

**The Environmental Council of the States (ECOS) Testimony before the
House Transportation and Infrastructure Committee
On The Clean Water Act: 37 Years of Environmental Protection**

Presented by

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Thank you, Mr. Chairman, for providing the Environmental Council of the States (ECOS), the opportunity to present testimony on the Clean Water Act (CWA). My name is Steve Brown, and I am Executive Director of our national association, ECOS. Today I am speaking on behalf of the environmental agencies in our 50 member States and territories.

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 United States 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 96% of all Federally delegated environmental programs;
- Instituting 95% of all environmental enforcement actions;
- Collecting nearly 94% of environmental monitoring data; and
- Managing all State lands and resources, and many environmental matters in which the States have become national leaders.

The Committee is interested in how we can improve enforcement in the Clean Water Act. We share this desire and applaud the Committee's interest in it. This testimony will outline the challenges that States face, and solutions to meet them.

States are living in an era not of doing more with less, but of doing less with less. However, by working in full co-regulator partnership, managing resources, data, and the workload more efficiently, and clarifying jurisdiction and roles, the States and EPA can and will meet these challenges.

Opportunities for Improvements

The relationship between the States and EPA is of paramount importance. Consequently, improving that relationship to achieve a true partnership is a high priority. ECOS envisions a partnership with EPA that is collaborative and cooperative; that is based upon a clarity of roles and responsibilities; that recognizes and efficiently utilizes shared, finite resources; and that generates, disseminates and uses information effectively.

Worksharing, collaboration and cooperation. A relationship based upon collaboration and cooperation acknowledges the collective knowledge and experience of both the States and EPA. As full partners, the States and EPA would jointly develop programmatic goals and policies. The States would have meaningful involvement in all phases of the development of these programmatic goals and policies. The States and regional EPA offices would set performance goals jointly with headquarters EPA. To ensure a high level of accountability and transparency, the extent to which the States as well as the EPA regional offices and the EPA headquarters meet their respective performance measures would be assessed and reported in a consistent fashion. ECOS understands that EPA's CWA action plan contemplates regional and State staff worksharing to utilize resources efficiently. This recognition of the need for full partnership is a positive step.

Roles and responsibilities. The States' relationship with EPA can be enhanced by clarifying the roles and responsibilities of the States and EPA in the work that they share. In order to meet the parties' joint commitment to solving environmental problems, the States and EPA need to understand and support each others priorities. Clearly defined functions and duties would help States, headquarters EPA, and regional EPA offices to work more efficiently together to address tough problems. Clearly defined roles and responsibilities would eliminate unwarranted redundancies in effort and would also assist the States and EPA in effectively addressing environmental issues that cut across traditional program lines.

Role of States in Enforcement and Informal Enforcement Mechanisms

Under the CWA, States are authorized by EPA to take over substantial portions of the act, including permitting, enforcement, inspections, monitoring and standard setting. EPA runs the program in five States; all the rest are authorized to run the program under regular "oversight" from EPA. This arrangement is often referred to as the "co-regulator" system. Additionally, States have their own clean water laws that address issues beyond those in the CWA.

For most States, compliance is the goal - enforcement action is one tool among several that is available to achieve that goal (along with compliance assistance and compliance training for example). Traditional enforcement emphasizes the role of penalties and punitive actions as a deterrent to violations, and this is part of every State enforcement program. However, many States have realized the value of informal enforcement action as an effective means for achieving results and returning facilities to compliance quickly. Informal actions means more actions, quicker compliance, and allows us to focus formal methods for more serious cases.

To fully understand State enforcement results, we need to look beyond formal enforcement actions. By limiting reporting to only formal action EPA's databases may continue to list a facility as having "no action" taken even if that facility has returned to compliance through informal mechanisms. In its [April, 2001 Report to Congress](#), ECOS found that many facilities return to compliance through swift and effective informal enforcement action, and that these initial steps can be very effective (success rates in returning facility into compliance shown below). States can choose from a wide array of formal and informal actions. These include:

Informal Actions

- Oral notification of violation – 76% success rate
- Field citation
- Letter to regulated entity (warning letter) – 81% success rate
- Voluntary compliance agreement - 83% success rate

Formal Actions

- Written notice of violation
- Complaint/proposed order
- Final order – 86% success rate (unilateral orders)
- Demand for stipulated penalties
- Judicial referral

While formal actions are a very important part of the "enforcement tool box," there is no guaranteed outcome for formal enforcement actions – a judge or hearing officer may side for the defendant. The process is lengthy and consumes significant resources for all parties. Even though informal actions are not punitive in nature, they offer States an effective mechanism to bring facilities into compliance and utilize scarce resources efficiently. As is true across any law enforcement activity, an incremental enforcement approach to achieve compliance is the most effective use of resources. Serious violations will receive a serious response to match, including penalties, with the primary goal a facility's return to compliance.

Funding Declines Coupled with an Expanded Workload Present Challenges

States' enforcement responsibilities have become even more challenging in the face of budget deficits affecting all but two States. During the period 2001 – 2009, inflation ran at about 24%, while the increase in categorical grants to States rose only 11 percent.

During this time EPA issued hundreds of new rules which the States are expected to implement. While increased State revenue covered much of this increased cost, with the recent downturn in State revenues this is no longer the case, and nearly all State environmental agencies are furloughing employees, not filling empty positions, and even discharging them. This budget situation has a direct impact on all work we do, including enforcement and will continue to have a negative effect until it is remedied by increased funding or reduced workload.

Starting in 2005, EPA began systematically cutting Federal support for State environmental programs. This continued until 2008 when the cuts were stopped, but not restored. Not until this year (fiscal 09) did States see increases in Federal budget help. From 2005-2008, Federal funding to States declined from \$3.5 billion to \$2.9 billion. The economic downturn in 2008 led to reductions in State environmental budgets from State sources, which had picked up some of the slack previously. The combination of loss of Federal funds and a decline in State support resulted in layoffs, cutbacks, furloughs, and shutdowns in many States. Some States are increasing furlough days to 2 or 3 per month.

Federal support for State environmental agencies increased to an all-time high in 2009 thanks to ARRA, and we should see many compliance improvements over the next few years at municipal sources because of it. However, this increase did not extend to the “categorical grants” (i.e., operational) section of funding, which are the funds that States use to help implement sections 106 (point sources) and 319 (non-point sources) of the Clean Water Act – and the enforcement work that goes with it.

Declining funding support is troublesome enough, but during this period States faced a rising workload as the number of regulated facilities requiring oversight rose significantly. For example, EPA's Office of Water has said the number of new sources – vessels, concentrated animal feeding operations – and a new emphasis on minor sources, means up to 1 million new sources with potential enforcement actions. This year at least 50,000 vessels were added to the list of regulated facilities, for example.

In addition, new or modified rules or policies from EPA mean new costs for States. From 2000 to 2011, EPA has asked, or is asking, States to implement approximately 600 new or modified rules with a “State or local impact.” It is rare that States oppose these rules and in fact we are often eager to implement them. However, the recent funding patterns have made this more and more difficult.

States receive no Federal grants that are dedicated to enforcement. Instead, we manage the CWA section 106 and 319 grants to meet many demands. If the demands are increased - and they may need to be - then either more resources will be required, or some activities will be reduced. A typical State gets about 25% of its water funding from the Federal government. This is at, or near, an all-time low, and we hope it can be increased if we are to be successful in meeting the challenge of issues like non-point source runoff and stormwater impacts on water quality.

The 2010 Federal budget, as passed by the House, promises to turn this budget problem around, but that bill has not yet been signed into law. As ECOS developed its proposals for 2011, we were able to document a \$1 billion additional need to simply put into place the rules currently promulgated.

State and EPA Data Exchange

Just as growing demands and shrinking resources call on States and EPA to collaborate for efficiency, environmental data management requires the same mutual effort. States and EPA are cooperatively implementing the National Environmental Information Exchange Network (Exchange Network) to improve the accuracy and transparency of environmental information. The Exchange Network enables States and EPA to use the internet to electronically share and publish their information, including data related to pollutant discharge and enforcement activities.

For example, EPA and State environmental agencies recently launched a new jointly-developed product called NetDMR that allows NPDES permittees to electronically sign and submit their discharge monitoring reports (DMRs). The Exchange Network allows EPA and State regulators to automatically share these electronic records. This helps ensure consistency among data sets and offers opportunities to improve access to information, streamline data management efforts, and create new efficiencies in the enforcement process.

However, there remain many obstacles that still need to be addressed. For example, State data and the compiled data in EPA's databases often do not match. This data needs to match so that States and EPA can agree of courses of action, and so that the public can be correctly informed. EPA has acknowledged that this reconciliation process is necessary and is underway through the work of the Exchange Network (www.exchangenetwork.net). Until that is complete, State databases are still the primary sources of data, especially for specific sites.

Data system improvements should be designed to allow EPA and States to evaluate the significance of noncompliance both for discharging facilities and water quality of receiving water bodies, and prioritize the most serious environmental problems.

The Exchange Network also holds the potential to help aggregate information from disparate State and EPA sources and make it available on the internet in a common format. More timely access to higher quality information will give both environmental managers and the public the power to make better decisions. Additionally, the States appreciate EPA's efforts to facilitate faster reconciliation of data discrepancies in the State Review Framework process.

Such discrepancies were at the heart of State dissatisfaction with EPA's data as provided to the New York Times (NYT) for its recent article. However, that is in the past and our

focus here today is on how to improve water enforcement. The Exchange Network is a key path forward, as is the State Review Framework.

State Review Framework

In 2004 ECOS proposed a system to US EPA in which State enforcement programs would be evaluated on a consistent series of measures. EPA accepted this proposal, and the system has come to be known as the “State Review Framework.” The first iteration of that was completed in 2007 as a first effort. Many changes were made in it, and a second report is currently undergoing development.

ECOS continues to support the Framework, but we expressed dismay to EPA over its poor methodology in presenting the aggregated evaluation data following release of the NYT article. For example, EPA staff concluded that even one unresolved violation (among hundreds or even thousands) caused a State to be categorized as not having met timely data requirements. Such lumping is not accurate, is not based on sound methodological science, is not peer-reviewed, and may mislead the public. However, this issue is now behind us, and we look forward to working with the Agency more productively on this matter in the future.

Jurisdiction

Continuing uncertainty in the Clean Water Act due to several court cases has increased the difficulty in ascertaining jurisdictional authority over some polluters. ECOS has recommended steps to Congress to address this issue, and we continue to believe that legislative action is needed.