away from realization. For example, initiatives to improve EPA's ability to manage for environmental results are essentially long-term. They will require a long-term commitment of management attention, follow-through, and support—including the dedication of appropriate and sufficient resources—for their potential to be fully realized. A number of similar initiatives in the past have been short-lived and unproductive in terms of lasting contributions to improved performance management. The ultimate payoff will depend on how fully EPA's organization and management support these initiatives and the extent to which identified needs are addressed in a determined, systematic, and sustained fashion over the next several years.

Since the late 1990s, EPA has made progress in improving the management of its human capital. EPA's human capital strategic plan was designed to ensure a systematic process for identifying the Agency's human capital requirements to meet strategic goals. Furthermore, EPA's strategic planning includes a cross-goal strategy to link strategic planning efforts to the Agency's human capital strategy. Despite such progress, effectively implementing a human capital strategic plan remains a

major challenge. Consequently, the Agency needs to continue monitoring progress in developing a system that will ensure a well-trained and motivated workforce with the right mix of skills and experience. In this regard, the Agency still has not taken the actions that we recommended in July 2001 to comprehensively assess its workforce—how many employees it needs to accomplish its mission, what and where technical skills are required, and how best to allocate employees among EPA's strategic goals and geographic locations. Furthermore, as previously mentioned, EPA's process for budgeting and allocating resources does not fully consider the Agency's current workload. With prior years' allocations as the baseline, year-to-year changes are marginal and occur in response to (1) direction from the Office of Management and Budget and the Congress, (2) spending caps imposed by EPA's Office of the Chief Financial Officer, and (3) priorities negotiated by senior Agency managers.

EPA's program offices and regions have some flexibility in realigning resources based on their actual workload, but the overall impact of these changes is also minor, according to Agency officials. Changes at the margin may not be sufficient because both the nature and distribution of the workload have changed as the scope of activities regulated has increased and as EPA has taken on new responsibilities while shifting others to the States. For example, controls over pollution from storm water and animal waste at concentrated feeding operations have increased the number of regulated entities by hundreds of thousands and required more resources in some regions of the country. However, EPA may be unable to respond effectively to changing needs and constrained resources because it does not have a system in place to conduct periodic "bottom-up" assessments of the work that needs to be done, the distribution of the workload, or the staff and other resource needs.

Mr. Chairman, to its credit, EPA has initiated a number of actions to improve its enforcement activities and has invested considerable time and resources to make these activities more effective and efficient. While we applaud EPA's actions, they have thus far achieved only limited success and illustrate both the importance and the difficulty of addressing the long-standing problems in ensuring the consistent application of enforcement requirements, fines and penalties for violations of requirements, and the oversight of State environmental programs. To finish the job, EPA must remain committed to continuing the steps that it has already taken. In this regard, given the difficulties of the improvements that EPA is attempting to make and the time likely to be required to achieve them, it is important that the Agency remain vigilant. It needs to guard against any erosion of its efforts by factors that have hampered past efforts to improve its operations, such as changes in top management and priorities and constraints on available resources.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions that you or members of the committee may have.

If you have any questions about this testimony, please contact me at (202) 512-3841 or stephensonj@gao.gov. Major contributors to this testimony include Ed Kratzer, John C. Smith, Ralph Lowry, Ignacio Yanes, Kevin Bray, and Carol Herrnstadt Shulman.

RESPONSES BY JOHN STEPHENSON TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. In your testimony you cite Clean Air Act inspection data demonstrating a variation in inspection activity among the regions in fiscal year 2000. How does the percentage of inspected facilities vary across fiscal years?

Response. In our testimony, we reported Clean Air Act inspection data for the most recent fiscal year at the time of our report and did not compare variation across fiscal years. (See Human Capital: Implementing an Effective Workforce Strategy Would Help EPA to Achieve Its Strategic Goals, GAO-01-812, July 31, 2001). However, we reported in 2000 that earlier observations by EPA's Office of Inspector General and internal Agency studies are consistent with our findings that variations in regional actions are reflected in the number of inspections EPA and State enforcement personnel conducted at facilities discharging pollutants within a region. For example, fiscal year 1998 EPA data show that regional and State inspection coverage for Clean Air Act-related programs ranged from a low of 27 percent of facilities inspected in the Chicago region to a high of 74 percent for facilities in the Philadelphia region. This compares with about 30 percent and 80 percent of facilities inspected in the Chicago and Philadelphia regions respectively, in fiscal year 2000.

Question 2. Is it possible that a facility not inspected in fiscal year 2000 could have been inspected in a later fiscal year?

Response. Yes. EPA's Office of Enforcement and Compliance Assurance (OECA) relies heavily upon periodic inspections by regional and/or State enforcement staff as the primary means of detecting violations and evaluating overall facility compliance. According to the director of OECA's air enforcement division, because the air program does not have continuous monitoring, facilities found in compliance some years ago may fall into noncompliance without being detected unless they are periodically retested.

Question 3. What factors inhibit GAO from accurately studying the effects of inconsistent enforcement on various businesses within the regulated community?

Response. Data on the quality and the content of the Agency's and States' inspections, and the number of inspections undertaken to ensure adequate coverage, are important indicators of the enforcement program's effectiveness. Nonetheless, it is important to get behind these data by considering contextual information associated with the data. EPA's data and analyses performed by OECA and EPA's Inspector General show that variations exist in the quantity and quality of inspections, the number and type of enforcement actions, and other key elements of the Agency's enforcement program. However, the data themselves do little to explain the causes of the variations. Without causal information it is not possible to determine accurately the extent to which variation represents a problem, whether it is preventable, or the extent to which it represents the appropriate exercise of flexibility towards the regulated community.

Question 4. In your testimony, you cite a Small Business Administration study that finds, according to your summary, "environmental requirements fall most heavily on small businesses". How do you reconcile this finding with the EPA Inspector General's determination that EPA "concentrates most of its regulatory activities on large entities and knows little about the identities or cumulative impact of small entities"?

Response. According to an SBA-funded study entitled "The Impact of Regulatory Costs on Small Firms", published in September 2005, small businesses continue to bear a disproportionate share of the Federal regulatory burden. Taking into account four types of regulation—economic, workplace, environmental, and tax compliance—the total regulatory cost per employee for firms with fewer than 20 employees was $7,647, with environmental regulation amounting to $3,296 per employee or 43 percent. However, as the following table shows, the importance of environmental regulation as a share of total cost per employee decreases rapidly as the size of the firm increases, with environmental regulatory costs representing the lowest regulatory cost per employee for firms with 500 or more employees.

		Cost per employee for firms with:		
Type of Regulation	All Firms	<20 employees	20-499 employees	500+ employees
All Federal Regulations	$5,633	$ 7,647	$ 5,411	$ 5,282
Economic	$2,567	$ 2,127	$2,372	$ 2,952
Workplace	$ 922	$ 920	$1,051	$ 841
Environmental	$1,249	$ 3,296	$1,040	$ 710
Tax Compliance	$ 894	$ 1,304	$ 948	$ 780

The finding that the costs of complying with environmental rules falls disproportionately on very small firms is not necessarily inconsistent with the finding of EPA's Office of Inspector General that OECA has limited knowledge of the diverse regulated universe for which it maintains responsibility or that it concentrates most of its regulatory attention on large entities and knows little about the identities and cumulative environmental impact of small entities. As the Inspector General reported in September 2005, EPA's enforcement and compliance monitoring activities focus on major and large entities or pollution sources, which represent only a small fraction of the total universe of entities subject to regulation. OECA has mostly focused on larger and major entities, and has not conducted or obtained analyses showing the cumulative impact of the vast number of entities that emit pollution below the threshold of major or larger entities. EPA has focused on major and larger entities because any one of the larger entities, individually, can have a greater impact than any of the individual smaller entities. However, given the much greater

number of small entities and the potential collective or cumulative impact from this vast but little understood part of the regulated universe, the Inspector General's report argued that it is important for OECA to know the cumulative environmental impact of entities that fall below the major or large threshold. Improved information on small entities, including overall numbers and compliance rates, could help OECA better prioritize where to focus resources and facilitate effective management of compliance and enforcement activities.

Lastly, in recognition of the environmental compliance burden imposed on small firms, Congress enacted statutes to protect small businesses while continuing to regulate their impact on the environment. The Regulatory Flexibility Act (RFA) and the Small Business Regulatory Act (SBREFA) were enacted to provide small businesses with the flexibility and clarity necessary to comply with Government standards. Various subtitles of these statutes (1) require the Agency to publish Small Entity Compliance Guides written in plain language explaining actions a small entity must take to comply with the rules; (2) require the Agency to support the rights of small entities in enforcement actions , specifically providing for the reduction (and in certain cases the waiver) of civil penalties for violations; (3) provide small entities with expanded authority to go to court to be awarded attorneys' fees and costs when the Agency is found to have been excessive in the enforcement of regulations, (4) provide small entities with expanded opportunities to participate in the development of regulations; (5) require the Agency to provide Congress and GAO with copies of all final rules and supporting analyses. Congress may decide not to allow a rule to take effect.

Question 5. In your testimony, you provide examples of various EPA auditing protocols that regions employ to oversee State delegated authority. Specifically, how would a standardized audit tool developed at the headquarters improve compliance?

Response. In 2004, OECA, EPA Regions, the Environmental Council of the States (ECOS), and State representatives from each Region collaborated in the development of a tool to provide consistent oversight of State performance in core enforcement and compliance assurance programs. This tool has considerable potential not only for improving compliance but also for increasing consistency among EPA regions and encouraging greater uniformity among State compliance and enforcement programs. Specifically, the purpose of the assessment tool is to provide a consistent level of environmental and public health protection across the country and provide a consistent mechanism by which EPA Regions, working collaboratively with their States, can ensure that States meet agreed upon performance levels. Known as the State Review Framework (SRF), the SRF is intended to address issues raised in EPA Office of Inspector General audits, concerns raised by ECOS' Compliance Committee, program delegation withdrawal petitions filed by environmental organizations and others, and other EPA assessment efforts. The SRF is based on the 1986 guidance memorandum entitled "Revised Policy Framework for State/EPA Enforcement Agreements" and utilizes existing program guidance, such as EPA's national enforcement response policies, and civil penalty policies or similar State policies (where in use and consistent with national policy) to evaluate State performance and to help guide definitions of a minimum level of performance.

The SRF consists of twelve core elements that examine major aspects of a State's compliance and enforcement program plus a thirteenth element that provides the opportunity to give States credit for innovative approaches to achieving results in their programs. Examples of the core elements include: (1) the degree to which a State program has completed the universe of planned and agreed upon inspections; (2) the degree to which inspection reports and compliance reviews document inspection findings, including accurate descriptions of what was observed to sufficiently identify violations, (3) the degree to which significant violations are accurately identified and reported to EPA national databases in a timely manner, and (4) the degree to which a State takes timely and appropriate enforcement actions, in accordance with specific EPA policy.

Anticipated benefits of the SRF include, among others: (1) more strategic resource utilization; (2) reduction of duplicative work; (3) consistent and predictable baseline oversight with agreed upon thresholds for corrective action; (4) a level playing field for States in competition for business, (5) enhanced (or even relaxed) oversight based on State performance, (6) improved public confidence; and (7) reduced vulnerability to criticisms regarding EPA's level of oversight , particularly from the Office of the Inspector General, the Government Accountability Office (GAO), and the public.

Eleven States participated in a pilot test of the SRF in 2004, one State in each region, with the exception of region 7 in which two States divided responsibilities for specific programs. The reviews of pilot States and Region 10 were all completed by January 2005. EPA evaluated the results of the pilot reviews in May 2005 with

the participation of key stakeholders such as ECOS, the Association of State and Territorial Solid Waste Management Officials (ASTWMO), the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), and State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials (STAPPA/ALAPCO). Reviews of the remaining States are scheduled to be completed by the end of FY 2007.

Question 6. How has the lack of available compliance and enforcement data hindered GAO's ability to study regional inconsistency? What other factors hinder a quantitative analysis?

Response. GAO reported in June 2000 that the lack of reliable compliance and enforcement data has hindered the ability of EPA and the Agency's stakeholders, including GAO and the EPA Office of Inspector General to ascertain the extent to which regional inconsistencies do in fact exist, the impact they may have on human health and the environment, and the manner in which they should be addressed. (See Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement, GAO-00-108, June 2, 2000). GAO's findings and recommendations in its June 2, 2000 report, the Inspector General reported both in September 2005 and December 2005 that EPA faced challenges in developing outcome data, such as compliance rates, to evaluate the effectiveness of the Agency's regulatory activities. The Inspector General explained, for example, that EPA has limited knowledge of the regulated universe for which it maintains responsibility. EPA and others need reliable universe information to accurately ascertain the scope of EPA's responsibilities and workload in different regions and evaluate management decisions about regulatory activities in different regions, for example, the basis on which regional offices develop targeting strategies, set priorities, and allocate resources. Universe data also serves as the basis for calculating compliance rates.

The Inspector General further reported in December 2005 that EPA focused primarily on measuring activities, or outputs, such as "number of enforcement actions" and "number of inspections" because of the difficulty in demonstrating a direct cause and effect relationship between specific enforcement and compliance activities, and outcomes such as the impact the activities may have on human health and the environment. Without reliable outcome data, EPA, GAO, and other stakeholders cannot accurately assess the effectiveness of enforcement strategies in different regions. For example, they cannot accurately evaluate whether compliance is going up or down, how regions may vary in this regard, the extent to which regional differences in compliance rates may result from management and program decisions, and how the impact of regulations—such as on small entities—may vary between regions.

Other factors hinder quantitative analysis of regional inconsistency. EPA headquarters enforcement officials emphasized that enforcement and compliance data, by themselves, do not always offer the appropriate context to help determine the extent to which the variations pose problems because the data do little to explain the reasons for variations. Without such information, it is difficult to determine the extent to which variations represent a problem, whether they are preventable, or the extent to which they reflect appropriate flexibility in applying national program goals to unique circumstances.

Question 7. Has GAO considered in its enforcement studies how inconsistent enforcement may negatively impact human health and the environment?

Response. Our reports have not directly addressed the effect of inconsistent enforcement on human health or the environment. We reported that Federal and State enforcement officials agree that basic program elements should be largely consistent, although some variation is to be expected. According to EPA, for example, some variation is to be expected in how regions target resources to the most significant compliance issues in different regions and States. However, we reported that it is important for EPA to get behind the data to understand the causes of apparently wide disparities, in areas such as the quality and content of inspections, to understand whether they reflect a problem (for example, to human health or the environment).

Question 8. In your testimony, you note an earlier GAO finding that EPA does not sufficiently encourage States to consider economic benefit in calculating penalties. Which Federal environmental statutes require such a determination in calculating penalties?

Response. We have identified no Federal environmental statutes that require States to consider the economic benefit of noncompliance when assessing penalties, nor have we found any statutes that require EPA to encourage States to make such considerations. However, we did find several Federal statutes requiring EPA or courts to consider the economic benefits of noncompliance when assessing penalties

for violations of Federal programs or permits. (See 33 USC 1319(d), 1319(g)(3), 1321(b)(8), 1344(s)(4), 300h-2(c)(4)(B), 7413(e)(1), 7524(b), 7524(c)(2), 7545(d)(1), 9609(a)(3), 11045(b)(1)(C)).

GAO's June 2, 2000 report, "Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement" relied upon earlier EPA Inspector General audit reports and OECA regional evaluations for this and several other characterizations of the regions' oversight of State programs. Among other things, the Office of Inspector General and OECA reports cited the regions for not conducting an adequate number of oversight inspections; not sufficiently encouraging that economic benefit be considered in calculating penalties; not taking more direct federal actions where States were slow to act; and not requiring States to report all significant violations. Regional officials acknowledged at the time that, at least to some extent, the criticisms were valid.

EPA headquarters has issued basic enforcement policy guidance since the mid-1980s, the "Revised Policy Framework for State/EPA Enforcement Agreements", with periodic addenda and revisions that consistently encourage States to consider EPA's penalty policies as they develop their own penalty policies. The policy framework states, in part, that "to remove incentives for noncompliance and establish deterrence, EPA endeavors, through its civil penalties, to recoup the economic benefit the violator gained through noncompliance. EPA encourages States to consider and to quantify where possible, the economic benefit of noncompliance where this is applicable. EPA expects States to make a reasonable effort to calculate economic benefit and encourages States to attempt to recover this amount in negotiations and litigation. States may use EPA's computerized model (know as BEN) for calculating that benefit or different approaches to calculating economic benefit. EPA will provide technical assistance to States on calculating the economic benefit of noncompliance, and has made the BEN computer model available to States".

In 1993 a revision to the EPA "Policy Framework" reiterated that it is "a common goal for penalty assessments at the Federal, State, and local levels that penalties should seek to recover the economic benefit of noncompliance at a minimum where appropriate plus a portion reflecting the gravity of the violation". In discussing the criteria for assessment of monetary penalties, the 1993 policy revision states that "in order to preserve deterrence, it is EPA's policy not to settle for less than the amount of the economic benefit of noncompliance, where it is possible to calculate it, unless the benefit component is a de minimus amount, the violator demonstrates inability to pay, there is a compelling public concern, or there are litigation-related reasons for such settlement. State and local enforcement agencies should calculate and assess the economic benefit of noncompliance in negotiations and litigation except under these circumstances. Where State or local statutory authority would not specifically authorize recovery of economic benefit, EPA still expects States to make a reasonable effort to calculate economic benefit and to attempt to recover this amount in negotiations and litigation using the State's own statutory criteria. In addition to these factors, EPA recognizes that some State statutes do not support the equivalent of the collection of the full economic benefit of noncompliance because of limitations imposed, such as penalty caps. In such instances, EPA will work closely with the States to assist them in overcoming these limitations".

Grain Division- 815-683-2105
Onarga Branch- 815-268-4141

A-WAY
P.O. Box 460
690 E. Jerry Ash Ave.
Crescent City, IL 60928

Fertilizer Division- 815-683-2171
Fax- 815-683-2154

US Senate Environment & Public Works Committee
Washington D.C.

Dear Senators,

I am a sales representative at a small Ag retail site in east central Illinois that came under the noncompliance of the RMP inspection. The actual inspection went very smoothly, I thought at the time.

We then received the threatening letter from Region 5 EPA. Most of our issues were paperwork misunderstandings, but to talk to the people at Region 5 you do not receive any of your returned phone calls to help you reach an answer of what they wanted. We then had the meeting in Peoria, they finally answered the questions, but when they answered the questions, it was still very confusing.

Our biggest problem, in my opinion, was that I did not write a summary of a 200# release of NH3 in the early hours of the morning from a suspected methamphetamine theft. I had documents from Iroquois County, Illinois State Police, IEMA, Illinois Department of Ag. our scale tickets, maps, and the answers to the questions from Region 5 on the release. However, I did not write a summary.

In my opinion, as a small businessperson, the whole process took up a lot of valuable time, and did not fix anything.

Safety is very important to me personally, because my house is in the area of impact, if we would have an incident. I currently have seven daughters that live at home, that is why it is personally important to run a safe Ag. NH3 plant. In addition, I am a Fireman for Crescent Iroquois Fire Protection District; we need to be safe for the community and my fellow firefighters.

Sincerely,

Fred Butt

Fred Butt

June 19, 2006

The Honorable James Inhofe
Chairman, Senate Environment & Public Works Committee
410 Dirksen Building
Washington, DC 20510

Dear Chairman Inhofe and Members of the Committee:

I have been actively involved with risk management program compliance since the rule was first finalized. Based upon the recent actions of Region 5, I feel it is my responsibility to provide the following information to be included in the record for your upcoming hearing on June 28, 2006. I provide this information with hope that our industry will never again be subject to the inconsistencies and unfair enforcement of a Federal rule by an individual region.

For more than twenty years I have helped farm centers with their regulatory requirements. The Asmark Institute exists to help retail farm centers comply with the myriad of regulatory requirements. Our compliance assistance materials are utilized nationwide. Our organization has helped more than 500 farm centers prepare their Risk Management Plan (RMP) with only one location being assessed a monetary penalty (of $150) since 1999. For Region 5 to proclaim that more than 90% of the Illinois farm centers inspected were substantially out of compliance is ridiculous and an indication that the problem lies within Region 5.

The Illinois Fertilizer and Chemical Association worked with their state EPA, The Fertilizer Institute, the Asmark Institute and a broad cross-section of professionals across the United States to develop the format and materials used in our industry. These materials have been widely copied and distributed and have earned the respect throughout the industry as the industry standard for RMP compliance. The materials have served to help a high percentage of the 3,500 RMP facilities in the country, most of which are small businesses.

EPA instills fear in the hearts of our farm center personnel. The majority of these people are small business owners and employees who feel they have no alternative but to cower to EPA's intimidation and to fulfill their demands. No better example of this exists as in Region 5's misuse of Expedited Settlement Agreements (ESA) in this case. Several of our farm centers received an ESA for alleged violations that were not significant in nature. In most cases concerning the alleged violations, the inspector had reviewed the documentation and failed to recognize that it fulfilled the requirement for which she was auditing. The ESA for these facilities were later withdrawn by Region 5 staff only after the issue gained national attention.

Asmark Institute · 4941 Goetz Drive · Owensboro, Kentucky 42301 · (270) 926-4600 · FAX (270) 926-0011

I first became aware of Region 5's intention to issue an ESA to Illinois farm centers on July 25, 2005 in a meeting in Chicago held at their office. I was joined by two representatives of the Illinois Fertilizer and Chemical Association for a meeting with the Region 5 staff to discuss the first six locations that received an ESA. It took two months to arrange the meeting. At the meeting Mark Horwitz and Sylvia Palomo announced they were finalizing their intentions to issue an ESA to more than 90% of the 500 Illinois farm centers previously inspected. They stated they had decided on a small monetary penalty issued in the form of an ESA along with a four-hour mandatory training course. Each location in receipt of an ESA would be required to attend the training, correct any deficiencies, pay the penalty and sign a Consent Agreement.

As an industry that has always been proactive and enjoyed a cooperative relationship with the agencies we work with, we were shocked to learn of the news. We appealed to the Region 5 staff stating it was not reasonable to proceed with enforcement when no form of outreach or training had been extended or offered to our industry. They indicated that we should have been monitoring their website for new information and updates. For the record, it should be noted that any form of industry-wide enforcement is acceptable only after the agency has completed multiple forms of outreach.

The spirit of cooperation has been noticeably absent throughout this ordeal with Region 5. The only mitigating factors in reducing the unreasonable effects of the Region 5 staff have been through contact with the Administrator and Deputy Administrator, and that occurred only when the issue received attention from people in our nation's capitol.

The Region 5 staff repeatedly failed to honor the following commitments until made to do so by a higher authority.

- In our July 25, 2005 meeting they agreed to meet with industry to discuss the alleged violations. This meeting was finally held on November 30, 2005 after the Administrator intervened. Region 5 staff limited the attendance of industry representatives to this meeting.
- In our July 25, 2005 meeting, Region 5 staff agreed to list the IFCA Annual Conference as a location for training. This was re-affirmed at the November 30, 2005 meeting. However, when the violation letters were issued by Region 5 the IFCA training location was not included; the Deputy Administrator had to intervene at industry's request to force the staff to include this training event.
- Region 5 staff announced in our November 30, 2005 meeting with industry that sample materials provided by industry would be used by staff in their training to demonstrate the level of compliance desired by Region 5. We sanitized them of proprietary information and sent them to Region 5 but they did not utilize them in any of the training classes.
- Region 5 staff announced in our November 30, 2005 meeting that wording for the "deficiency letters" would state that *"the inspection at your facility has indicated that you may have deficiencies"*. Without any advanced notice the letters actually received by our farm centers stated *"based upon the inspection by your Illinois Department of Agriculture, we (Region 5 staff) have determined that your facility has violated the following provisions of the RMP regulations."*

- The Region 5 staff requirement for use of Consent Agreements was dropped after being questioned by EPW staff. Wording was developed in the form of a Certification of Compliance. It stated irrevocably that by signing *"the facility is in full compliance".*
- The Certificate of Compliance was revised after the Deputy Administrator responded to concerns from our industry. After his intervention the final wording on the certification statement reads *"the owner and/or operator hereby certify, to the best of my knowledge, information and belief formed after reasonable inquiry, that as of the date of this certification the facility is in full compliance."*

There are many more examples of mis-steps and the unwillingness of some Region 5 staff to communicate clearly with industry and work toward a resolution. As you can see from the examples listed above, as an industry, we did not gain any degree of reasonable relief for which we did not have to fight and plead and seek assistance from a higher authority. Had it not been for the long-time relationships cultivated by those within our industry combined with the luck of receiving national recognition of the issue, our Illinois farm centers would have been hit with more than a half a million dollars in penalties and left to comply with RMP requirements for which the Region 5 staff themselves cannot reasonably explain.

As a particular note of interest in this case, the state of Ohio is located in Region 5 and has taken responsibility for administering the RMP in their state. To date, backed by the experience of several inspections, we have yet to encounter anything but cooperation from the state of Ohio, despite being located in Region 5.

As for the farm centers located in the state of Illinois and affected by Region 5's actions, there is no way to adequately explain to them why they were singled out. It is especially difficult to justify these events when no other state, including those also located in the same region, has not experienced or been subject to this level of scrutiny.

Despite all of this our industry has responded to EPA's criticisms and we have worked to develop several new compliance assistance materials designed to help avoid this from happening again. These materials will help fill the void for training and education on the risk management program requirements. New tools and forms have been developed or revised to assist our farm centers in providing the highest level of documentation that can be reasonably expected to be maintained on-site. While we demonstrated good faith in developing materials that will help avoid uneven enforcement in the future, we would ask the Honorable Members of this committee to help ensure all Regions provide for the reasonable and even enforcement of Federal rules and regulations.

Thank you for allowing me to provide this information as part of the record on June 28th.

Sincerely,

Allen Summers, Jr.

Allen C. Summers, Jr.
President

At Arrowsmith

301 W. Young St.
P.O. Box 110
Arrowsmith IL. 61722
Phone (309)-727-1417
Fax (309)-727 1271

U.S. Senate
Environment & Public Works Committee
Washington, D. C.

Dear Senators

I believe the Ag retail outlets in the state of Illinois carrying Anhydrous Ammonia have been unjustly violated. It is hard to be in compliance with something or someone if you are never given any guidelines on how to do so. We comply with all the guidelines put in place by the Illinois Department of Ag that we know exist. I my self had no idea what the USEPA guidelines where until after our RMP audit, when they offered a class to tell you the things we were not compliant with which seems kind of backwards to me.

We have tried to stay more than compliant with all regulations the Illinois Department of Ag have in my 20 years at this location. The Department of Ag always does a yearly inspection of our facility, which I think is great. The Department of Ag's goals are to make sure dated pieces of equipment are changed out at the right times, all safety equipment is in place and over all safety concerns are addressed. To me these are the most critical things to be aware of...SAFETY. That is what I am most concerned with also, we are the ones that have to work with Anhydrous Ammonia on a daily basis and at the end of a day we all like to go home to our families safely.

It takes a lot of time out of our already busy schedules to take care of all this paper work that really does not mean a whole lot other than to create someone a job at the USEPA.

Thank You
Greg Garlock

caledonia farmers elevator
Lake Odessa Agronomy
9260 E. Eaton Hwy., Lake Odessa, MI 48849
Fert.Plant (616) 374-7329 FAX (616) 374-8670 Uptown Office (616) 374-8061

June 12, 2006

Honorable James Inhofe
United States Senator
Chairman, Environmental Public Works Committee
410 Dirksen Senate Office building
Washington, DC 20510

Dear Chairman Inhofe and Members of the Committee:

I understand the subject of uneven enforcement and specifically the actions of U.S. EPA Region V will be the subject of an upcoming hearing in Washington, D.C. I would like to thank you for your efforts in helping provide relief from the over-zealous actions of the Region V staff. By sending this letter, I want to make sure the record is complete and the members of your committee fully understand what a small facility such as mine experienced.

My facility sells anhydrous ammonia as a fertilizer nutrient and was inspected by U.S. EPA staff member Sylvia Palomo on August 27, 2004. I was able to produce everything Ms. Palomo asked to see except one document. It was not until May 20, 2005 that I received an Expedited Settlement Agreement (ESA) for 10 alleged violations. I don't know if you have ever read an ESA or not, but it stated that without question, I could pay $900 and accept the terms of the settlement or contest the alleged violations and take my chances at a risk of $32,500 per day for each alleged violation.

We decided to respond to the ESA after reviewing the alleged violations with the Asmark Institute. Our Risk Management Plan was prepared using the same format and materials as used by hundreds of other retail facilities around the United States. Upon checking, I learned the RMP format and materials provided by the Asmark Institute and The Fertilizer Institute had been subject to repeated audits and inspections elsewhere in the country with the facilities not receiving any violations.

I have learned there were only six facilities inspected in Michigan and all received an ESA. The process of addressing the ESA for my facility started once I received it and lasted until just last week, a period of 14 months. It is hard to believe that any agency can operate in this manner. Based upon my experience with Region V:

- They failed to communicate with my facility and keep me informed. If not for the Illinois Fertilizer & Chemical Association and the Asmark Institute we would not have received any information. Our first request for an extension was granted, however any other correspondence went unanswered from Region V.

- Upon reviewing our response to the ESA, Sylvia Palomo contacted me by phone and insisted that I allow her to get her legal counsel on the phone so she could settle with me on the spot. I felt this was very inappropriate because she did not want to put anything in writing or allow us time to review the conditions or think about it.

- They took almost a year to contact my facility after the inspection date. If the alleged violations were of any importance, the elapsed time Region V took to notify us would have been irresponsible.

- They used the ESA process for alleged violations that were not significant or even clearly a violation.

- They failed since 1996 to offer any training or workshops to help us understand the RMP requirements before proceeding straight to enforcement.

- I attended the four hour training class conducted by Region V staff as part of the process industry agreed to settle the alleged violations. Region V's training failed to provide clear guidance on the requirements and demonstrate what was acceptable. They stood before us and read us the regulations. Their main focus was pointing out to do a better job recording our findings and documenting how we arrived at the decisions we made. Anytime a participant asked a question, they were instructed to contact them back at their office and they would provide the answer. As a participant we left feeling we would just have to keep trying repeatedly until it pleased the Region V staff. They can't tell us the correct way to do something but they are very willing to keep on telling us how we did it wrong.

I have to admit that my company was tempted to pay the $900 and avoid any further delay of the dispute with Region V. I felt I had complied with the RMP requirements and that it was plain wrong to pay the ESA and possibly set a precedent for the rest of the retailers in the United States. I'm very pleased with our decision to join the rest of industry and stand up to the misuse of power from Region V.

Thank you for allowing me the opportunity to provide information on my experience with Region V on the recent uneven enforcement case involving risk management programs.

Sincerely,

Joel Stoepker
Manager

Cooperative Gas & Oil Co., Inc.
324 East Exchange St. PO Box 329 Geneseo, IL 61254
Phone: (309) 944-5703 Fax: (309) 944-4087

June 19, 2006

US Senate Environment & Public Works Committee
Washington, DC

Dear Senators:

I am writing in regards to the confusion and frustration among fertilizer dealers in the state of Illinois who have ammonia facilities in their efforts to understand and comply with RMP requirements. My specific issues are as follows:

1. There has been a lack of clarity as to what is expected and no specific format to follow. We have the perception that whatever we do, it will never be enough. Due to the lack of clarity, there will always be an issue that we are out of compliance with.

2. The alleged violations are not consistent with the Department of Agriculture inspections along with lack of clear direction on how to address the violations.

3. Our staff attended the training sessions and came away still not understanding what was expected.

4. The overall poor communications and lack of detail from USEPA.

5. There seems to have been a total disregard for the excellent safety record that the fertilizer industry has in the storage and handling of ammonia.

6. The overall confusion and the amount of time required to work on RMP when we are not clearly understanding the end result.

Thank you for your time and consideration.

Larry Wenthold, General Manager
Cooperative Gas & Oil Co, Inc.
Geneseo, Illinois

Earlville Farmer's Co-Operative

Crop Production Center

US Senate Environment & Public Works Committee, Washington DC

Dear Senators:

This letter is regarding our Risk Management Plan inspection and violations. Following our RMP inspection from the Illinois Department of Ag, we were left with the impression that we were in compliance. However, we were given six violations which we feel were unwarranted.

The USEPA administered very little help in their training sessions on how to come into compliance. Had the USEPA provided more specific instruction and better communication on what they wanted, there would have been no need for a training session.

Overall, we feel the Risk Management Plan regulations were completely unnecessary. We have been handling anhydrous ammonia since 1978 without any safety issues, and we continue to comply with the Illinois Department of Ag's stringent inspections.

J. Bryan Killelea
Crop Production Manager

EFFINGHAM
EQUITY

June 22, 2006

US Senate Environment & Public Works Committee
Washington D.C. 20510

Re: USEPA RMP Enforcement Actions

Dear Senators:

Effingham Equity is an agricultural cooperative located in South Central Illinois. We operate 14 anhydrous ammonia facilities, which are subject to the RMP regulations under Section 112(r) of the Clean Air Act. I would like to take this opportunity to express my concern over the ongoing situation with our industry and USEPA Region V. I am unaware of any other state or industry that has been subject to as much inspection and enforcement as the Illinois Agribusiness Industry. I think most individuals in our industry would agree that the Agency's inspections were inconsistent and their communication was very poor.

To comply with the regulations, my staff and I prepared a standard RMP for all 14 facilities. The only differences between the plans were the site specific details (storage container sizes, emergency procedures, facility layout, etc...). When USEPA Region V conducted the inspections, the Agency determined Effingham Equity violated provisions of the regulations, but they were inconsistent. I have facilities with as few as 2 violations and some with as many as 5 violations. How is that possible if all plans are the same? To this day, I still do not understand the reason for the inconsistencies.

The other disturbing trend I have seen from the Agency is the lack of communication. Whether it is RMP or SPCC, the Agency seems to be very reluctant to conduct outreach. And unfortunately, when they have conducted outreach, it has been confusing. The inability for the Agency to give a straight answer has been extremely frustrating.

I hope the Committee will take a close look at USEPA Region V actions over the past couple of years in the state of Illinois.

Sincerely,

Jamie Southard
Safety and Regulatory Director
Effingham Equity

P.O. Box 488 Effingham, IL 62401 Phone: 217-342-3123 Fax: 217-347-7601

HAR BRAND INC.

618 W. VAN BUREN
P. O. BOX 457
CLINTON, ILLINOIS 61727

US Senate Environment & Public Works Committee
Washington, DC

Dear Senators,

I would like to voice my opinion as to the latest handling of the Risk Management Program. The procedures as to filing should have been made clearer at the start back in 1999. The Ag industry has and will always try to do the right thing, but we need to know the rules. The latest go around cost each location a great deal of time and money. I think that after the audit conducted by IL. Department of Ag., that EPA would have worked with our industry to correct the violations. Instead they chose to fine all of us. Not a way to build trust with our industry in my opinion. Some of the violations listed by EPA were different than the findings of IL. Dept of Ag. The safety record of our industry should speak for it's self. For all of us to move the volume of product in the amount of time allotted and with very few incidences, in my mind we know what we're doing.

Respectively,

Richard Fairfield

Richard Fairfield

KOHLBRECHER TRUCK SERVICE, INC.
8307 MAIN STREET
ST. ROSE, IL 62230
(618) 526-7548

June 23, 2006

U.S. Senate
Environment and Public Works Committee
Washington D.C.

Dear Senators:

In December 2005 we were sent notice from the U.S. E.P.A. about violations of our R.M.P. file. A copy is attached.

Never had the U.S. E.P.A. given us any guidelines or solid recommendations on how to fill out these reports. The only guidelines we received were from the I.F.C.A. and one of our suppliers from Iowa.

In reference to the compliance audits we had the documentation on this but it was not filed in the right place and I could not find it when the inspector was here. As for the census data we has no way of finding the information, so we used numbers from our sewer district and added some farm families in the area.

When we used the proper census data we were off by 55 people on the worst-case scenario and 24 over on the alternative case scenario. Even after I attended the risk management training session I still did not know where to look for the answers to these problems. If it had not been for the Illinois Fertilizer and Chemical Association our company would not be able to comply.

Thank you all for the interest in this matter.

Sincerely,

Clarence Kohlbrecher

Clarence Kohlbrecher

M&M Service Company
[illegible] • Carlinville, IL [illegible] • Phone: 217-854-[illegible]

US Senate Environment & Public Works Committee
Washington, DC

June 15, 2006

Dear Senators:

I would like to comment on the USEPA Region V RMP enforcement. We had several citations issued by the USEPA, which were clearly miscommunication between the Department of Agriculture and the USEPA. Many of the things in question were done in the manner we thought was right, considering the poor guidance and direction we had received from the USEPA. Had anyone asked us for clarification at the time of the inspection or a simple phone call later, we could have saved everyone some time and money.

Our industry knows more about the safety needs than anyone else. By law, we are required to train our employees in the safe handling of ammonia when employed and every three years thereafter. We train our people extensively when hired and then annually. Failure to handle ammonia safely is an option we cannot afford. The things USEPA are targeting are the wrong area. The industry safely handles ammonia.

Sincerely,

Brad Klaus
General Manager

MONT EAGLE MILLS, INC.
P O BOX 192
FLAT ROCK, ILLINOIS 62427
(618) 584-3224
FAX (618) 584-3228

U.S. Senate Environment & Public Works Committee

Dear Senators:

This letter is to address the inconsistencies of the Risk Management Plan (RMP) audit conducted at our facility by inspectors contracted by Region V USEPA. On March 29, 2005 an inspector contracted by Region V conducted a RMP compliance inspection at the company Mont Eagle Mills, Inc. located near Flat Rock, Illinois to determine compliance with Risk Management Plan regulations. After receiving a letter noting four deficiencies with the RMP; representatives from Mont Eagle Mills, Inc. requested a copy of the inspection report from Region V USEPA. There were four separate violations noted by Region V USEPA that contradict the inspection report.

The first violation; Mont Eagle Mills, Inc. failed to prepare and implement procedures to maintain the on-going mechanical integrity of the process equipment as required under 40 C.F.R. § 68.56. Contradictory to this violation, the inspector noted on the inspection form the our facility has prepared and implemented maintenance procedures, have on-site technical manuals for the process equipment (i.e. tanks, pump, valve, etc...) and also noted in the report that this facility inspects and tests the process equipment twice a year.

The second violation, Mont Eagle Mills, Inc. failed to conduct incident investigations as required under section 40 C.F.R. §68.60. The inspector clearly noted on the inspection form that there were no incidents which resulted in or could reasonably resulted in a catastrophic release of anhydrous ammonia. Our facility had no incidents to report, thereby making the incident investigation report obsolete. In fact, the inspector clearly notes in the report that this facility did not have an anhydrous ammonia spill or any release of anhydrous ammonia with offsite exposure, yet our facility was considered in violation for failing to conduct and incident investigation.

The third and fourth violations, Mont Eagle Mills failed to maintain all the records on the offsite consequence analysis as described in 40 C.F.R. § § 68.39(a) through 68.39(e). The inspector noted in the report that our facility did indeed have a worst case scenario for our bulk storage tanks and an alternative release scenario for ammonia and the inspector also noted in the report that the documentation supporting both scenarios is complete and maintained.

An RMP audit was conducted at two of our other facilities by the same inspector with similar inconsistencies as the inspector who conducted the audit at our Flat Rock facility. On May 17, 2005 an inspector contracted by Region V USEPA conducted a compliance inspection at Mont Eagle Mills, Inc. near Sumner, Illinois and an inspection was conducted on May 19, 2005 by the same inspector to determine compliance with RMP regulations. Both facilities were noted as being in violation for failing to conduct incident investigations as required under section 40 C.F.R. § 68.60. The inspection report clearly notes there were no incidents recorded at both facilities because there were no incidents which resulted in or could reasonably have resulted in a catastrophic release of anhydrous ammonia.

The second violation noted by Region V USEPA at both facilities; Mont Eagle Mills, Inc. failed to prepare written operating procedures for the storage and nurse tanks in accordance with 40 C.F.R. § 68.52. On the inspection report submitted to Region V USEPA it clearly states that both facilities have prepared written operating procedures for the ammonia tanks and procedures are updated whenever a major change occurs and prior to startup of the changed process.

Okaw Farmers COOP
P.O.Box 31
Lovington, Illinois 61937

June 23, 2006

U S Senate Environment & Public Works Committee
Washington DC

Dear Senators:

This letter is to be put on file in support of the agrichemical dealers across the United States.

I started in the grain and fertilizer business over 30 years and of those I was Mayor of our farm community of 1300 people for 20 years. I have always looked out for the safety of our community and have not had a problem of a safety issue yet. We have always been checked out by the Dept. of Agriculture, which I welcomed to make sure I have not overlooked anything. Since the RMP's were put into affect, my direction has been shifted from the local safety standpoint, to just trying to satisfy the USEPA and the paperwork. The paperwork is very non understandable with very little help, and then one mistake with the paperwork and a huge fine issued. The Dept. of Agriculture cannot even answer questions because they do not understand it either.

I would much rather see the USEPA work with the Dept. of Ag and the agrichemical dealers to create safer regulations that is more uniform across the country and more understandable if we are expected to follow them. If we operate a safe business but our paperwork is not up to USEPA, we receive a huge fine instead of the trying to work with us.

Thank You,

Gary P. Smith

Gary P. Smith
Okaw Farmer's COOP

TARTER FEED & FERTILIZER
1240 So. 4th. Ave.
P.O. Box 686
Canton, IL 61520
Phone: (309) 647-4814 Fax: (309) 647-4860

U.S. Senate Environment & Public Works Committee

Dear Senators:

This letter is in reference to deficiencies cited by Region V USEPA for non-compliance with certain requirements of the Risk Management Plan. On November 17, 2004 an inspector contracted by Region V USEPA conducted a RMP compliance audit. Over a year later, we received notice from Region V USEPA that we were in violation of certain rules of the RMP. Our company uses Asmark Institute services to help gain compliance with regulations that impact our ag retail business including regulatory assistance with the Risk Management Plan.

Tarter Feed & Fertilizer was found in violation of failing to conduct a review of the hazards associated with anhydrous ammonia and the associated process and procedures, including the use of storage and nurse tanks, as required under 40 C.F.R. §68.50. This did not make any sense to us because we have a copy of the hazard review in our RMP file. In fact, after reviewing the inspectors report, he did make note that this facility conducted a review of the hazards associated with the anhydrous ammonia tanks and the inspector noted the results of the hazard review documented and identified problems resolved. A copy of the hazard review was submitted to Region V USEPA, yet we were cited in violation of this requirement.

The next violation we are confused about deals with census data. EPA states that Tarter Feed & Fertilizer failed to use the most recent Census data or other updated information to estimate the population as required under 40 C.F.R. §68.30(c). After reviewing the inspectors report, we noticed the inspector wrote that we used U.S. Census Bureau—Land View III. This is either a typo or oversight by the inspector because the Asmark Institute used U.S. Census Bureau—Land View V to help us determine the population affected by the worst and alternative case scenarios. The documentation in our RMP file clearly states we used Land View V data and the Asmark Institute only uses the most recent U.S. Census data to determine affected populations, yet we were also cited in violation.

Another issue that we do not understand is that the contractor listed in the letter from Region V that inspected our facility was not the person who actually showed up to conduct the inspection. This only added to the lack of validity and reliability of the RMP violations we received. How do you fix things that aren't broken.

The training session I attended that was put on by Region V personnel was more confusing than helpful. The session lasted about four hours and I left not knowing how to comply with the RMP rules and felt it was a complete waste of my time.

Sincerely,

Kevin Tarter
Mark Tarter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cr-40029-JPG
	)	
WABASH VALLEY SERVICE COMPANY et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

This matter is before the Court on Defendants' joint motion to dismiss the charges against them and to declare 7 U.S.C. § 136j(a)(2)(G) unconstitutional (Doc. 43). Defendants submitted a memorandum in support of their motion (Doc. 44), to which the government has responded (Doc. 47) and Defendants have replied (Doc. 53). The Court heard oral argument on this motion on February 16, 2006. Having considered the briefs and arguments in this case, the Court finds that 7 U.S.C. § 136j(a)(2)(G) ("the statute") is unconstitutionally vague as applied here insofar as it incorporates certain provisions from the labels of two pesticides, AAtrex 4L ("AAtrex") and Bicep II Magnum ("Bicep"). Therefore, Defendants' motion (Doc. 43) is **GRANTED** and the charges against the Defendants in this case are **DISMISSED**.

BACKGROUND

The incident giving rise to this prosecution took place on May 8, 2000. On that date, defendant Noah Horton ("Horton"), a Wabash Valley Service Company ("Wabash") employee applied two restricted-use pesticides subject to the provisions of the Federal Insecticide Fungicide

and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.* ("FIFRA"), to a farm in Hamilton County, Illinois. Horton applied pesticides that had been impregnated[1] onto fertilizer pellets using an "air flow application rig" – a tractor-like vehicle fitted with booms. Elaine Zohfield ("Zohfield"), a neighbor who observed (and videotaped) Horton's application of the pesticides, complained to authorities about Horton's activities because she was worried that these pesticides would drift, and then saw (and filmed) these pesticides drifting onto her land. According to records kept by Wabash, the wind that day was blowing at approximately 20 m.p.h. toward Zohfield's farm. At trial, the government intends to show that when applicators apply pesticides through the impregnated fertilizer method, the pebble-like fertilizer pellets break down and generate fine particles that can drift when the weather conditions are not appropriate for application. The government claims the windy conditions that day caused this pellet dust to drift onto Zohfield's property.

The pesticides used by Horton that day, AAtrex and Bicep, both contain the chemical atrazine. The EPA has classified these chemicals restricted-use pesticides because of atrazine's toxicity to aquatic life. In its offer of proof, the government submits that Horton applied these pesticides illegally because he did so contrary to three specific provisions contained in the AAtrex and Bicep labels. The first two provisions appear on both labels: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift;"(Doc. 44-2 at 2, 44-4 at 2) and "To avoid spray drift, do not apply under windy conditions."(Doc. 44-2 at 3, Doc. 44-4 at 3). The government also claims Horton failed to comply with a second provision of the AAtrex

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[1]Impregnation refers to the process where pesticides are mixed with a dry bulk granular fertilizer prior to application. (Doc. 44 at 8). According to Defendants, the impregnated fertilizer takes on a solid form and resembles a small pebble.

label which reads "Do not apply when weather conditions favor drift from treated areas." (Doc. 44-5 at 7). In its brief and at oral argument, the government represented that these three provisions are different ways of saying the same thing: Do not apply when it is too windy. (Mtn. Hrg. Tr. at 44).

ANALYSIS

The statute reads as follows: "It shall be unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). It simply incorporates the label provisions of registered-use pesticides into itself and provides for criminal penalties for the failure to comply with them. Defendants claim the three provisions under which the government is bringing its case are so vague that they make the statute unconstitutional as applied. They also claim it is void on its face for reasons the Court will discuss below.

The most recent Supreme Court case giving the vagueness doctrine in-depth treatment was *City of Chicago v. Morales*, 527 U.S. 41 (1999). There, the Supreme Court found the statute at issue unconstitutionally vague, but did so in a plurality decision. Because the decision was a plurality, *Morales* left the Supreme Court's vagueness jurisprudence unclear. The broad outlines of the doctrine, however, are relatively clear. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Id.* In other words, the statute must be sufficiently clear to provide individuals with fair notice that their conduct is prohibited. In addition, a criminal statute must define the conduct prohibited under in its terms "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Supreme Court has sometimes characterized the enforcement facet of the vagueness

doctrine as the most "important." *Id.* at 358. It has focused on this dimension because the lack of minimal guidelines for enforcement "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

When a statute purports to regulate constitutionally protected conduct, the Court has said that a statute can be held unconstitutionally vague on its face despite the fact that the statute may not be unconstitutionally vague in all its applications. *Kolender*, 461 U.S. at 358 n.8 (collecting cases). Whether a court should, and the extent to which a court can, invalidate a statute on its face has been the subject of a heated debate over the years. *See, e.g., id.* at 371 (White, J., dissenting). Some members of the Court have attempted to draw a distinction between constitutionally protected conduct generally, and conduct protected by the First Amendment. In any event, a majority of the Court – some justices more grudgingly than others – has determined that the "overbreadth" doctrine allows for facial invalidation of statutes that implicate First Amendment freedoms. *Morales*, 527 U.S. at 52. Under this doctrine, a law inhibiting the exercise of First Amendment rights may be facially invalid if the "impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep'." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)).

In *Morales*, Justice Stevens, joined by Justices Souter and Ginsburg, found that courts may declare statutes facially invalid for vagueness under the overbreadth doctrine and in a second situation, where a statute "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." 527 U.S. 41, 52 (1999) (citing *Kolender*, 461 U.S. at 358). In making this finding, the Court suggested that a statute that regulates business

activity only, and does not implicate other constitutional rights might not be subject to a facial attack in the second circumstance. *Id.* at 55 ("This is not an ordinance that simply regulates business behavior and contains a scienter requirement. It is a criminal law that contains no mens rea requirement and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack.") (internal citations and footnote omitted). That two separate avenues for facial invalidation exist was not a position that a majority of the *Morales* Court accepted. Justice Scalia, for example, questioned the propriety of ever declaring a statute invalid on its face, citing advisory opinion concerns. *Morales*, 527 U.S. at 77 (Scalia, J. dissenting). Acknowledging that the Court had found, on a number of occasions, statutes facially invalid, Justice Scalia noted that the Court had only done so when the litigant established that the statute at issue was unconstitutional in all its applications. *Id.* For this proposition, Scalia relied on, among other cases, *United States v. Salerno*, 481 U.S. 739 (1987). There, the Court said "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the Act would be valid.*" *Morales*, 527 U.S. at 78-79 (Scalia, J. dissenting) (quoting *Salerno*, 481 U.S. at 745). The above analysis is necessary here, because the parties take the respective positions of the two main factions of the *Morales* Court, Defendants asserting the position espoused by Justice Stevens, and the government championing the position of Justice Scalia.

Significantly, the Supreme Court and the Seventh Circuit have indicated that non-First Amendment-implicating statutes are not subject to facial attack. *See, e.g., Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (vagueness claims not implicating First Amendment concerns must be evaluated as-applied only); *see also United States v. Cherry*, 938 F.2d 748, 753 (7th Cir. 1991)

(same). The Seventh Circuit, for its part, has not taken a consistent position on the *Salerno* issue. In *A Woman's Choice-East Side Women's Clinic v. Newman,* the Seventh Circuit characterized *Salerno*'s "no set of circumstances" language as a suggestion not essential to the judgment in that case, and disregarded it in favor of contrary Supreme Court authority. 305 F.3d 684, 687 (7th Cir. 2002) ("Given the incompatibility between *Salerno*'s language and *Stenberg*'s [*v. Carhart*, 530 U.S. 914 (2000)] holding, it is the language of *Salerno* that must give way."); *see also Karlin v. Foust*, 188 F.3d 446, 483 (7th Cir. 1999) ("In *Casey*, the Court appears to have tempered, if not rejected, *Salerno*'s stringent 'no set of circumstances' standard in the abortion context."). On the other hand, the Court indicated the "no set of circumstances" test is the law of the circuit in *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 467 (7th Cir. 2002) ("[T]o mount a successful facial challenge the plaintiff must establish that no set of circumstances exists under which the Act would be valid.") (internal quotation and citation omitted). Significantly, the Supreme Court has said that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (footnote omitted). As a final general matter, it is necessary for the Court to consider the following admonition from the Supreme Court in *United States v. National Dairy Products Corp.*,

> The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

372 U.S.29, 32 (1963) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). With these considerations in mind, the Court will address the specific claims in this case.

A. The Facial Challenge

Defendants claim the statute is void on its face because the phrase "manner inconsistent with its labeling" does not apprise applicators of which actions taken inconsistent with product labeling will subject them to criminal sanction. The labels placed on pesticides subject to FIFRA contain a number of safety indications as well as suggestions as to efficient and proper product use. One such suggestion reads: "For best results, apply [Bicep] to weed-free soil following use of a preplant surface, preplant incorporated, or preemergence herbicide, or following a lay-by cultivation. . . ." (Doc. 44-4 at 4). Thus, under a straightforward application of 7 U.S.C. § 136j(a)(2)(G), Defendants maintain that an individual could be subject to criminal sanction if he failed to follow the above-quoted suggestion. This uncertainty, claim Defendants, forces commercial applicators to speculate as to which inconsistent acts are criminal. That the statute forces them, among others, to speculate as to which provisions they must strictly adhere to makes this statute unconstitutionally vague in accordance with Stevens's plurality opinion in *Morales*.

The government does not believe Defendants may challenge this statute facially because it does not implicate First Amendment concerns. *Maynard*, 486 U.S. at 361; *Cherry*, 938 F.2d at 753. The government does however, address the merits of Defendants' facial challenge. As a starting point for analysis, the government directs the Court to *United States v. Corbin Farm Service*, 444 F.Supp. 510 (D.C. Cal. 1978), the only reported case addressing the vagueness of the statute. In *Corbin Farm Service*, the court found that the phrase "inconsistent with its labeling" was not vague. *Id.* at 516-17. Interpreting the statutory language the court stated, "It is clear enough that, if one

applies a pesticide in a way contrary to the directions on the label, one has violated the statute." *Id.* at 516. In that case, the court found that courts reviewing the statute here should "not be too demanding" and that it would not find the statute vague "simply because [it might be difficult to determine] whether certain marginal offenses fall within their language." *Id.* at 515, 516 (second quotation from *National Dairy Products Corp.*, 372 U.S. at 32-33).

In its more precise application, the government claims the statute does not really force applicators to speculate what conduct will subject them to criminal sanction. It claims common sense and experience allow applicators to determine which portions of the labels are advisory and which are mandatory. A sentence beginning "Do not apply . . ." is plainly distinguishable from one that begins "For best results . . ." Further, the government claims that the nature of the criminal prohibition in the statute is clear to those to which it applies. Though not in force at the time of the incident here, the government cites to a Pesticide Registration Notice (an EPA policy document) published by the EPA, which allegedly makes the interaction between the statute and the labels clear. In Pesticide Registration Notice 2000-5[2] the EPA distinguishes between mandatory labeling statements – statements that include imperative verbs such as "must" or "shall" – and advisory statements – those written in descriptive or "nondirective" terms. U.S. ENVIRONMENTAL PROTECTION AGENCY, PESTICIDE REGULATION (PR) NOTICE 2000-5: GUIDANCE FOR MANDATORY AND ADVISORY LABELING STATEMENTS, *at* http://www.epa.gov/PR_Notices/pr2000-5.htm. (last visited Mar. 12, 2006) [hereinafter PR NOTICE 2000-5]. These advisory statements merely "provide information to the product user on such topics as product characteristics and how to maximize safety

[2]The EPA issued this notice on May 10, 2000 – after the incident here. However, the government contends that the document accurately reflects pre-existing EPA practice and policy.

and efficacy while using the product." PR NOTICE 2000-5. The government believes this statement makes the law clear and asks the Court to consider the EPA's construction here. *See Kolender*, 461 U.S. at 355.

After reviewing the law and arguments, the Court concludes that Defendants cannot make a facial challenge to this statute. The Supreme Court and the Seventh Circuit have held in *Maynard* and *Cherry* respectively, that facial challenges are only appropriate to those cases that implicate the First Amendment. In any event, the plurality which suggested that a non-First Amendment-implicating statute could be subject to a facial attack indicated that such would not be the case for the regulation of business activity which did not implicate other constitutional rights. As the statute at issue here simply regulates business activity, the Court finds that it is not subject to facial attack. *Maynard*, 486 U.S. at 361; *Cherry*, 938 F.2d at 753.

B. Unconstitutional as-applied

Defendants claim this statute is unconstitutional as applied to them with respect to each of the three label provisions the government claims Horton failed to follow. The initial point of contention between the parties relates to the lens through which the Court should view these labels. Defendants claim their status as persons with specialized knowledge should significantly color the inquiry. Because the statute regulates commercial applicators, the Court should analyze the provisions incorporated in it, for vagueness purposes, from the perspective of one with specialized knowledge in the industry. A proposition similar to this finds substantial support in the case law, in a line of analysis seeming to start with the 1926 Supreme Court decision in *Connally v. General Const. Co.*, 269 U.S. 385 (1926). There, the Court indicated that a statute is sufficiently clear for vagueness purposes when it "employ[s] words or phrases having a technical or other special

meaning, well enough known to enable those within [its] reach to correctly apply them." *Id.* at 391. The Court made similar pronouncements in subsequent cases as well. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (suggesting in dictum that business people regulated by a statute would be able to understand what is covered under its terms as a matter of "ordinary commercial knowledge" or by making a reasonable investigation). The courts of appeals[3] have built upon this rationale and found that the vagueness standard is lower when a statute uses specialized phraseology apparent to those governed by its terms. In *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993), the Ninth Circuit held that when a statutory prohibition

> involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered, and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them.

(quoting *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 907 (1st Cir. 1980)); *see also United States v. Elias*, 269 F.3d 1003, 1016 (9th Cir. 2001). Put slightly differently, the Court in *Precious Metals Assocs.* said that whether a statute is vague depends upon whether the "language sufficiently conveys a definite warning as to the proscribed conduct, when measured by common understanding and commercial practice." 620 F.2d at 907. Defendants urge the Court to apply this rationale in a slightly different context here. They argue that it is the specialized knowledge within the industry that makes the labeling discussed below vague and unclear.

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[3] The Seventh Circuit has not explicitly applied this construction; however, its cases could be read accordingly. *See Coleman v. Ryan*, 196 F.3d 793, 797 (7th Cir. 1999); *Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974) (in determining if a statute is vague "it is necessary to examine whether the rule creates a standard of conduct which is capable of objective interpretation" by those who must abide by it).

The Government, on the other hand, believes the Court should evaluate the statements in the labels under a reasonable person standard. It argues that when read by an individual of ordinary intelligence, the statements clearly indicate that applicators should not use these pesticides when they could be "blown" onto a neighbor's property or towards people. The government does, however, claim that the provisions are not vague because they use specialized language understood in the industry, citing *Champlin Ref. Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 242-43 (1932) (indicating that statute might not be vague if terms used were familiar to those with knowledge of the subject regulated); *McGowan*, 366 U.S. at 428.

To the extent necessary, the Court finds that the statute should be read from the perspective of those subject to its application. Whether the terms used in the label provisions have precise meanings that are different from the way a reasonable layman would understand them is an issue of fact. In any event, the Court does not believe the resolution of this relatively fine point is outcome-determinative.

i. The First Provision in the Labels

The labels for both AAtrex and Bicep state: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift." Defendants claim the use of the phrase "in a way" references improper forms of application (*e.g.*, the use of a crop-duster, boom unit or other implement of application). As the government claims Horton should not have applied the chemicals because of the wind, not that he used an improper form of application, Defendants claim the statute is unconstitutionally vague as applied here. The government disagrees with this characterization. It claims the prohibition is general in nature and that an ordinary person reading it would understand that it prohibits the application of the product where it may come into contact

with other people, regardless of the particular application method used.

The distinction Defendants attempt to draw between "condition" and "method" is not very persuasive. With respect to this provision, there is no claim that some specialized understanding in the industry fosters a mistaken view of the particulars of its requirements. The relative weakness of this position, however, does not diminish the potential infirmity of the provision as a whole. In their briefs and at oral argument, Defendants made an overarching argument directed at all three of the provisions here: that they simply do not let an applicator know what to do and what not to do. This is the heart of the inquiry; whether the provisions incorporated into the statute apprise an applicator of what conduct will subject him to sanction. As came out in the briefs and oral arguments, there are a number of ways in which these pesticides can come into contact with workers or other people. Counsel for the government indicated that if applicators apply a product in liquid form when there is little or no wind, the pesticide might become suspended in the air. (Mtn. Hrg. Tr. at 43). Thus, if the chemical is in the air for some time the potential for drift or for someone to come through a treated area will increase. Common sense and experience indicate that wind conditions are subject to abrupt change. These concerns are part of Defendants' broader argument. They tell the Court that the impregnated pellet method of application is a more time-consuming method, a method that reduces the risk of drift. Nevertheless, even using this method, both sides tell the Court that some drift will occur in almost all cases. (Mtn. Hrg. Tr. at 46). The EPA recognizes this as well. In their spray drift fact sheet, the EPA candidly admits "that some degree of drift from spray particles will occur from nearly all applications." U.S. ENVIRONMENTAL PROTECTION AGENCY, PESTICIDES: TOPICAL & CHEMICAL FACTS SHEETS: SPRAY DRIFT OF PESTICIDES, *at* http://www.epa.gov/pesticides/factsheets/spraydrift.htm. (last visited Mar. 12, 2006) [hereinafter

SPRAY DRIFT FACT SHEET].

After looking at this direction in the label, an applicator must decide how much wind is too much. If there is always going to be some drift, he must decide how much drift is acceptable. If "acceptable" is not the right term, then he must decide how much drift makes him subject to prosecution. If an applicator knows that a house is two-hundred and fifty yards away from a field where he needs to apply pesticides, it is clear he must consider the level of the winds and the method of application in determining whether he will be applying the pesticides in a way that they will come into contact with people. To be reasonable in this determination, must he also determine if people are in the house, and if so, whether they are likely to come outside and venture toward the fields? What about children? Must he determine whether children live in the house? Any reasonable person knows that children are liable to be in and out of a house and are not especially aware of the dangers of the kind presented here. If there are kids around, is two-hundred and fifty yards too close? Should he take other precautions? Maybe he should check with the parents of the children and find out when they will be at school so there is no chance they will come into contact with the pesticides. Does the age of the children change the answers to these questions? An applicator must consider other factors as well. He must take into account other environmental factors such as the humidity and topography of the landscape. The variables are indeed quite numerous. What should guide the applicator's decision?

The government tells the Court that this is a determination that depends on the circumstances and method of application. Fair enough. Nevertheless, does the label give an applicator any direction on this score? Clearly not. What about EPA? In its fact sheet, the EPA says simply that a "prudent and responsible" applicator considers all environmental factors, the proximity of people

and the method of application. SPRAY DRIFT FACT SHEET. The "EPA uses its discretion to pursue violations based on the unique facts and circumstances of each drift situation." SPRAY DRIFT FACT SHEET. In the real world, this does not tell the applicator in the hypothetical above whether two-hundred and fifty yards is a fair distance with 10 m.p.h. winds.

The factual situation here raises the same kind of questions as the previous hypothetical. The government is presumably claiming a violation of this provision because of Zohfield's presence. Here, one might reasonably ask if the level of precaution Horton should have taken changed because she was old enough to operate a video camera. Based on the fact she was taping the occurrence that day, one can reasonably assume she put herself in the position to videotape Horton's actions intentionally. The Court does not know if she was inside or outside her house. If she was inside, would she have been in any danger? Should Horton have anticipated that she *might* come outside to get a better shot? If she was outside, did Horton need to calculate the risk differently because Zohfield put herself in harm's way? All these questions trouble the Court.

When experienced trial attorneys decide whether to file a lawsuit, they often look at the instructions the court will give to the jury if the case makes it to trial. By analyzing what he must prove to the jury, an attorney can make a reasonable approximation of the strength of his case. The Court wonders if the government considered this simple question. The Court has considered it, and, candidly, it is given pause by the question. How should the Court instruct the jury here? What if Horton knew there was some risk when he applied the pesticides that day but deemed the risk acceptable? If the jury gives credence to his subjective determination, but they determine the risk too great objectively, must they find him guilty? Though some of these questions are probably

answered in the FIFRA's penalty provision,[4] the Court must question whether the provision as incorporated in the statute gives an applicator enough guidance so that he can fairly be held to that standard.

The Court is left with another question raised only tangentially by the parties, but necessarily important, the enforcement of this provision. How do the authorities know what level of drift makes one subject to penalty under this provision? At oral argument, counsel for the government conceded, "some degree of drift is going to occur on almost every application." (Mtn. Hrg. Tr. at 46). Given this fact, the Court asked counsel whether that means that every applicator is potentially subject to criminal liability for what is essentially an unavoidable byproduct of his work. (*Id.*) In response, counsel for the government said he "hope[ed] that the government would use its discretion." (*Id.*) What guides the government's discretion? Does it only prosecute when a neighbor decides to videotape an incident and submit the tape to the authorities? Counsel is "sure [he] didn't say that." (*Id.*). Maybe so, but the implication is fairly drawn.

In *Kolender v. Lawson,* the Supreme Court found a California loitering statute which required those who loiter to provide a "'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify" a *Terry* stop unconstitutionally vague on its face. 461 U.S. at 353. This holding was based on the statute's

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[4]7 U.S.C. §§ 136l(b)(1)(A) & (B) provide:
(A) Any registrant, applicant for a registration, or producer who knowingly violates any provision of this subchapter shall be fined not more than $50,000 or imprisoned for not more than 1 year, or both.
(B) Any commercial applicator of a restricted use pesticide, or any other person not described in subparagraph (A) who distributes or sells pesticides or devices, who knowingly violates any provision of this subchapter shall be fined not more than $25,000 or imprisoned for not more than 1 year, or both.

failure to clarify the meaning of "credible and reliable" identification. *Id.* at 354. Because federal courts must consider any limiting construction of a law by the state courts or enforcement agencies when they are asked to determine the facial validity of state laws, the Court considered the interpretation given to "credible and reliable" by the state courts: "identification carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.* at 355 & 357 (internal quotation and citation omitted). After considering the statute as limited by this and other constructions, the Court was convinced that it was virtually standardless. *Id.* at 358. The lack of meaningful guidance to authorities left enforcement of this provision to the whim of the police; the statute "furnishe[d] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure . . . and confer[ed] on police a virtually unrestrained power to arrest and charge persons with a violation." *Id.* at 360 (internal quotations and citations omitted). Clearly, the concerns of class- or race-based discrimination present in *Kolender* are not present here. However, the concern over arbitrary enforcement is just as real. If every application causes drift, then every single applicator could violate this provision when he applies pesticides. An applicator simply has no way of knowing whether he will be prosecuted because the statute leaves that decision entirely to the unguided discretion of the authorities.

In light of the concerns the Court has discussed, the Court finds that this provision is unconstitutionally vague. The prohibitions in this section are not clearly defined, and the Court is convinced that the section does not provide applicators with any reasonable notice of what conduct it proscribes. *See Grayned,* 408 U.S. at 108.

ii. The Second Label Provision

The labels for both AAtrex and Bicep state: "[t]o avoid spray drift, do not apply under windy conditions." Defendants claim the term "spray" as used in the labels is understood in the industry to mean the application of pesticides in liquid form. They claim"spray drift" refers to the drifting of a chemical mist over a distance after an applicator releases the chemicals in liquid form. Defendants contrast this method with the method Horton used here, spreading – the term used for the application of impregnated fertilizer. Defendants claim that the specialized meaning of the terms spray and spread in the industry makes the statute unconstitutional as applied. They claim that the relevant inquiry is whether persons involved in the pesticide application business would have understood that the above-quoted phrase applied to Horton's conduct on May 8. Because one in Horton's position would not have realized that spreading the impregnated fertilizer fell within the prohibition in the warning, Defendants claim he was not on notice that the provision proscribed his conduct that day. On a more basic level, Defendants take issue with the guidance provided by the term windy. They believe the term is simply too vague to guide their conduct in any meaningful way. Finally, Defendants claim the use of the words "to avoid" is not a clear prohibition but merely advisory.

The government argues that the label makes it clear that applicators must avoid "spray drift" when using impregnated fertilizer – it does not really take a position on "spreading." It grounds this argument in the label instructions on the Bicep product under the heading "Dry Bulk Granular Fertilizers." In this section, the label states that "[w]hen applying Bicep . . . with dry bulk granular fertilizers, follow all directions for use and precautions on the . . . label regarding target crops, rates per acre, soil texture, application methods, and rotational crops." (Doc. 44-2 at 3). Thus, the label clearly tells applicators that all its restrictions apply to the spreading of fertilizer through

impregnated pellets. The government also rejects Defendants' assertions that spray drift is restricted to the drift from liquid pesticides. It claims that the term "drift" and "spray drift" are interchangeable. In support of this, the government points the court to the EPA definition of spray drift as the "physical movement of a pesticide through the air at the time of application or soon thereafter." SPRAY DRIFT FACT SHEET. The government also cites similar provisions in the Illinois Pesticide Training Manual.[5]

For reasons similar to its decision on the first provision and for others detailed below, the Court finds that this second provision is unconstitutionally vague as applied because it did not apprise Defendants of the conduct that would subject them to criminal liability. As an initial matter, Defendants have introduced the affidavits of unaffiliated members of the pesticide applicator community that support their contentions regarding the specialized meaning of the term "spray drift." Of course this is a factual dispute, and thus possibly unsuitable for determination at this stage in the litigation. *See Corbin Farm Service*, 444 F.Supp. at 518. In any event, there is an *indication* that the term *may* be understood by those in the industry differently than the government's asserted meaning. On that level then, Defendants, according to their own subjective understanding of the term, did not know that Horton's spreading of the pesticides would subject them to liability under a "spray drift" provision. The government takes issue with the use of subjective understanding to determine the meaning of a criminal statute. It claims Defendants' subjective understanding of the language is irrelevant; that the only relevant inquiry is what the provision says, analyzed objectively. Whatever the general applicability of that statement, it seems to the Court to be a rather weak

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[5] According to the government, this manual is not mandatory reading, it is simply suggested that applicators read this manual before they take the licensing exam to be certified to apply restricted-use pesticides.

position here. In dealing with similar issues, the Supreme Court, as stated above, has said that specialized understanding of terminology is a relevant factor in the vagueness inquiry. *See Connally*, 269 U.S. at 391; *McGowan*, 366 U.S. at 428. The First and Ninth Circuits have held similarly. *See, e.g., Weitzenhoff*, 35 F.3d at 1289; *Precious Metals Assocs.* 620 F.2d at 907. If these considerations can, in effect, lower the standard, it seems only reasonable that they can raise the bar as well. The Court finds no principled basis for distinction.

In addition to the subjective understanding of those in the professional application community, there are other indications that "spray drift" refers to liquid application. The Court knows of no better way of ascertaining the precise definition of a term than looking in the dictionary. Entry of "spray" into the search function at the web site www.dictionary.com[6] returned results supporting the notion that spray indicates liquidity. The American Heritage® Dictionary of the English Language defines spray as "water or liquid moving in a mass of dispersed droplets, as from a wave." Dictionary.com, *at* http://dictionary.reference.com/search?q=spray In its infinitive form, it is "to disperse (a liquid) in a mass or jet of droplets." *Id.* WordNet® 2.0 defines spray as "a pesticide in suspension or solution; intended for spraying." *Id.* Other online dictionary services returned similar results. Merriam-Webster OnLine defines spray as "water flying in small drops or particles blown from waves or thrown up by a waterfall." Merriam-Webster Online, *at* http://www.m-w.com/dictionary/spray (last visited Mar. 12, 2006). Some definitions of the term from the Oxford English Dictionary include: "Water blown from, or thrown up by, the waves of the sea in the form of a fine shower or mist" and "Water or other liquid dispersed by impact or other

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[6] Dictionary.com is a "multi-source dictionary search service" which performs searches in several dictionaries hosted on its site. *See* http://dictionary.reference.com/help/about.html. (last visited (Mar. 12, 2006) [hereinafter Dictionary.com].

means in fine mist-like particles." Oxford English Dictionary, *at* www.oed.com/ (last visited March 12, 2006). From this review of online dictionaries, it is clear that spray primarily denotes liquidity.

Despite the apparent understanding in the industry and the common understanding of the term, the government contends that "spray" as used in the term "spray drift" is not a modifier; it claims the two terms (*i.e.*, drift and spray drift) are synonymous. When the Court expressed its befuddlement at this redundancy, counsel for the government admitted, "it's poor drafting" but rested his claim of the terms' synonymy on the EPA's definition of spray drift. (Mtn. Hrg. Tr. at 40). In December 1999, the EPA promulgated the following definition of spray drift:

> the physical movement of a pesticide through air at the time of application or soon thereafter, to any site other than that intended for application (often referred to as off target). EPA does not include in its definition the movement of pesticides to off-target sites caused by erosion, migration, volatility, or contaminated soil particles that are windblown after application, unless specifically addressed on a pesticide product label with respect to drift-control requirements.

SPRAY DRIFT FACT SHEET. The clarification the government contends this definition accomplishes is vitiated by the next subsection of the fact sheet, titled "How Does Spray Drift Occur?" It explains that:

> When pesticide solutions are sprayed by ground spray equipment or aircraft, droplets are produced by the nozzles of the equipment. Many of these droplets can be so small that they stay suspended in air and are carried by air currents until they contact a surface or drop to the ground. A number of factors influence drift, including weather conditions, topography, the crop or area being sprayed, application equipment and methods, and decisions by the applicator.

Id. The only entry for "droplet" in Merriam-Webster's Online Dictionary defines a droplet as "a tiny drop (as of a liquid)." Merriam-Webster Online, *at* http://www.m-w.com/dictionary/droplet (last visited Mar. 12, 2006). Therefore, it seems the government is actually in a weaker position because the EPA defines how spray drift occurs in a way that primarily denotes liquid application. The

Court is not suggesting that the government is being less than ingenuous in its arguments. Rather, despite what the drafters of the provision may have meant, even the EPA fact sheet would make a reasonable person think spray drift implies liquid application. This alone is sufficient to ground the Court's holding that this provision is unconstitutional as applied. If the term did indeed cover Horton's activities, he was not on notice that his conduct ran afoul of this provision.

The spray drift language is not the only constitutional infirmity in this provision. The Court also finds that the term "windy" is too vague to guide the conduct of Horton here.[7] The only reasonable way to interpret this provision is to substitute the term "too windy" for "windy."[8] Put another way, as the government has conceded, the provision essentially tells applicators not to apply pesticides when it is too windy. When viewed in this light, the best way to demonstrate the problem is by analogy. Just as any reasonable person would agree that, as a matter of policy, the use of potentially dangerous chemicals should be regulated, reasonable people (outside of Germany) probably agree that for the safety's sake, the state should regulate the speed at which individuals may drive on the highway. State governments have made policy decisions on this score and have determined that the speed limit on the highways should be somewhere between 65 m.p.h. and 75 m.p.h. This decision probably does not reflect a scientific determination that traveling 66 m.p.h. or 76 m.p.h. on the highway is objectively unsafe. Rather, lawmakers had to set the speed limit

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[7]The following discussion is relevant to all three of the provisions attacked by Defendants' Motion.

[8] The term windy is defined as "characterized by or abounding in wind: *a windy night*." Dictionary.com *at* http://dictionary.reference.com/search?q=windy (last visited Mar. 12, 2006). In this context, perhaps the term is better characterized as the oppositive of, or absence of wind. The government concedes that the application of pesticides in some wind is acceptable. If this is true, as it must be, then to the extent this provision has any meaning, it can only be read as indicating that applicators must not apply pesticides when it is too windy.

objectively, if not arbitrarily, and those speeds were either deemed, or for some other reason found to be, appropriate. An individual driving 85 m.p.h. north on Interstate 57 might not think he is driving too fast, but he has a reasonably good idea that if he sees a cop, he is going to get a ticket. In Illinois at least, the State does not tell its citizens that they should not drive "too fast."[9] Reason

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[9] In the interest of a complete discussion, the Court must take note of 625 ILCS § 5/11-601 and similar "too fast for conditions" statutes. Section 5/11-601 states:

> No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

625 ILCS § 5/11-601. At first blush, this statute might seem indistinguishable from a provision telling pesticide applicators not to apply pesticides when it is too windy because the statute essentially tells drivers not to drive at a speed which is "too fast for conditions." The Court believes this statute is meaningfully different from the provisions in the labels for several reasons. Importantly, the statute provides specific examples of situations that might require a driver to slow to a speed that is below the set speed limit. It includes a non-exclusive list of *objective* conditions, such as intersections, hills, pedestrians and traffic that should affect the speed at which a driver travels. The other examples of conditions are less objective. Perhaps one could make vagueness attacks on what a curve is, or what makes a road winding or narrow. However, the fact that some specific objective conditions and other subjective conditions are listed gives the reader examples from which he can reasonably infer other conditions which might make a reduction in speed appropriate. Further, it puts him on notice that he is subject to penalty for failing to take account of the specific objective conditions listed in the statute. The Court does not believe that this is a distinction without a difference.

The Court's research has not disclosed a vagueness challenge to the current version of the statute. However, the Supreme Court of Illinois did entertain a vagueness challenge to a precursor statute in 1920. In *People v. Beak*, 126 N.E. 201, 201-02 (Ill. 1920), the Court addressed a challenge to § 10 of the Illinois Motor Vehicle Act (Hurd's Rev. St. 1917, c.121, § 269j), a statute similar to 625 ILCS § 5/11-601. That statute provided:

> No person shall drive a motor vehicle or motor bicycle upon any public highway in this state at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of

suggests that a random selection of individuals subject to such a requirement would have their own ideas about the meaning of "too fast." Some might feel that the risk of driving 75 m.p.h. is negligible and therefore not "too fast." Others, from experience or bad luck, might think that driving over 65 m.p.h. is just too risky, and therefore too fast. Whatever their subjective beliefs on the safety issue, given the norms of today's drivers these people would not be on notice that they were driving too fast if they were pulled over by a police officer who thought anything over 50 m.p.h. was

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> any person. If the rate of speed of any motor vehicle or motor bicycle operated upon any public highway in this state where the same passes through the closely built up business portions of any incorporated city, town or village exceeds ten (10) miles an hour or if the rate of speed of any motor vehicle or motor bicycle operated on any public highway in this state where the same passes through the residence portions of any incorporated city, town or village exceeds fifteen (15) miles an hour or if the rate of speed of any motor vehicle or motor bicycle operated on any public highway in this state outside the closely built up residence portions and the residence portions within any incorporated city, town or village exceeds twenty (20) miles an hour or upon any public highway outside of the limits of an incorporated city, town, or village if the rate of speed exceeds twenty-five (25) miles per hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of a motor vehicle or motor bicycle operated on any public highway in this state in going around a corner or curve in a highway where the operator's view of the road traffic is obstructed exceeds six (6) miles an hour, such rate of speed shall be prima facie evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person.

Id. at 201-02 (citing Hurd's Stat. 1917, p. 2573). In that case, defendant essentially claimed that telling motorists not to drive "at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person" did not put them on notice as to what conduct was unlawful under the statute. The Court conceded that if the sentence quoted in the previous sentence constituted the entirety of the statute, that it might be void for vagueness. *Id.* at 202. However, because the statute provided examples of speeds that would be inappropriate under specific circumstances, the court found the statute constitutional as applied to the defendant. *Id.* Thus, at least in Illinois, the Court's analogy to the speed limit laws is not meretricious.

too fast – unless perhaps this was the common policy of all police officers in an area. An individual driving 175 m.p.h. in a Porsche down a two-lane road in the rain and fog during heavy traffic would have a hard time convincing anyone that he was not driving too fast. No one has suggested that by applying the fertilizer here, Horton was exhibiting the same degree of recklessness. Put another way, no one has suggested that Horton's conduct was so outrageous that any fool would know he was breaking the law. In the same way that telling drivers not to drive too fast does not really tell them anything, telling applicators not to apply pesticides when it is too windy does not tell them anything either. The Court simply does not see how this language sets forth any kind of standard that would have put Horton on notice that his conduct violated the law.

In its briefs and at oral argument, the government placed great emphasis on the fact that commercial applicators must receive training and obtain a license from the state to apply these pesticides. Their experience, training and study, claims the government, make those licensed to apply these pesticides cognizant of when it is too windy. If they do possess this ability, it is certainly not the standard policy of the State to trust people to make those kinds of decisions. At least sometimes, conduct of experienced professionals that affects the public safety does not go unguided. At the risk of beating a dead horse, the Court will return to the speed limit analogy. The men and women who drive eighteen-wheel trucks receive training and must be specially licensed to do so. Without question, there are truck drivers out there who have been driving up and down America's highways every day for thirty years. Surely these drivers have seen every kind of weather and traffic condition on the highway. They probably have enough experience to determine what is too fast for a specific set of conditions. Just the fact that they are still alive after all those years shows that they are either lucky or reasonably safe. Even so, the government does not give them

an open-ended standard to guide their driving habits. Though they are certified professional drivers, they are still subject to speed limits, 55 m.p.h. on Illinois highways. The state does not tell them not to drive too fast. The Court gives little credence to the government's argument on the importance of experience here.

In *Colten v. Kentucky*, 407 U.S. 104, 110 (1972), the Supreme Court said that vagueness "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." The Court does not believe the problem inherent in this provision results from such a dilemma. The decision in *Colten* turned, at least in part, on the Court's determination that "citizens who desire to obey the statute will have no difficulty in understanding it." *Id.* This cannot be said for the provision at issue here. Therefore, for reasons similar to those given for the first provision and the reasons specifically directed at the second, the Court finds that this second provision is unconstitutionally vague as applied to the Defendants.

iii. The Third Label Provision

The final provision comes from the AAtrex label. It provides, "Do not apply when weather conditions favor drift from treated areas." Defendants claim this directive does not apply to wind, but to surface migration or water runoff. Again, Defendants take issue with the choice of words in the provision. They believe the terms "favor" and "weather conditions" provide no guidance as to what is prohibited conduct and what is not. The government argues that Defendants' reading of "drift" language is troublesome in light of the definitions it has previously cited indicating that the term "drift" contemplates movement by air. The Court agrees with this contention. However, for

reasons similar to the first two provisions and others, the Court finds this provision unconstitutionally vague as applied to the Defendants.

Telling applicators not to apply pesticides when weather conditions favor drift simply does not tell them anything meaningful. The Court has already established that some degree of drift occurs in almost every application. Even a small admixture of wind can make the sum total of the environment conditions at an application site likely to contribute to drift, whether the risk of drift arises from the dusty remnants of impregnated fertilizer or droplets of liquid fertilizer. If drift almost always occurs to some extent, then weather conditions almost always allow for drift. It seems to the Court that the most reasonable definition of favor here is "to make easier or more possible; facilitate." Dictionary.com *at* http://dictionary.reference.com/search?q=favor (last visited Mar. 12, 2006). For the sake of argument, one might assume that the provision contemplates or expects that applicators are aware of a sub-set of conditions in which the drift from application is within objectively acceptable bounds, say 10 m.p.h. No one disputes that when it is windier at time x than at time y, pesticides applied by means of liquid application will be more likely to drift at time x. Or, depending on the method of application, vice versa. Thus, one could say that the conditions at time x favor drift more than at time y. If one assigns a wind speed of 10 m.p.h. for time y and a wind speed of 11 m.p.h. for time x, then the conditions at time x clearly favor drift as compared to the conditions at time y. But if one takes for granted that 10 m.p.h. is a reasonable or acceptable level of wind speed to apply liquid pesticides, then the fact that, all other conditions being equal, drift is more likely, or facilitated at time x – despite the fact that it is only 1 m.p.h. removed from the 10 m.p.h. threshold for objective reasonableness – means that an applicator has violated this provision of the label. This simply cannot be. Absolutely nothing in this provision guides

applicators or the authorities. Again, for reasons previously discussed, whatever training and experience an applicator might have does not cure the basic flaw of this provision. Even if one trusts the judgment of an experienced applicator, his judgment does not make his speculation as to what an authority will consider reasonable any easier. Maybe the applicator's experience is different from the authority's; these differences in the opinions of experienced professionals should not make the difference between criminal sanction and polite reproach. It is concerns such as these that sometimes require the institution of a somewhat arbitrary dividing line – the 65 m.p.h. speed limit on Illinois interstates. The government has made the Court aware of the somewhat convoluted process that results in the final wording of the provisions on pesticide labels. (Mtn. Hrg. Tr. at 34).[10] Even so, if these provisions are going to be incorporated into the nation's criminal laws, then they must meet the basic requirements of due process. They must put those subject to their requirements on notice of the conduct they prohibit. This might require a relatively arbitrary policy determination, such as, do not apply pesticides in impregnated pellet forms when the winds are 20 m.p.h. or greater. If such explicit directions are included applicators will know what they must not do. The Court does not believe such a requirement is too onerous.

Given the strong presumption in favor of the validity of an Act of Congress, the Supreme Court has often held that a court should not invalidate a statute "simply because difficulty is found

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[10] Pesticides must be registered with the EPA under various federal statutes. The registration process is composed of many steps. Among other things, manufacturers must submit health and safety data, and multi-tiered studies on pesticide effectiveness under various conditions. The labels for these pesticides must contain proper conditions for use for the various crops the pesticide is manufactured to treat. In the first instance, the manufacturer who wishes to sell a pesticide submits the label's proposed language to the EPA. After this, there is time for public comment where trade associations and various other interest groups have an opportunity to comment on the proposed language. According to the government, it is this process that has lead to the admittedly unclear labels. (Mtn. Hrg. Tr. at 34).

in determining whether certain marginal offenses fall within their language." *National Dairy Products Corp.*, 372 U.S. at 32 (collecting cases).[11] In *National Dairy Products Corp.*, the defendants were charged with violating a provision of the Robinson-Patman Act, 15 U.S.C. § 13a, making it illegal to sell goods at unreasonably low prices in an effort to destroy competition or to eliminate a competitor. *Id.* at 29. Conducting an as-applied inquiry into the validity of the provision, the Court tasked itself with determining whether defendants' selling of their goods below cost with "predatory intent" was within the "unreasonably low prices" prohibition of the statute. *Id.* at 33. The Court found that defendants could reasonably understand that their conduct was prohibited by the statute because they sold their goods below cost. *Id.* at 34-35. The Court rejected their argument that the phrase "unreasonably low prices" was vague, and found that its determination of validity was bolstered by the inclusion of a proscribed mental state within the statute's terms. *Id.* at 35 (finding that defendants' predatory intent met the requirement that goods must be sold "for the purpose of destroying competition."). Here, given the provision's lack of direction to those regulated by its terms and its lack of direction to those responsible for enforcing the law, it simply cannot be said that the difficulty here is only found at the margins. Further, differences in the requisite mental states in the statute here and in that case, make *National Dairy Products Corp.* plainly distinguishable. One violates the Robinson-Patman Act by undercutting competitors' prices specifically to eliminate competition. *Id.* at 33-34. Here, the statute incorporates various provisions in product labels and speaks to the mental state – knowledge not purpose – in another provision

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[11] In *Corbin Farm Service*, the court discussed whether the level of deference it had to give to the label provisions was different from that given to standard pronouncements of Congress because Congress does not write these labels. 444 F.Supp. at 516. The Court feels that it need not make this determination here because the provisions would be invalid regardless of whether it applied the higher, Act of Congress standard here.

altogether. *See* 7 U.S.C. §§ 136l(b)(1)(A) & (B). Under this label it is not just the marginal situations that are unclear, it is all but the most egregious situations that are unclear. Accordingly, for the reasons above the Court finds the third label provision unconstitutional as applied to the Defendants.

CONCLUSION

For the foregoing reasons the Court finds that 7 U.S.C. § 136j(a)(2)(G) is unconstitutional as applied here insofar as it incorporates the provisions from the AAtrex and Bicep labels discussed above. Therefore, Defendants' motion to dismiss the charges and declare the statute unconstitutional (Doc. 43) is **GRANTED**. The charges against the Defendants are **DISMISSED**. The **Clerk of Court** is **DIRECTED** to enter judgment accordingly.

IT IS SO ORDERED.

DATED: March 16, 2006.

/s/ J. Phil Gilbert
J. PHIL GILBERT
U.S. District Judge

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