

**EPA Policy on
Flexible State Enforcement Responses to
Small Community Violations:
An Assessment of Activities and Results**

1995-1998

prepared by:

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September 1998

Acknowledgments

The Center for Watershed and Community Health wishes to thank those individuals who participated in, and made possible, this assessment. Staff of both Environmental Partnerships for Oregon Communities and Nebraska Mandates Management Initiative deserve special thanks for their time and effort to provide information and documentation. Without that, this effort would have been impossible. In addition, state program staff in Alaska, Idaho, South Dakota, Washington and at EPA Headquarters and Region 10 provided additional information that made the assessment more comprehensive and complete.

Executive Summary

Background

In June of 1998, the Chemical Commercial Services and Municipal Division of the US Environmental Protection Agency determined that there was a need to evaluate the effectiveness of its *Policy on Flexible State Enforcement Responses to Small Community Violations* ("the policy."). The Center for Watershed and Community Health was identified as an appropriate

organization to carry out the evaluation based on the experience of staff with the policy and with the flexible compliance programs in Oregon and Idaho.

This report focuses on the programs operating in Nebraska and Oregon. The Nebraska Mandates Management Initiative project (NMMI) and Environmental Partnerships for Oregon Communities (EPOC) both represent well-established programs that have been developed the most fully. NMMI was begun in 1994 and was initiated from the Nebraska Governor's Office. EPOC was begun in 1992 and began in the state Department of Environmental Quality (DEQ).

The purpose of this report is to examine how states have implemented the policy and whether the policy itself is effective in outlining parameters in which individual states can have discretion to offer comprehensive multi-media assistance to small community violators. Flexible compliance programs that take a multi-media approach to enforcing regulations are an alternative to the traditional methods of enforcement. By understanding the impact of the policy on these flexible compliance programs, the EPA will be better able to assess the effectiveness of the policy and make revisions as necessary to improve its responsiveness.

Although, in less detail, background is also given for other states at various stages of development and implementation of compliance flexibility programs. These other states include: Idaho, Alaska, South Dakota, and Washington.

There are a number of significant differences in the Nebraska and Oregon programs that make them particularly interesting case studies. EPOC takes a more regulatory approach. It was begun in the Department of Environmental Quality (DEQ) and continues to be housed there. NMMI was initiated at the Governor's office and takes a different approach. It is more politically driven, rather than regulatory, and therefore seeks a more cooperative approach. NMMI does not utilize legally binding enforcement agreements with its participating communities and monetary savings for its participating communities are important as a marketing tool when promoting the program. EPOC also works cooperatively, outside the traditional enforcement realm, but its focus is different. The ultimate goal of EPOC is to reach an enforceable agreement with its participants and to establish a compliance schedule that, while flexible, is legally binding.

Principal Findings

1. States see value in the policy.

The policy allows states to develop and implement flexible compliance programs with the assurance that EPA is supportive of their efforts and will not have objections far along in the process. The policy lays out EPA goals and policies and provides guidance for states interested in developing these programs.

2. Program variety is a positive aspect fostered by the policy.

There is a place for a variety of programs designed under the umbrella of flexible compliance programs. The policy should not become so prescriptive that these differences are blurred. EPA needs to remain flexible. A cookie cutter approach will not work.

3. Information dissemination about flexible compliance programs is important.

The intent of the policy should be disseminated widely so states are familiar with the alternatives that are available to them. Information dissemination seems to be critical to fostering these programs and providing for the widest possible audience. Having EPA regional staff that is familiar with and possibly assigned to these flexible compliance program would allow for more information to be disseminated

4. The programs are critical for their role in promoting dialogue and education.

Flexible compliance programs are useful because they promote dialogue and education among groups that traditionally haven't cooperated - local governments, states regulatory agencies, and EPA. Small communities come to see state regulatory agencies as people who cooperate rather than as institutions that present requirements without concern for the other considerations facing them.

5. Potential conflicts

The legal framework of compliance flexibility policies is significant. Compliance flexibility policies such as these could be subject to the threat of third party lawsuits filed by environmental groups and interested parties against localities for failing to comply with regulations. The biggest potential threat to these alternative approaches is a citizen suit claiming abuse of agency discretion or abandonment of statute.

6. Effectiveness of legally binding agreements

The Mutual Agreements and Orders (MAOs) signed by Oregon with their participating communities have been very effective. There have been no communities that have failed to meet the requirements. A few of the communities have received extensions to the established schedule for valid reasons, as defined by state program staff. The main reasons have been engineering delays or funding problems. Neither Nebraska nor Oregon put many resources into quantitatively measuring the effectiveness of their flexible compliance programs. This information would provide a useful measure of this differences between legally-binding and non legally-binding agreements that result from flexible compliance programs.

7. Potential conflict within state agencies.

One on-going issue is the need for state regulatory agencies to act outside their traditional roles in enforcement and compliance. Flexible compliance programs force regulatory staff to deal with communities on a multi-media basis and utilize skills in negotiation and mediation. Regulatory staff come into a community with the intent to work cooperatively to set priorities and seek solutions with local officials. This approach is very different from traditional enforcement methods which were more command-and-control based. This can cause conflicts between the flexible compliance program staff and enforcement staff.

8. Past Efforts

The original EPA evaluation (Community Environmental Compliance Flexibility: Case Study Assessments in Idaho and Oregon, 1995) came at a critical time in the process. As one of the early programs, Idaho feels that the initial evaluation gave legitimacy to the programs in the eyes of state government as well as the local participants.

Introduction

Background on this Report

In June of 1998, the Chemical Commercial Services and Municipal Division of the Environmental Protection Agency determined that there was a need to evaluate the effectiveness of its *Policy on Flexible State Enforcement Responses to Small Community Violations* ("the policy."). The Center for Watershed and Community Health was identified as an appropriate organization to carry out the evaluation based on the experience of staff with the policy and with the flexible compliance programs in Oregon and Idaho.

Information presented in this report was developed through state program document review as well as extensive interviews with project staff and management in relevant states. Given the nature of the policy and the structure of state programs, the focus of the evaluation is on state program staff. While local officials are the crucial implementers of these programs, the policy itself is often unfamiliar to them. Some of the state staff have informed participating local officials of the policy's existence and used it to lessen their discomfort with EPA bringing enforcement action against them, but local officials knowledge of the policy beyond its presence is non-existent.

This report focuses on the programs operating in Nebraska and Oregon. The Nebraska Mandates Management Initiative project (NMMI) and Environmental Partnerships for Oregon Communities (EPOC) both represent well-established programs that have been developed the most fully. NMMI was begun in 1994 and was initiated from the Nebraska Governor's Office. EPOC was begun in 1992 and began in the state Department of Environmental Quality (DEQ).

Although, in less detail, background is also given for other states at various stages of development and implementation of compliance flexibility programs. These other states include: Idaho, Alaska, South Dakota, and Washington.

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Purpose of Report

This report has been designed to examine and evaluate how states have implemented EPA's "*State Implementation of Small Communities Policy*." The purpose of this report is to examine how states have implemented the policy and whether the policy itself is effective in outlining parameters in which individual states can have discretion to offer comprehensive multi-media assistance to small community violators. Flexible compliance programs that take a multi-media approach to enforcing regulations are an alternative to the traditional methods of enforcement. By understanding the impact of the policy on these flexible compliance programs, the EPA will be better able to assess the effectiveness of the policy and make revisions as necessary to improve its responsiveness.

Specifically this report will:

- * identify recent and current state programs providing environmental compliance assistance to small communities;
- * summarize states' activities in this area;
- * analyze the extent to which state programs conform to the policy.

It must be noted that this report is a follow-up to a case study report done in January 1995 entitled, *Community Environmental Compliance Flexibility: Case Study Assessments in Idaho and Oregon* (EPA 230-R-95-001). That report represented an early look at the implementation of pilot programs in Oregon and Idaho. It was issued at approximately the same time as the *Policy on Flexible State Enforcement Responses to Small Community Violations* was developed by EPA and examined programs that were established prior to the policy.

EPA Policy Statement Summary

The EPA *Policy on Flexible State Enforcement Responses to Small Community Violations* was issued on November 29, 1995 after many months of negotiation and revisions. *The Policy* expresses EPA's support for states' use of enforcement flexibility to provide compliance incentives for small communities. The purpose is to provide small communities the flexibility to

enter into enforceable compliance agreements and schedules with the state that require communities to correct all of their competing environmental violations expeditiously while allowing them to prioritize among competing environmental mandates on the basis of comparative risk.

EPA assesses each individual state flexible compliance program and evaluates it based on the following:

- * expeditious response to a community's request for compliance assistance;
- * selection of communities to which it offers compliance assistance and flexible enforcement;
- * assessment of community's good faith and compliance status;
- * establishment of priorities for addressing violation;
- * prompt correction of all environmental violations.

Generally, EPA intends this policy be directed at communities with a population of less than 2,500 which is a non-profit, governing entity that owns the facilities that supply municipal services. The purpose is to provide flexible assistance to those communities that are most resource-limited. Community capacity will also be taken into consideration by EPA. The number of staff and their responsibilities, degree of isolation, quality of existing infrastructure, household income and employment opportunities as well as revenue sources and capacity of the community are all critical to both the need for participation in a flexible compliance program as well as the possibility for success. EPA recommends that states provide EPA with a quarterly list of participating communities to ensure federal and state coordination of enforcement activity.

States should require participating communities to correct any identified violation of environmental regulations as soon as possible, given any technical, administrative, or financial limitations. The priority of the correction of these violation shall be based on a simple risk assessment. Within 180 days of the state's commencement of compliance assistance to a community, the two parties shall enter into and begin implementing a written and enforceable compliance agreement and schedule. This agreement shall establish a specific time period for correcting all outstanding violations, incorporate interim milestones, and ensure continued and future compliance. EPA reserves all enforcement authority.

If a state flexible compliance program fails to adequately satisfy the above criteria or fails to protect public health and the environment, this *Policy does not* apply. Where EPA determines that *the Policy* does not apply, other existing EPA enforcement policies remain applicable. Neither the state's actions in providing, nor in failing to provide, compliance assistance shall constitute a legal defense in any enforcement action. A community's good faith efforts to correct violations during compliance assistance may be considered a mitigating factor in determining the appropriate enforcement response or penalty in subsequent enforcement actions.

This policy has no effect on the existing authority of citizens to initiate legal action against a community alleging environmental violations.

Background for Flexible Compliance Programs

Evolution of flexible compliance programs

Small communities, those numbering 5,000 or less, have environmental responsibilities similar to those of larger communities, yet they have far fewer financial and technical resources to meet the requirements. Large cities often have permanent staff to help them plan and comply with federal and state regulations. These larger cities are able to write permit and grant applications and are familiar with people and procedures in state and federal regulating agencies. In contrast, small communities do not always have the resources to create a staff of environmental professionals; consequently, it is more difficult to comply with environmental regulations. The public works staff frequently must be a "jacks-of-all-trades. Often, the person who operates the sewage system also runs the drinking water treatment plant and is responsible for building maintenance. When new rules are developed, they may be more challenging to someone who must manage many different municipal services. Municipalities, both large and small, must comply with multiple environmental regulations.

The environmental regulations that most often affect small communities include:

water monitoring and treatment; wastewater treatment, sludge and pre-treatment, upgrading, or closing solid waste landfills; recycling when based on state law; implementing air quality attainment programs; underground storage tanks; and environmental cleanup of contaminated sites. Any community may need to work on complying with one, some, or all of these regulations at once. The size of the community affects how easily the city can comply with multiple regulations. Most cities are juggling multiple environmental requirements. The most common problems are related to drinking water and wastewater treatment. Drinking water and wastewater treatment standards apply to all cities regardless of their technical and financial resources. The burden to meet the standards may be disproportionate for small cities due to economies of scale. If a small city is to establish a water quality monitoring and treatment program, it may represent a bigger percentage of the budget and mission than for a larger city. It will not only cost more per capita to treat drinking water and wastewater but small cities have fewer technical resources to carry out the planning and design phases on their own.

Because many cities cannot keep up with the requirements, they face being out of compliance with federal and state regulations. Noncompliance subjects the city to formal enforcement action by the state agency, or the EPA if the state does not take action. While penalties are a strong incentive for bringing about compliance, cities do not choose to be in noncompliance. Rather, noncompliance is the result of overwhelming infrastructure needs and a lack of the technical or financial capacity to address them.

Non-Federal Stakeholders in flexible compliance process

Local

Local officials took a lead role in demanding that change occur and that states and the federal government act to relieve their financial obligations. For example, in the State of Idaho, an organized group of mayors, administrators, and city council members (the MACC group) took on the role of lobbying Idaho politicians, the Governor, local legislators and their Congressional delegation to initiate a program to address "rural communities infrastructure needs."

Also at the local level, residents have played an important role in developing the policies and establishing local priorities in many of the state programs. Public participation is an important facet of many of the state programs, and is written into the policy statements for NMMI and EPOC, among others. Public meetings are held often throughout the process in order to educate residents about the intent of the state program and to elicit input from community members about their concerns and priorities. The purpose of public input and education is an attempt to gain resident buy-in of the program. In many instances, the water and sewer rates of residents are raised in order to pay for the improvements necessary to reach compliance. The main concern of residents has been financial. In public meetings, residents have been critical of government for writing regulations and providing no funding for carrying them out. If residents understand the needs of the town and the purpose of the rate increase, the implementing agencies hope that public protest might be lessened.

State Government

State governments have taken the major role in developing programs and policies to meet the financial concerns of local governments while ensuring the integrity of the environment. The main concern of state regulatory agencies is the lack of compliance and the inadequacy of past programs to compel small communities to reach and maintain compliance. This traditional mission has led to some inconsistency within state agencies between traditional programs and the innovative program approach. A number of states mentioned some conflict between traditional permit writers and enforcement personnel, and the flexible compliance program staff. Critical to the successful completion of flexible compliance programs has been education of agency staff and buy-in and support of management.

Non-Governmental Parties

It appears that no environmental groups have raised any controversies in any of the policy development processes, nor at the discussions about the financial constraints of the cities and their inability to meet environmental regulations. Although these programs have been highly publicized at the local level and follow the standard rules regarding public notice, silence from environmental groups on this matter could be due to their lack of knowledge about or attention to programs such as these.

Project Descriptions

Nebraska Mandates Management Initiative

The Nebraska Mandates Management Initiative was initiated in 1994 by Governor Benjamin Nelson. The approach addresses a number of issues critical to Nebraska. These include a lack of fiscal and human resources, aging infrastructure, increased regulatory requirements, one-size-fits-all requirements, declining federal investment, fragmented programs, and increasing costs. The Initiative uses an intergovernmental and interdisciplinary team approach to dealing with these

issues, particularly as they relate to small governments. The purpose is to help local leaders better understand regulations, analyze the local situations and issues to determine which problems pose the greatest risk, prioritize these risks and find technically and financially feasible solutions. NMMI partners with as many as 25 public and private agencies and organizations to carry out this program. The partners attempt to provide participating communities with the most complete information that will be helpful to them in improving their capacity to reach and maintain compliance with environmental regulations. Partners include eight Nebraska state agencies, the League of Nebraska Municipalities, the Nebraska Rural Water Association, the University of Nebraska College of Engineering and Cooperative Extension Service, the Nebraska Chapter of the American Consulting Engineers Council, the EPA, and the US Department of Agriculture.

As of October 1997, 69 communities have taken part in the NMMI program which has yielded outcomes ranging from savings in capital expenditures to coordination and rationalization of the regulatory, technical assistance and finance programs available, to empowerment of local leaders and regulatory officials by encouraging flexibility, customization and common-sense solutions.

The ultimate goal of the program is to implement a strategic process in each participating community which will assist them in using risk-based criteria to address their regulatory requirements. There is no legally binding agreement that results from the process, rather NMMI uses this cooperative approach to provide education and technical assistance to improve environmental practices and relationships among local officials and state regulators.

The goals of the strategic development process are as follows:

1. Create a prioritization process to allow communities to deal with their most significant water quality problems according to public health risk, environmental protection, and compliance capacity; and
2. Provide support and advocacy for state level initiatives and national reform focusing upon public sector efficiency and economic sustainability, including public health and environmental protection, fiscal responsibility, federalism/local control, government efficiency and intergovernmental collaboration.

Please see Table A - "Summary of Nebraska Mandate Management Initiative Violation 1994-1998" to see a summary of the violations and problems that were facing each EPOC when they joined the program. These violations and problems were identified through an evaluation of compliance issues facing each community interested in joining the NMMI program.

Table A - Violations and Potential Problems of NMMI Cities - 1994-98

(issues in **bold** are potential problems, non-bold are violations)

Drinking	Waste	USTs
Water	Water	ASTs
Nitrates	Capacity	Yes
Regulatory clarification		

Gresham	Nitrates Capacity	Lagoon compliance Lack of certified operator	Yes
Henderson	Nitrates Regulatory clarification	Yes	Y
Beemer	Regulatory clarification Capacity	Capacity	
Belden	Nitrates Regulatory clarification Capacity		
Burr	Regulatory clarification	Lack of certified operator	
Hooper	Regulatory clarification Capacity	Regulatory clarification	
Howells	Regulatory clarification	Capacity Flood control issues	
Leigh	Nitrates Regulatory clarification	Lagoon compliance Inflow & Infiltration	
Meadow Grove	Capacity	Capacity Inflow & Infiltration	Y
Nemaha	Nitrates	Lagoon compliance	

	Copper	Flood control issues	
Osmond	Nitrates		Y
	Regulatory clarification		
Salem	VOCs	Failing septic systems	Y
Scribner	Nitrates	Capacity	Yes
	Regulatory clarification	Sludge management	
Shubert	Nitrates	Capacity	
	Regulatory clarification	Mechanical treatment	
Snyder	Regulatory clarification	Regulatory clarification	
		Sludge management	
Tilden	Nitrates	Capacity	
	Regulatory clarification	Inflow & Infiltration	
	Capacity	Mechanical treatment	
Wisner	Nitrates	Regulatory clarification	
	Regulatory clarification		
	Well siting issues		
Alvo		Regulatory clarification	
		Lagoon compliance	
Arthur	Nitrates	Failing septic systems	
Ayr		Regulatory clarification	

			Lagoon compliance	
Barneston			Regulatory clarification	
			Lagoon compliance	
Bayard	Nitrates		Lagoon compliance	Yes
	Regulatory clarification		Inflow & infiltration	
Bellwood			Lagoon compliance	
Benedict	Nitrates		Lagoon Compliance	Y
	Lack of certified		Lack of certified	
	operator		operator	
Bloomfield	Nitrates			
	Regulatory clarification			
Brainard			Lagoon compliance	Y
			Inflow & Infiltration	
			Lack of certified	
			operator	
Bruning	Nitrates			
	Regulatory clarification			
Brunswick	Nitrates			
	Regulatory clarification			
Burwell			Regulatory clarification	
			Lagoon compliance	

Butte

Capacity

Lagoon compliance

Iron/manganese

Flood control issues

Well siting issues

Chambers

Regulatory clarification

Lagoon compliance

Clarkson

Lagoon compliance

Yes

Clearwater

Lagoon compliance

Flood control issues

Concord

Regulatory clarification

Lagoon compliance

Capacity

Inflow & Infiltration

Lack of certified operator

Crab Orchard

Failing septic systems

Craig

Nitrates

Regulatory clarification

Crookston

Regulatory clarification

Failing septic systems

Culbertson

Nitrates

Regulatory clarification

Duncan

Nitrates

Regulatory clarification

Edgar

Nitrates

Regulatory clarification

Edison

Lagoon compliance

Capacity

effluent disinfection

Funk

Nitrates

Regulatory clarification

Grafton

Nitrates

Regulatory clarification

Guide Rock

Nitrates

Lagoon compliance

Regulatory clarification

Capacity

Gurley

VOCs

Yes

Capacity

Well siting issues

Holbrook

Regulatory clarification

Mechanical treatment

Humbolt

Nitrates

Regulatory clarification

Jackson

Radium/gross alpha

Lagoon compliance

Nitrates

Regulatory clarification

Kenesaw

Regulatory clarification

Lagoon compliance

Capacity

Leshara

Failing septic systems

Loomis

Nitrates

Regulatory clarification

Lyman

Nitrates

Lagoon compliance

Regulatory clarification

Inflow & Infiltration

Martinsburg

Nitrates

Regulatory clarification

Mitchell

Nitrates

Lagoon compliance

Yes

Regulatory clarification

Orchard

Nitrates

Regulatory clarification

Orleans

Nitrates

Regulatory clarification

Paxton

Nitrates

Regulatory clarification

Pender

Nitrates

Regulatory clarification

**Princeton
(unicorporated)**

Failing septic systems

Ragan

Nitrates

Failing septic systems

Regulatory clarification

Ravenna

Lagoon compliance

Effluent disinfection

Rising City

Nitrates

Lagoon compliance

Regulatory clarification

Regulatory clarification

Capacity

Smithfield

Nitrates

Regulatory clarification

Capacity

South Bend

Private wells

Failing septic systems

Nitrates

Stamford

Nitrates

Lagoon compliance

Regulatory clarification

Capacity

Steele City

Nitrates

Regulatory clarification

Trumbull

Nitrates

Regulatory clarification

Ulysses

Nitrates

Lagoon compliance

Regulatory clarification

Capacity

Capacity

Environmental Partnerships for Oregon Communities

In 1992, The Environmental Partnerships for Oregon Communities (EPOC) program, was created by the Department of Environmental Quality (DEQ). It sought to partner local governments with DEQ and Oregon Health Division (OHD) in a coordinated effort to assist the local governments in managing the environmental regulations that are required of them. The Oregon Economic Development Department (OEED) is also included in the partnership when it becomes necessary to look at funding options for carrying out the actions needed to reach compliance. The program is strictly voluntary on the part of the local government and involves an assessment by DEQ and OHD of the compliance issues that are facing the community. A determination is made about which compliance violations are most critical, what compliance problems might arise in the foreseeable future, and what funding sources are available for each of the issues. A timetable of compliance deadlines is laid out, which may or may not adhere to the federal and state mandated deadlines, and is agreed to by the city and the state. The final result is a legally-binding mutual agreement and order which is signed by the city and the state agencies and which lays out what the city is required to accomplish by what date.

While participation in the program does not relieve a participant city of its obligations in relation to the requirements, it may waive fees or fines and extend deadlines. A purpose of the program is to ensure that environmental quality of Oregon's water, air and land is not continually compromised by small cities unable to meet requirements through lack of financial and technical resources and that the health and safety of its residents is ensured. A secondary goal is to provide the city with a coordinated effort on the part of the state through which the city can meet all of the requirements required by law - in essence "one stop shopping."

Specific program goals include:

- 1) To establish multiple-agency environmental teams to work with small communities;
- 2) To help communities identify, define, evaluate, and prioritize mandates;
- 3) To inform local citizens about environmental requirements and involve them in the decision-making process, and

4) To negotiate an enforceable agreement and schedule for achieving compliance.

EPOC requires that a city wishing to participate in the program have a population less than 2,500, lack a city manager, make a commitment to include public participation in the program, be resource limited, and most importantly, have multiple compliance problems. DEQ has determined that cities with these characteristics can benefit most from the program.

The state provides extensions when there is authority to do so and if the cities and state agencies agree. To achieve the goal, the interagency team assists communities in prioritizing environmental mandates and setting a schedule that is financially feasible. The objectives are

* to list and evaluate the responsibilities of the city;

* to assess the cost of compliance;

* to determine ability to pay;

* and to analyze the availability of grants and loans.

Once these objectives have been met, the interagency project team along with the city prioritize the responsibilities based on health and environmental risk. Following this prioritization, DEQ writes an order with a compliance schedule that protects the city from fines.

It must be emphasized here that noncompliance is not an option. Every city must comply with the standards established by the state and EPA. The only flexibility is in the timing. Though this program does not provide additional grants to help cities, the project team will be able to assist cities in preparing applications for outside grants. Technical assistance combined with deadline flexibility is a way for the state to help stretch state and local dollars and to help keep cities in compliance.

In addition to state agency staff, EPOC has also convened an advisory committee that has been in existence since the inception of the project. According to DEQ records, this committee includes representatives from the League of Oregon Cities, representatives of local governments both participating in and not participating in EPOC, environmental law experts, and public policy interests. The purpose of the citizens advisory group is to guide the direction of the program and ensure that agency staff is aware of local government concerns and legal issues surrounding program policy decisions.

EPOC uses a very simplified method of relative risk assessment in order to prioritize problems. The prioritization process begins with the listing of all environmental compliance requirements that need to be met. For each task on the list, the project team helps the city determine the number of people exposed to the health risk from noncompliance, duration of the exposure, health effects of noncompliance, an inventory of ecological effects of noncompliance, effects on other communities, and cost of compliance options. The project team works with the city to evaluate the relative risk of noncompliance with the identified regulations. Once relative risk has been assessed, the project team, along with the city, determine which problems will be corrected in which order and establish a legally binding schedule that lays out that schedule and the penalties for failing to meet it.

Please see Table B "Summary of Violations/Potential Problem of EPOC Cities 1993-98" to see a summary of the violations and problems that were facing each EPOC when they joined the program. These violations and problems were identified through an evaluation of compliance issues that is carried out by EPOC staff at the onset of each new participant joining the program. Many of the violations and problems identified during this evaluation are corrected by the cities long before the mutual agreement and order is negotiated. A number of the problems are due to lack of knowledge on the part of the city and are quickly remedied once technical assistance is given.

Table B - Violations and Potential Problems - EPOC Cities - 1993-98

	Drinking Water Violation	Drinking Water Potential Problem	Wastewater Violation
Falls City	Surface Water Treatment Rule Copper exceeded action level Chlorine Toxicity	Significant water loss b/c of deteriorated condition of system Incapable of delivering fire flow No finished water storage for water system backup or fire	Lack of NPDES permit due to late application Violation of discharge limits Equipment Malfunctions System bypasses Overflows Lack of required reporting
Garibaldi	Lead exceeded action level Copper exceeded action level Surface Water Treatment Rule Develop Sampling Plan for fecal coliform Radionuclides monitoring Nitrates monitoring Public Education Requirement		NPDES violations overflow

Glendale

Inadequate treatment
Surface Water Treatment Rule
Chlorine Toxicity

Violations of NPDES
overflows

Lakeview

Violates WPCF permit by
discharging to public waters

Monroe

Lack of lead/copper
testing
Incomplete Cross Connection
Control Pgm

Minimum System pressures
not met
Out-of-date Drinking Water
Master Plan

Lack of Wastewater Notification Plan
Based on recent rule changes, need
E. coli monitoring
Potential chlorine toxicity b/c of
effluent

Nyssa

Groundwater under the
influence of surface water
Storage reservoir
painted w/ lead paint

BOD, TSS, fecal coliform
exceedances
Potential Chlorine toxicity
Discharges to Snake River

Powers

No filtration

Inadequate capacity

Raw sewage overflows

			Sludge not properly treated
Oakland	No watersystem master plan	Pipe deterioration Inadequate capacity	Expired NPDES permit BOD, TSS, DO, fecal coliform exceedances (Civil penalty - 6/20/95 - \$1320) Violates water quality stds for tempurature
Rainier	Non-compliance w/ SWTR		Raw sewage overflows to Columbia River - inadequate capacity for storm events
Vale	Nitrates exceeded action level Microbiological contaminants exceeded action level Arsenic exceedances of MCL	Limited well capacity No well-head protection Inadequate storage capacity Leaking distribution sys 10-15% of existing water meters non- functioning or in need of adjustment	Raw sewage overflows
Westfir			No sludge management plan

BOD, TSS, fecal coliform exceed.

Bypasses during storm events-

chlorine treatment only

Other State activities

Alaska

Alaska's Small Community Assistance Program is currently being designed. It provides a process through which a small community (population less than 2,500) can identify and prioritize its public health and environmental compliance problems, and coordinate a long-term agreement for achieving compliance with environmental regulations.

The program is multi-media in scope and focuses only on those facilities directly owned and operated by local governments and does not relieve the community of its need to comply with Alaska Department of Environmental Conservation regulations. It instead provides for manageable time lines for coming into compliance based on a community's financial, technical, and administrative resources.

The participating community must commit to conducting a public education program, solving their environmental problems, maintain compliance, and focus on prevention.

The program design is planned for review by managers in August 1998. Following that review, two or three communities will be chosen in fall 1998 to pilot the program.

Idaho

Idaho began its Small Community Mandates Pilot Project began in 1993 and sought to assist participating communities in prioritizing all mandates (environmental and non-environmental) that were facing them. Four communities were selected as pilot communities and memorandum of understanding were signed with each. During the winter of 1994-95, public education programs were conducted in each community and the process was begun to assist them in identifying all mandates facing them, discussing community priorities, ranking those priorities, and establishing a schedule to reach compliance.

Since that time, the Idaho Small Community Mandates Project has become much less active. While in theory the program still exists, the Department of Environmental Quality (IDEQ) hasn't put resources into it. The original section implementing the program is no longer in existence and the management supportive of the program has shifted their focus. IDEQ does not publicize the program or promote to community where it may be helpful. There is one staff member technically in charge of carrying out the program, but he is part-time on the project and has other duties which are the focus of his position.

South Dakota

The South Dakota Department of Environment and Natural Resources (DENR) has begun the Active Cities' program to assist small towns (population 100 to 2,500) to identify and rank environmental and public health concerns. The program is in the early stages and a grant has been sought from EPA to support the program.

The program design calls for the towns involved in the program to prioritize their concerns and develop action plans for addressing them. A comprehensive approach will be taken to review the status of wastewater, drinking water, solid waste, wetlands, wellhead protection, underground storage tanks, hazardous waste, radon, etc. in each community. Public participation and input is a key component of the program. Action plans developed by the community, with technical assistance from DENR, to address the problematic issues will utilize pollution prevention measures when possible. If there are non-compliance issues, a formal corrective action plan will be negotiated and will become the community's formal environmental compliance schedule.

The main emphases of Active Cities' will be to maintain compliance where possible. Five small communities are currently part of the Active Cities' program, with three staff members, located throughout the state, working part-time. The DENR serves as the environmental outreach and community organizing entity with the communities.

Washington

Environmental Partnerships for Washington Communities (EPWC) is a voluntary approach to achieving compliance with environmental and public health regulation through a flexible compliance program involving a partnership between Washington Department of Ecology and Washington Department of Health. The objectives of the program are to:

- * establish multi-agency project teams to work with small communities;
- * help communities identify, define, evaluate, and prioritize requirements;
- * negotiate an enforceable agreement and schedule for achieving compliance;
- * inform local citizens about environmental requirements and involve them in the decision-making process.

EPWC targets small communities with populations less than 2,500 with limited financial resources and no city manager. Project teams are formed to include representatives from state agencies, non-profit organizations, local government, and local citizens. The project teams assist communities identify non-compliance issues, rank the actions required to reach compliance, and establish a schedule for completing those actions.

The ultimate goal of the EPWC program is an enforceable agreement, including a schedule, which fully and effectively address applicable environmental and public health requirements. Public participation is a significant part of the program.

EPWC program staff is currently working to resolve internal, agency issues relating to the conflict between the innovations in the flexible compliance program and the traditional enforcement methods. Agency staff is questioning the efficacy of the program and the need for it.

A pilot program in one city in Washington is being considered for fall 1998.

Program conformance with EPA Policy

Of the older programs, Nebraska and Oregon, generally conform to the intent of the policy. Oregon was well-established when the policy was developed and therefore, the policy was not of concern to the program development of EPOC. However, because of the way EPOC was designed (with mutual agreements and orders) and through EPOC staff's input and involvement in the development of the policy, it was developed flexibly enough that the policy is complementary to EPOC goals and objective.

Nebraska was also involved in the development of the policy and provided input into the way it would be most useful to states. Since the policy allows for a variety of programs to develop at the state level, NMMI conforms to the intent of the policy.

Many of the states currently in the development and implementation stages of their own flexible compliance program utilize the policy in writing their program documents. The policy was of consideration when they conceived of developing a flexible compliance program and is often cited in program documentation. Washington and South Dakota both utilized the policy when developing their programs and Alaska actually cites the policy in their program design documents. The Alaska "Small Community Assistance Program" includes as an element: "this program corresponds with the EPA, 'Policy on Flexible State Enforcement Responses to Small Community Violations,' which is EPA's support for a states' use of enforcement flexibility to provide compliance assistance and incentives for small communities."

Assessment of Effectiveness of EPA Policy

1. States see value in the policy.

The policy allows states to develop and implement flexible compliance programs with the assurance that EPA is supportive of their efforts and will not have objections far along in the process. The policy lays out EPA goals and policies and provide guidelines for states interested in developing these programs.

Specifically, Washington sees it as endorsing their work. They can and have used it as a defense for their actions, although they don't particularly use it on a day-to-day basis. Early in the process Washington state staff was unwilling to test the waters because they weren't sure where EPA would finally stand flexible compliance and because the traditional enforcement methods were so firmly established. Following the policy adoption, Washington felt comfortable in designing a flexible compliance program to meet their needs. Oregon sees the policy as affirming their efforts

and providing assurance that EPA isn't going to restrict their efforts in the future. Alaska has written into their program design that their program corresponds to the EPA policy and should be generally supported by that policy.

2. Program variety is a positive aspect fostered by the policy.

There is a place for a variety of programs designed under the umbrella of flexible compliance programs. For instance, as mentioned earlier, EPOC takes a more regulatory approach. It was begun in the DEQ and continues to be housed there. EPOC works with fewer partners and fewer cities, very in depth. The ultimate aim of EPOC is a legally binding order. NMMI was initiated at the Governor's office and takes a different approach. It is more politically driven, rather than regulatory, and therefore seeks a more cooperative approach. NMMI works with a large number of partners and has no legally enforceable agreement.

Both of these approaches have validity and significant value. EPA should recognize that each has a place in the system and ensure that the policy does not become so prescriptive that these differences are blurred. EPA needs to remain flexible. A cookie cutter approach will not work. Dialogue and education between states and communities has value even without formal agreements.

As mentioned in the earlier report "Community Environmental Compliance Flexibility: Case Study Assessments in Idaho and Oregon," EPA should act as a facilitator of these flexible compliance programs rather than as the driver.

Flexibility in these programs could open EPA up for some vulnerability down the road. As mentioned in the below (#5), the lack of standardization could present an opportunity for third-party lawsuits.

3. Information dissemination about flexible compliance programs is important.

The intent of the policy should be disseminated widely so states are familiar with the alternatives that are available to them. Region 8 presented the idea to South Dakota and Region 10 promotes flexible compliance widely through its Clearinghouse, funding, and general networking. Particularly in Region 10, state agency staff are familiar with the policy. All the states in Region 10 are currently operating a program, have attempted one in the past, or are trying to begin one now. This supportive atmosphere allows states to explore the potential for a flexible compliance program, network with state staff who has experience with these programs, and gather comprehensive information easily. This type of information dissemination seems to be critical to fostering these programs and providing for the widest possible audience. Having EPA regional staff that is familiar with and possibly assigned to these flexible compliance program would allow for more information to be disseminated

4. The program are critical for their role in promoting dialogue and education.

Flexible compliance programs are useful because they promote dialogue and education among groups that traditional haven't cooperated - local governments, states regulatory agencies, and EPA. Whether states have legally binding agreements written into their programs or not, the role of these program in convening diverse and traditionally disparate groups to discuss issues is crucial to environmental and public health. Implementing agencies better understand the issues facing small communities and are perceived by small communities as more compassionate and more interested in problem-solving. Small communities see state regulatory agencies as people who cooperate rather than as institutions that present requirements without concern for the other considerations facing them.

5. Potential conflicts

The legal framework of compliance flexibility policies is significant. Compliance flexibility policies such as these could be subject to the threat of third party lawsuits filed by environmental groups and interested parties against localities for failing to comply with regulations. The biggest potential threat to these alternative approaches is a citizen suit claiming abuse of agency discretion or abandonment of statute. Given the number of small cities in the United States, their lack of compliance has the potential to cause huge environmental impacts and a great deal of political debate. To date, though, there have been no third party lawsuit and the issue has not become politically charged.

6. Effectiveness of legally binding agreements

The MAOs signed by Oregon with their participating communities have been very effective. There have been no communities that have failed to meet the requirements. A few of the communities have received extensions to the established schedule, but Oregon DEQ staff feels for valid reasons. The main reasons have been engineering delays or funding problems. For instance, Garibaldi lost a funding source through the Oregon Economic Development Department and was facing an amendment to the agreed upon schedule. Instead they proactively sought other funding through the state revolving loan fund and were able to complete the project work on schedule.

7. Potential conflict within state agencies.

One on-going issue is the need for state regulatory agencies to act outside their traditional roles in enforcement and compliance. Flexible compliance program force regulatory staff to deal with communities on a multi-media basis and utilize skills in negotiation and mediation. Regulatory staff come into a community with the intent to work cooperatively to set priorities and seek solutions with local officials. This approach is very different from traditional enforcement methods which were more command-and-control based. This can cause conflicts between the flexible compliance program staff and enforcement staff.

8. Past Efforts

The original EPA evaluation (Community Environmental Compliance Flexibility: Case Study Assessments in Idaho and Oregon, 1995) came at a critical time in the process. As one of the early programs, Idaho feels that the initial evaluation gave legitimacy to the programs in the eyes of state government as well as the local participants.

Conclusions

The EPA *Policy on Flexible State Enforcement Responses to Small Community Violations* provide value to the state regulatory agencies. To both the states implementing flexible compliance programs and to the communities participating in the programs, the policy provides the reassurance that EPA understands and generally supports what they are trying to do. The policy allows state regulatory agencies to operate more flexibly within the context of environmental regulation.

The policy does not give up any authority that the EPA and the state regulatory agencies have because all states recognize that any program they design must comply with federal regulations. All states acknowledge that if participating communities blatantly misuse the flexibility offered through these program, the states and the federal government retain the authority to assess civil penalties. The flexibility of the policy allows states to explore a wide variety of options when designing their programs and to utilize the most effective techniques for their situation.

There is value in programs that use a legally binding enforcement agreement and programs that do not. Each plays a different role for the states that use them but, from the federal perspective, increased dialogue and education will ultimately lead to greater compliance with environmental regulations. Whether a legally binding enforcement agreement is written into the program description, state regulatory agencies and the EPA still retain final enforcement authority if participating communities are not actively working towards compliance.

A related policy that is being developed currently by EPA is the "Framework for Community-Based Environmental Protection Policy." This framework is in draft form and is being reviewed throughout EPA and by various stakeholders in Region. The framework is for use throughout EPA and it seeks to provide EPA with a policy and planning framework for supporting and implementing community-based environmental protection (CBEP) over the next three years. Following review by stakeholders both inside EPA and outside the agency, the framework should be adopted in September 1998. CBEP is EPA's term for a holistic and collaborative approach to environmental protection that bring together public and private stakeholders within a place or community to identify environmental concerns, set priorities, and seek solutions. In draft form, the core principles of CBEP are focusing on a definable geographic area, working collaboratively with a range of stakeholders, assessing and protecting places "as a whole," promoting sustainable communities, using both regulatory and non-regulatory activities as solutions, and using adaptive management to direct efforts.

This framework, as it is drafted, appears to generally support the concept of flexible compliance. Through the partnerships that develop to work collaboratively to seek alternatives to traditional enforcement methods, flexible compliance programs exemplify a number of the characteristics within the CBEP. Once the Framework has been finalized, the *Policy on Flexible State Enforcement Responses to Small Community Violations* might utilize the new Framework for Community-Based Environmental Protection to further define and support its position.

