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## *Articles*

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### “Slack” in the Administrative State and its Implications for Governance: The Issue of Accountability.<sup>1</sup>

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<sup>1</sup> For use of the term “slack” in discussing agency discretion in the administrative state, see, for example, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 101-02 (1998) (characterizing as “high slack” an administrative regime that “shroud[ed] regulators from public scrutiny” and suggesting that “slack” makes special-interest regulation possible because it allows regulatory decision-makers to operate in a “shadow of secrecy”); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 174, 179 (1990) (describing “slack” as “allow[ing] a regulator to function without being perfectly observed by the polity”). For elaboration of the concepts of “accountability” and transparency, see, for example, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and*

The appropriate structure of the administrative state has been a topic of rich debate for decades.<sup>2</sup> There are those who are concerned, on the one hand, about “unchecked administrative power”<sup>3</sup>—that is, about agencies having too much “slack” in implementing their programmatic responsibilities.<sup>4</sup> On the other hand, concerns have been raised that agencies’ capacity to fulfill their missions has been compromised because of internal constraints,<sup>5</sup> and/or because of overly zealous external oversight, including “excessive judicial intervention in executive branch activities.”<sup>6</sup>

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*Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 508-26 (2002); ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* (2001).

<sup>2</sup> For a recent overview, see Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003). For a few other articles in the vast literature concerning this issue, see, for example, Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1040-44 (1997); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 104-05, 121-23 (2001); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) [hereinafter *Reformation*].

<sup>3</sup> See, e.g., Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990). The fact that agencies exercise legislative, executive, and judicial powers highlights this concern. Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 181 n.122 (1996).

<sup>4</sup> Croley, *supra* note 1, at 12. As Levine and Forrence note, “slack” in governance may produce a range of agency behaviors. Some may serve the public interest while others may not. Levine & Forrence, *supra* note 1, at 185.

<sup>5</sup> See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1317-18 (1992); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 315 (1987); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000) (counting 111 steps in the rulemaking process).

<sup>6</sup> Levin, *supra* note 3, at 692. Views about the appropriateness of judicial review of agency actions relate both to the intensity of judicial review as well as to whether there should be judicial review at all. *Id.* at 690. For discussions of the contributions of judicial review and of its downsides, see, for example, ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE* (Yale Univ. Press 2003); Levin, *supra* note 3, at 693-702; Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 654-55, 683 (1985) (noting that, *inter alia*, “[i]n the modern era, the judicial role is to ensure the identification and implementation of statutory values and to guard against factional power over the regulatory process”). For discussions of the mechanisms that Congress has available to influence agency action and the principal-agent problems that Congress faces, see, for example, E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the*

There have been ebbs and flows in the shape of governance over the years as views have evolved over how best to strike the proper balance in terms of agency autonomy. In his 1975 article, *The Reformation of American Administrative Law*,<sup>7</sup> Professor Richard Stewart describes an ongoing “transformation” of administrative law that featured increased accountability of government for its actions.<sup>8</sup> Professor Sid Shapiro has suggested that the leaders of Stewart’s “reformation” were “civic skeptics,” individuals who were not inclined to put their faith in “bureaucratic elites.”<sup>9</sup> These leaders identified “the ‘capture’ of government by the business community as the cause”<sup>10</sup> of a variety of societal ills, including environmental pollution. Their fixes included re-vamping agency practice to increase the public’s opportunities to participate in agency decision-making and increasing opportunities for the public to challenge agency practices in court.<sup>11</sup>

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*Legislative Veto*, 1983 SUP. CT. REV. 125, 150-60 (discussing various mechanisms for legislative control of agencies, including the legislative veto). For assessments of presidential power to influence the course of agency action through appointment power and otherwise, see, for example, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Geoffrey P. Miller, *Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 219 (listing “threat of removal,” “appointments,” “budgetary control,” and “the promise of higher office” among the President’s powers to influence agency action); cf. Bhagwat, *supra* note 3, at 181 n.122 (suggesting that “in the context of the huge modern executive branch, in which only the President is elected, the extent to which the agencies are actually politically answerable is quite limited”).

<sup>7</sup> *Reformation*, *supra* note 2.

<sup>8</sup> See *id.* at 1669, 1715-60 (suggesting that the “expansion of standing to seek judicial review,” and “the extension of non-constitutional rights to participate in agency proceedings,” among other doctrinal developments, leads to better “consideration of the interests of all affected persons,” and better results for society as a whole). Thomas W. Merrill has suggested that between 1967 and 1983 there was “expanded judicial oversight and control of agency action . . . [and] a general shift in authority over regulatory policy from agencies to courts.” Merrill, *supra* note 2, at 1040. And, that while there have been some retrenchments in judicial authority since 1983, most of the innovations spawned during that period have endured. *Id.* at 1040-44.

<sup>9</sup> Shapiro, *supra* note 2, at 696 (quoting MICHAEL W. McCANN, *TAKING REFORMATION SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 44 (Cornell Univ. Press 1986)).

<sup>10</sup> *Id.* at 697; see also *Reformation*, *supra* note 2, at 1713.

<sup>11</sup> Shapiro explains, “[t]o ensure the effectiveness of federal regulation,” proponents of reform advocated the use of administrative procedures—“particularly the impact statement, ‘hard look’ review, and standing—which enabled regulatory beneficiaries to challenge the failure of agencies to regulate sufficiently.” Shapiro, *supra* note 2, at 736-37. Professor Shapiro offers the following concise summary of Stewart’s view of the character of the reformation:

Stewart’s [reformation] referred to various developments that had the cumulative impact of empowering the beneficiaries of regulation, or more

Professor Shapiro noted that the reformation, too, had its skeptics and engendered what he has termed a “counter-reformation,”<sup>12</sup> which, among other things, sought to reduce citizen participation in governance.<sup>13</sup> Professor Shapiro characterized the story of the counter-reformation as “see[ing] irrational and counterproductive regulation as the problem, the ‘capture’ of government by regulatory beneficiaries as the cause, and the reduction of the influence of such groups as the solution.”<sup>14</sup> Shapiro noted the counter-reformation view that there was an “iron triangle”<sup>15</sup> of interests that were biased against a free commercial society and markets that had captured government.<sup>16</sup> This triangle did not “represent the will of the people, but only the narrow, parochial interests of the New Class.”<sup>17</sup>

This Article explores the ongoing evolution of central features of the regulatory state by examining important “details of agency behavior”<sup>18</sup> in the field of environmental regulation. My thesis is that while there are numerous signals that our system of governance is becoming increasingly open and transparent,<sup>19</sup> important features of the administrative state have the potential to slow

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often, their representatives, public interest groups, to exercise the same participatory rights in regulatory decisionmaking as regulated entities. At the time, this transformation was revolutionary. While those whose private property was adversely affected by governmental action have always had participatory rights, the beneficiaries of regulation historically did not have the same opportunities to influence regulatory decisionmaking or to sue agencies when regulations were not to their liking.

*Id.* at 692.

<sup>12</sup> *Id.* at 689.

<sup>13</sup> *Id.* at 697.

<sup>14</sup> *Id.* For a more in-depth explanation of “the cause,” see *id.* at 703.

<sup>15</sup> Professor Shapiro suggests that the “iron triangle” included the press, agencies, and judiciary. *Id.* at 704.

<sup>16</sup> *Id.* at 704-05 (citing Paul H. Weaver, *Regulation, Social Policy, and Class Conflict*, 50 PUB. INT. L. REP. 45, 52 (1978)). Shapiro notes that there are a variety of versions of the story that regulatory beneficiaries have captured regulatory policy. *Id.* at 705 (listing and explaining the versions of Bruce Ackerman, William Hassler, Cass Sunstein, and Justice Stephen Breyer).

<sup>17</sup> *Id.* at 704-05. The counter-reformationists, in Professor Shapiro’s view, used three tools that were also key elements of reformation, *id.* at 689, to “combat ‘government failure,’” *id.* at 707. The reformationists: (1) required the agencies to produce “impact statements” to investigate the effects of regulations prior to their implementation; (2) encouraged the judiciary to use “‘hard look’ review,” in which judges closely scrutinize an agency’s decision to ensure that it is rational; and (3) used strict application of standing to limit the regulatory beneficiaries’ access to the Court. *Id.* at 707-20.

<sup>18</sup> Croley, *supra* note 1, at 7.

<sup>19</sup> Part II, *infra*.

such trends, and even to shift our regulatory apparatus in the opposite direction, toward reduced openness and accountability and diminished leverage or influence for interested citizens.<sup>20</sup>

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<sup>20</sup> This Article may have value for theoreticians since proof of these theories (or lack thereof) can and should be found, at least in part, in the reality of the operation of the administrative state. Complementing the assessments summarized in the text concerning the evolution of the administrative state are a variety of theories about its operation—about what the administrative state does and should do and how it should be structured.

In his synthesis of the scholarship on regulatory governance, Professor Steven Croley identifies four significant schools of thought: public choice theory, neopluralist theory, public interest theory, and civic republican theory. In capsule form, public choice advocates believe that agencies provide “regulatory benefits to well organized political interest groups . . . at the expense of the general, unorganized public.” Croley, *supra* note 1, at 5. Neopluralists assert that regulation is the result of “many interest groups with opposing interests compet[ing] for favorable regulation.” *Id.* In their vision of the regulatory world, this competition is far less “lopsided” than under public choice theory. Public interest theorists concentrate on the general public’s “ability to monitor regulatory decisionmakers.” *Id.* Proponents claim that regulatory outcomes “tend to reflect general interest” when there is significant public scrutiny of agency actions, while such outcomes tend to “deliver regulatory benefits to well organized interest groups at the public’s expense” when oversight is lacking. *Id.* Civic republicans believe that deliberation is a key feature of effective governance and that, accordingly, regulation works well when it facilitates collective deliberation about “means and ends.” *Id.* Croley acknowledges that his synthesis oversimplifies the terrain in a variety of ways. *Id.* at 4 n.6. He suggests that “while more than a difference of vocabulary distinguishes them, at times it is possible to interpret each theory in ways that renders it much like its counterparts.” *Id.* at 11-12. Furthermore, the theories “do not always yield crisp, readily testable predictions” and “it is not immediately clear to what extent the different theories are complementary, compatible, or exclusive.” *Id.* at 5.

Others have emphasized the difficulty of understanding these theories as well. *See, e.g.,* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 805-10, 865 (1993) (noting that “it is difficult to define the doctrine [of civic republicanism]” and that “[t]he amorphous nature of modern civic republicanism forces non-adherents to resort to deduction and speculation to fill in the gaps regarding the theory’s implications in the real world,” and that “[u]nfortunately, since political theory concerns itself almost exclusively with conceptions of rights, institutions, and groups, this disclaimer indicates that not much has been resolved by modern civic republican theory. This is hard on those of us who are not yet sold on the theory.”); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1576 (1988) (noting that “[l]arge questions—having to do with the appropriate conception of rights, institutions, and groups—remain to be resolved.”).

Implicit in each theory is a vision of the administrative state—about how the administrative state should and does operate. Thus, public choice proponents would expect the administrative state to feature “procedural mechanisms [that] facilitat[e] [well-organized] groups’ ability to influence decisionmakers” but that do not “encourage widespread participation . . . .” Croley, *supra* note 1, at 97. Neopluralists would anticipate that administrative decision-making typically is “carried out through processes accessible to many parties . . . .” *Id.* at 100. Public interest theoreticians would expect a little bit of both: In some cases widespread participation

Part I of this Article describes what many believe to be a trend in our administrative state in the direction of greater openness and accountability. This Part reviews what some might characterize as the apparently evolving mores of the times and discusses actual changes in the nature of the administrative state that appear to portend a more transparent and inclusive state than ever before. My guess is that this Part reflects the views that many today hold about the overall direction of our administrative state in terms of the issues of openness and transparency.<sup>21</sup>

Part II provides a different picture of the operation of the administrative state than one might draw from the types of developments described in Part I.<sup>22</sup> This Part digs deeper into critical aspects of the actual operation of the administrative state. The picture this more in-depth perspective provides is one of a state that may be moving in the direction of less openness, transparency, and accountability, rather than more, or at least a state in which accountability and transparency may potentially be reduced because of the seemingly fundamental features of the regulatory state discussed in Part II.<sup>23</sup>

Part III concludes by reviewing the implications of these signals about the shape and direction of governance. This Part suggests that, at a minimum, there is a need to grapple with the underlying infrastructure of environmental law implementation in order to understand which way the state is going, and whether

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will occur, and will thereby “reduce the slack that so often makes special-interest regulation possible,” *id.* at 102, while in other circumstances special-interest regulation will occur because such widespread participation is lacking. Civic republican theorists would hope that administrative processes “provide real opportunities for participation by many groups” since in their view regulatory decision-making should provide an opportunity for “public-spirited dialogue and deliberation about regulatory priorities.” *Id.* at 96-104. Professor Croley, suggesting that theorists pay relatively little attention to how regulation works, calls for “more careful attention than existing theories have given to the actual administrative channels through which particular regulatory policies take shape,” asserting that “[s]uch attention helps to remedy the weaknesses of theories of regulation that abstract from administrative reality, and paves the way for further assessment and refinement of them.” *Id.* at 7.

<sup>21</sup> See *infra* Part II and sources cited therein, and *infra* note 41. But this view is by no means unchallenged. See *infra* note 40.

<sup>22</sup> What I am suggesting in Part II is that the narrative about the administrative state reviewed in Part I may not be taking adequately into account important elements of real world administrative law and practice. Part II effectively proposes a counter-narrative or refined narrative that highlights what seem to be potential gaps in the traditional story.

<sup>23</sup> See *infra* Part II.

fine-tuning of the regulatory state, or perhaps a more dramatic shift in course and structure, is warranted.

## I

### APPARENT TRENDS TOWARDS GREATER OPENNESS AND ACCOUNTABILITY IN GOVERNANCE

While forecasting the future is obviously a risky enterprise, there are several reasons why one might expect the future administrative state to evolve in the direction of increasing openness or transparency. First, there is the argument that, as Lester Salamon suggests in his 2002 book, *The Tools of Government: A Guide to the New Governance*,<sup>24</sup> the structure of government has changed dramatically in recent years. Professor Salamon asserts that there has been a “fundamental transformation not just in the scope and scale of government action, but in its basic forms.”<sup>25</sup>

Professor Salamon contends that “the defining characteristics of many of the most widely used, and most rapidly expanding, tools [of governance] is their indirect character, their establishment of interdependencies between public agencies and a host of third-party actors.”<sup>26</sup> He further suggests that as a result, “gov-

<sup>24</sup> THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., Oxford Univ. Press 2002) [hereinafter TOOLS OF GOVERNMENT].

<sup>25</sup> Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT, *supra* note 24. The debate about “new governance” in the environmental field has encompassed discussion of appropriate endpoints for environmental protection efforts and of the mix of tools that should be used to achieve desired goals. For a few of the contributions to the extensive literature on these questions, see Symposium, *Second Generation Environmental Policy and the Law*, 29 CAP. U. L. REV. 1 (2001); Jan Mazurek, *Back to the Future: How to Put Environmental Modernization Back on Track* 6, PROGRESSIVE POLICY INSTITUTE POLICY REPORT (April 2003) (urging moving to a Second Generation of strategies for environmental protection and calling for the development of an “Alternative Path” to the present system). Shelley H. Metzenbaum’s succinct summary of this work is as follows:

Over the past decade, numerous environmental, business, government, and community leaders have come together in multiple settings to explore ways to improve the environment and the existing environmental protection system. A common theme emanating from these groups is that the existing system needs to be more performance-focused, information-driven, flexible in the means of meeting standards, strictly accountable, and open and transparent (NAPA 1995; NAPA 1997; E4E 1998).

Shelley H. Metzenbaum, *Information, Environmental Performance, and Environmental Management Systems*, in REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? 146, 147-48 (Cary Coglianese & Jennifer Nash eds., Resources for the Future 2001).

<sup>26</sup> Salamon, *supra* note 25, at 11; see also Jody Freeman, *The Private Role in Pub-*

ernment gains important allies but loses the ability to exert complete control over the operation of its own programs.”<sup>27</sup> Overall, this change in government’s character and in the structure of governance seemingly portends increased government openness and accountability, at least to the extent that this shift involves more than new forms of regulator/regulated party partnerships and results in the inclusion of the “beneficiaries” of government.<sup>28</sup>

Second, dramatic developments in the world of technology operate to facilitate government openness and opportunities for civic engagement. The revolution in technology in recent years, including the invention of the Internet and accompanying hardware developments, partially accounts for this phenomenon. For example, the Toxics Release Inventory (TRI) program,<sup>29</sup> enacted in 1986, dramatically enhanced citizens’ ability to understand the volumes of pollutants being released into the environment by providing this information in one accessible location. The notion of consolidating pollutant release information in one place was quite creative, but its value was increased enormously by technological developments that facilitated transmission of and access to such information. As Michael Gerrard and Michael Herz have written, the TRI “was a good idea that became a great one because of the perfectly timed development of the ideal tool for dissemination of TRI data: [T]he World Wide Web.”<sup>30</sup>

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*lic Governance*, 75 N.Y.U. L. REV. 543, 552, 592 (2000) (suggesting that in the new administrative state “public and private actors share responsibility for governance”).

<sup>27</sup> Salamon, *supra* note 25, at 1.

<sup>28</sup> “Beneficiaries” of regulation include members of the public, typically represented by public interest groups, whose “private property [is not] adversely affected by governmental action” but who nonetheless benefit from agency regulation. Shapiro, *supra* note 2, at 692; *see also* Stewart, *supra* note 2, at 1682-83. In contrast, some forms of “interdependent” government have considerable potential to reduce government openness and accountability. Freeman, *supra* note 26, at 647.

<sup>29</sup> 42 U.S.C. § 11023 (2000).

<sup>30</sup> Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENVTL. L.J. 18, 19 n.5 (2003); *see also* E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of 44 U.S.C.); Mark S. Winfield, *North American Pollutant Release and Transfer Registries: A Case Study in Environmental Policy Convergence*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 38, 39 (David L. Markell & John H. Knox eds., Stanford Law and Politics 2003) (noting that the full potential of pollutant release and transfer registries (PRTRs) has “only come to be recognized in the past five years, in large part due to the emergence of the technical capacity in personal computers and the World Wide Web to support the collection, provision of access to, and analysis of PRTR data sets”). E-rulemaking is another example of the use of tech-



Third, interest in increasing transparency and public participation in governance appears to be burgeoning. Consistent with Professor Salamon’s characterization of the “new governance,” there has been considerable emphasis in recent years on enhancing opportunities for citizen participation in environmental governance.<sup>31</sup> This is true throughout the world.<sup>32</sup> Carl Bruch and Meg Filbey suggest that the 1992 Rio Declaration’s Principle 10, which provides that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level” and that “[s]tates shall facilitate and encourage public awareness and participation by making information widely available,”<sup>33</sup> “crystallize[s] the emerging norms of public involvement.”<sup>34</sup> Bruch and Filbey suggest that Principle 10 has served as

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nology to increase government openness. *See, e.g.*, Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 355 (2004).

<sup>31</sup> *See, e.g.*, MARY GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOULISM* (Governance Inst./Brookings Inst. Press 2002); Ira Feldman, *The Stakeholder Convergence: Enhanced Public Participation and Sustainable Business Practices*, 33 ENVTL. L. REP. 10,496 (2003). For earlier expressions of commitment to fostering citizen involvement, see, for example, Clean Water Act § 101(e), 33 U.S.C. § 1251(e) (2000) (providing that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard . . . or program established . . . under this chapter shall be provided for, encouraged, and assisted by the [EPA] Administrator and the States.”); *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (stating that “[I]n enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.”).

<sup>32</sup> *See generally*, THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY 220-24 (Ann M. Florini ed., 2000); Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10,428 (2002); INDEPENDENT REVIEW COMMITTEE, *FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* 17-18 (1998), available at [http://www.cec.org/pubs\\_info\\_resources/law\\_treat\\_agree](http://www.cec.org/pubs_info_resources/law_treat_agree) (noting a “trend toward increased citizen involvement in international mechanisms”). The Aarhus Convention is a prominent example of the increasing emphasis on public participation. *See* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (June 25, 1998), available at <http://www.unece.org/env/pp/documents/cep43e.pdf>; *cf.* Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 268 (1997) (considering whether NGO involvement is “cyclical” but concluding that “NGOs seem poised to strengthen their influence in the foreseeable future”).

<sup>33</sup> Rio Declaration on Environment and Development, Principle 10, June 14, 1992, 31 I.L.M. 874.

<sup>34</sup> Carl Bruch & Meg Filbey, *Emerging Global Norms of Public Involvement*, in THE NEW “PUBLIC”: THE GLOBALIZATION OF PUBLIC PARTICIPATION 1, 3 (Envtl. L. Inst. 2002). John Wirth similarly suggested that the Rio Declaration played a key

an anchor that has helped to spawn numerous regional initiatives to increase transparency and public involvement.<sup>35</sup> Proponents of increases in transparency and citizen participation in environmental or other aspects of governance internationally have invoked reasons similar to those offered by proponents of similar developments domestically, including increasing the fairness of the workings of international regimes;<sup>36</sup> improving the information available to international decision-makers;<sup>37</sup> enhancing prospects for compliance;<sup>38</sup> and strengthening the legitimacy of the institutions involved.<sup>39</sup>

The tide of interest in increasing transparency and public involvement in governance, including environmental governance, has clearly swept through the United States.<sup>40</sup> Professor Jim

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role in galvanizing citizens interested in increasing public involvement in governance. John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 30, at 199-200 (quoting Kathleen Rogers of Audobon as stating that “In Rio, we all caught on at the same time that civil society was emerging, [manifested] in civil participation . . .”).

<sup>35</sup> Bruch & Filbey, *supra* note 34, at 3-5 (listing, for example, eight such regional initiatives that have embraced a variation of Principle 10).

<sup>36</sup> THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 479-81, 484 (1995) (noting that, for example, “as more power has flowed to the anonymous bureaucratic and diplomatic institutions of international organizations, so the clamor of individuals for meaningful participation in the decisions affecting their lives has increased” and that the “characteristic of the predominant modality in the organization of global discourse that voice and vote are reserved exclusively for governments . . . is both manifestly unfair and, ultimately, destructive of discourse”).

<sup>37</sup> Kenneth W. Abbott, *The Decline of the Nation State and Its Effects on Constitutional and International Economic Law Contribution: “Economic” Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 1006 (1996) (noting that, for example, “NGOs can be valuable sources of information”).

<sup>38</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 331-34 (1997).

<sup>39</sup> Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 597-98 (1999) (noting, for example, that some environmentalists have “deplored the ‘democratic deficit’ in international institutions resulting from a lack of public participation”).

<sup>40</sup> There are significant currents moving in the direction of restricting access to various types of information, particularly concerns relating to national security. See, e.g., Center for Progressive Reform, *Secrecy in Government: “Democracy Dies Behind Closed Doors,”* at [www.progressiveregulation.org/perspectives/secrecy.cfm](http://www.progressiveregulation.org/perspectives/secrecy.cfm) (accessed July 25, 2005) (arguing that, particularly post September 11, 2001, the Bush Administration and Congress have taken numerous steps to encourage government secrecy); *Data on Chemical, Drinking Water Security Protected Under Homeland Security Rule*, Nat’l Env’t Daily (BNA) No. 34, Feb. 23, 2004, at A-1; Michael Fitzpatrick, *Code Orange: Will It Be Used to “End-Run” Federal Rulemaking Requirements?*, 29 ADMIN. & REG. L. NEWS, 11 (Spring 2004) (suggesting that a

Rossi, for example, suggests that “[o]ver the last thirty years or so, courts, Congress, and scholars have elevated participation to a sacrosanct status”<sup>41</sup> and he notes that “recent reform efforts are consistently geared to enhance broad-based participation in the agency decisionmaking process.”<sup>42</sup>

Fourth, there have been numerous changes in law and policy that are intended to enhance transparency in governance and the public’s opportunity to have input into public policy. In the rulemaking arena in particular,<sup>43</sup> the track record of governance, by and large,<sup>44</sup> is a prominent example of expanding opportunities for citizens to engage their governments.<sup>45</sup> Such opportuni-

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variety of laws passed in response to the terrorist attacks of September 11, 2001, “implicate important and sensitive policy issues,” including the availability of information to the public); Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 264 (2003) (“[O]ne must examine whether our government’s high degree of transparency, though serving a valuable social purpose, may also provide support to terrorists.”).

<sup>41</sup> Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174-75 (1997) (citations omitted).

<sup>42</sup> *Id.* at 175. For a recent example, see Executive Order “Facilitation of Cooperative Conservation,” issued by President George W. Bush on August 26, 2004, stating in section one that its emphasis is “on appropriate inclusion of local participation in Federal decisionmaking.” Exec. Order. No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

<sup>43</sup> U.S. EPA, OFFICE OF POL’Y, ECON. & INNOVATION, ENGAGING THE AMERICAN PEOPLE: A REVIEW OF EPA’S PUBLIC PARTICIPATION POLICY AND REGULATIONS WITH RECOMMENDATIONS FOR ACTION 8-9 (2000), available at [http://www.epa.gov/publicinvolvement/pdf/eap\\_report.pdf](http://www.epa.gov/publicinvolvement/pdf/eap_report.pdf) [hereinafter 2000 PUBLIC PARTICIPATION POLICY REVIEW] (containing summaries of various statutes and Executive Orders that influence public participation in rulemaking). The Administrative Procedure Act (APA) establishes detailed procedures that are intended to promote transparency and accountability for agencies to use in performing their rulemaking function. These include “notice and comment” procedures and opportunities for judicial review of regulations. 5 U.S.C. §§ 553(b)-(c), 701 (2000). For a helpful summary of issues that have percolated through the courts concerning these procedures and opportunities and that have received the Executive Branch’s attention, see MICHAEL ASIMOW ET AL., STATE AND FEDERAL ADMINISTRATIVE LAW 235-45 (West Group 2d ed. 1998).

<sup>44</sup> See *supra* note 40.

<sup>45</sup> Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 622-23 (2004) (noting that “the highly structured, technical rule-making processes required by the APA provide a means for regulated entities and other affected parties to participate in agency regulatory activity”). In contrast to its detailed guidance in the rulemaking arena for steps agencies must take to be transparent and accountable, the APA is virtually silent on agencies’ exercise of their enforcement responsibilities, other than in the context of rarely used “formal adjudication.” 5 U.S.C. §§ 554, 556-

ties range from involvement in the initial decision to develop rules and participation in rule formulation (for example, through negotiated rulemaking<sup>46</sup> and FACA Committees<sup>47</sup>), to participation in the “notice and comment” rulemaking process,<sup>48</sup> to challenging rules once they are promulgated or not promulgated.<sup>49</sup>

57 (explaining the procedures for formal adjudication and hearings but giving little attention to nonformal procedures). For a review of rulemaking versus adjudication in terms of accountability and transparency, see ASIMOW ET AL., *supra* note 43, at 645; Anthony, *supra* note 5, at 1312 n.2 (noting that, *inter alia*, “the two styles of lawmaking are governed by widely different procedural requirements”). See also Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97 (2003) (noting that the APA “fails to recognize the new modes of governance that characterize the administrative state, such as priority setting, resource allocation, research, planning, targeting, guidance, and strategic enforcement”). Congress and the agencies themselves have filled this APA vacuum in an ad hoc fashion through initiatives such as the GPRA.

<sup>46</sup> Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997). Some commentators argue that these early opportunities for citizen participation, especially negotiated rulemaking, are not always in the best interests of the public and may be legally problematic in some contexts. See *id.* at 1374-87 (examining, *inter alia*, some of the potential conflicts between negotiated rulemaking and the APA); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards*, 18 ENVTL. L. 55, 57 (1987) (proposing that the regulation of woodstoves under the CAA, which resulted from negotiated rulemaking, actually violates the CAA); cf. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 40 (2000) (concluding that “negotiated rulemaking has been remarkably successful in fulfilling its promise”). For a rebuttal of Prof. Harter’s article, see Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001).

<sup>47</sup> Federal Advisory Commission Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. §§ 1-15); Croley, *supra* note 1, at 136-38 (providing empirical data that supports the idea that “federal advisory committee membership may provide one avenue for fairly broad participation in agency decisionmaking”).

<sup>48</sup> Anthony, *supra* note 5, at 1314 n.7. Several studies suggest that public participation (for this purpose, non-regulated party participation) in rulemaking is limited, at least relatively speaking, although other studies suggest that public interest involvement is fairly substantial. See generally Croley, *supra* note 1, at 129.

<sup>49</sup> The case books are full of decisions in which an NGO sued the government, including the EPA, for various reasons including, for example, for alleged failure to perform a non-discretionary act, such as purported failure to promulgate a regulation by a date prescribed in the governing statute. See, e.g., 33 U.S.C. § 1365(a)(2) (2000); Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 373-83 (2004) (discussing the impact that citizen suits seeking “accelerated implementation of existing regulatory programs” has had on administrative agency practice). Citizens have the ability to petition agencies to promulgate rules and to obtain judicial review of agency decisions not to do so. See ASIMOW ET AL., *supra* note 43, at 378-79. There are a wide variety of possible forms of citizen involvement in addition to those mentioned in

There are signs that the EPA is trying to internalize this ethos of enhanced transparency and public engagement well beyond its rulemaking activities.<sup>50</sup> Both federal and state environmental agencies have paid homage to the notion that citizen education and involvement is to be encouraged. The EPA's May 2003 *Public Involvement Policy* highlights the EPA's commitment to public involvement. The agency provides a substantial list of goals for its public involvement processes and promotes "[i]nvolv[ing] the public early and often throughout the decision-making process" to facilitate achievement of these goals.<sup>51</sup> The EPA also has promulgated regulations that establish requirements for providing information to citizens and for public participation in a number of its programs.<sup>52</sup> States have been experimenting with a

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the text. Processes can be structured, for example, to give citizens a veto over agency decisions, as may occur in the negotiated rulemaking context, depending on how it is structured. Coglianese, *supra* note 46, at 1256-57, 1323.

<sup>50</sup> For a review of United States federal environmental disclosure requirements, see Joel A. Mintz, *Where Do We Fit In?: U.S. Information Disclosure and Hazardous Waste Remediation Laws as Compared With the Policy Suggestions of the U.N. Environment Program*, 33 ENVTL. L. REP. 10,694 (2003). Carl Bruch and Frances Irwin have concluded that "[t]he United States has been an international leader in promoting transparency, participation, and accountability, both generally and in the environmental context." *Public Access to Information, Participation, and Justice*, in STUMBLING TOWARD SUSTAINABILITY 511, 511 (John C. Dernbach ed., Environmental Law Institute 2002).

<sup>51</sup> U.S. EPA, OFFICE OF POL'Y, ECON. & INNOVATION, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY 2 (2003), available at <http://www.epa.gov/publicinvolvement/policy2003/policy2003.pdf> [hereinafter 2003 PUBLIC INVOLVEMENT POLICY]. The Agency's recent expressions of commitment to public engagement echo earlier statements and actions. See generally 2000 PUBLIC PARTICIPATION POLICY REVIEW, *supra* note 43. The agency issued its first Public Participation Policy on January 19, 1981, but the EPA acknowledges that "[d]uring the intervening years, knowledge of the 1981 Policy diminished externally and even within the Agency until 1999." *Id.* at 2.

Other agencies, including the SEC, also have explored ways to improve disclosure of environmentally-related information. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL DISCLOSURE: SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION 10-13 (July 14, 2004), available at [www.gao.gov/new.items/d04808.pdf](http://www.gao.gov/new.items/d04808.pdf). The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (2000), provides for public input for various types of projects. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 153-54 (Aspen 4th ed. 2003) (noting that NEPA expressly requires comments from both the public and agencies with environmental expertise regarding environmental impact statements prepared by federal agencies); 40 C.F.R. § 1500.2(d) (2003). Despite the wide range of public involvement initiatives, "more research on who participates in agency decisionmaking processes is badly needed before students of regulation can fully understand how the administrative regime operates and with what substantive consequences." Croley, *supra* note 1, at 120.

<sup>52</sup> See, e.g., 40 C.F.R. pt. 25 (captioned "Public Participation in Programs Under

wide variety of strategies to facilitate and encourage enhanced outreach and public participation as well.<sup>53</sup>

The EPA has expressed its commitment to enhancing citizens' roles in the enforcement arena, among others. A 1998 EPA "capacity building technical resource" document entitled *Citizen Enforcement: Tools for Effective Participation*<sup>54</sup> reflects the EPA's conviction that citizen engagement in the enforcement arena can contribute to more effective enforcement efforts. After noting that "[t]he role of citizens in environmental compliance and enforcement is fairly new in most countries," the EPA indicates that "giving citizens the proper tools can enhance government enforcement efforts."<sup>55</sup> Thus, the EPA has articulated the view that involving citizens can enhance government enforcement efforts.

The EPA has taken some initial steps to engage citizens *ex ante* in enforcement priority setting. For example, the EPA now solicits public input on its annual enforcement and compliance priorities.<sup>56</sup> The agency also routinely solicits public notice and

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the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act"); 40 C.F.R. pt. 2 (containing the EPA's Freedom of Information Act regulations); 40 C.F.R. pt. 124 (containing the EPA's permitting procedures under RCRA, UIC, PSD, and NPDES, which includes the procedures for issuing and revocation of such permits); 40 C.F.R. pt. 300 (containing the EPA's Superfund regulations).

<sup>53</sup> For example, New York adopted a law for the siting of power plants that required applicants to establish an "intervener fund" of \$300,000 to enable local government officials and interested members of the public to develop the technical expertise needed to participate meaningfully in the consideration of permit applications. See N.Y. PUB. SERV. LAW §§ 160-72 (McKinney 2000) (expired and deemed repealed Jan. 1, 2003); David Markell & Robert Nakamura, *The Effectiveness of Citizen Participation in the Article X Power Plant Siting Process: A Case Study of the Athens Project* (report submitted to the Hudson River Foundation for Science and Environmental Research, Inc. Oct. 2002); see also THE ACCESS INITIATIVE—UNITED STATES, AT THE FRONTLINES OF DEMOCRACY: STRENGTHENING THE PUBLIC VOICE IN STATE DECISIONS THAT AFFECT THE ENVIRONMENTAL AFFAIRS 1-2 (June 2004) (reviewing the extent to which California and Ohio provide access to the public in environmental decision-making), available at [http://www.accessinitiative.org/pdf/TAIUS\\_final.pdf](http://www.accessinitiative.org/pdf/TAIUS_final.pdf).

<sup>54</sup> U.S. EPA, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, CITIZEN ENFORCEMENT: TOOLS FOR EFFECTIVE PARTICIPATION (1998) [hereinafter EPA CITIZEN ENFORCEMENT].

<sup>55</sup> *Id.* at 1.

<sup>56</sup> See, e.g., *Enforcement: EPA Seeks Comment on Development of Priorities for Fiscal Years 2005-2007*, 34 ER 2710 (2003); cf. ENVIRONMENTAL LAW INSTITUTE ET AL., BEYOND ENFORCEMENT?: ENFORCEMENT, COMPLIANCE ASSISTANCE, AND CORPORATE LEADERSHIP PROGRAMS IN FIVE MIDWEST STATES 17 (2003) (noting

comment on its enforcement policies.<sup>57</sup> States have pursued similar initiatives. For example, for several years New York State’s Department of Environmental Conservation (DEC) periodically convened an Environmental Enforcement Advisory Committee (EEAC) to review the DEC’s enforcement priorities and to seek input from interested citizens.<sup>58</sup>

The EPA also has taken steps to increase transparency in particular enforcement matters. The EPA’s June 2003 *SEPs Community Involvement Policy*<sup>59</sup> is an example of the agency’s efforts to engage the public in the enforcement sphere. Supplemental Environmental Projects (SEPs) are a form of relief in enforcement cases that obligate the settling party to take actions that go “beyond compliance” in order to protect the environment and minimize environmental concerns.<sup>60</sup> In addition to increasing the potential for the enforcement process to serve as a tool for achieving enhanced levels of environmental protection, SEPs are intended to promote settlements through the additional flexibility they create for resolving cases. Under appropriate circum-

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that the EPA and state agencies “have . . . largely failed to solicit the views of the environmental community on high-level issues of compliance strategy”).

<sup>57</sup> 2000 PUBLIC PARTICIPATION POLICY REVIEW, *supra* note 43, at 8-9.

<sup>58</sup> I participated in a number of EEAC meetings in the mid- to late-1990s. A 2003 ELI study indicates that Illinois, Indiana, Michigan, Minnesota, and Wisconsin have also attempted to integrate public participation into their “Performance Partnership Agreements (PPAs),” but that “public and environmental group involvement . . . is . . . quite limited in most of the five states.” ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 5, 68.

<sup>59</sup> Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-expandinguse.pdf> [hereinafter Interim Guidance].

<sup>60</sup> Supplemental Environmental Projects Policy, 63 Fed. Reg. 24,796 (Apr. 10, 1998); Interim Guidance, *supra* note 59; David A. Dana, *The Uncertain Merits Of Environmental Enforcement Reform: The Case Of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181 (1998). As the EPA explains, a SEP must be, *inter alia*, related to the facility’s underlying violation, provide a benefit to the community adversely affected by the facility’s violation, significantly benefit public and environmental health, and enhance health beyond current environmental law:

The SEP Policy allows EPA to consider a defendant’s or respondent’s willingness to perform an environmentally beneficial project when setting an appropriate penalty to settle an enforcement action. The purpose of a SEP is to secure significant environmental or public health protection improvements beyond those achieved by bringing the defendant into compliance. The SEP must be a new project, where EPA has the opportunity to shape the scope of the project before it is implemented, and the defendant must not be otherwise legally required to do the work.

Interim Guidance, *supra* note 59 at 35,886 n.3.

stances, a regulated party and the EPA may agree to a settlement that includes a reduced penalty in exchange for the regulated party's undertaking a SEP.<sup>61</sup> The EPA's 2003 *SEPs Community Involvement Policy* encourages EPA officials and regulated party representatives interested in a SEP to seek public input concerning the SEP. Among other features, the SEP policy directs EPA staff to facilitate citizen involvement by giving a defendant a more substantial reduction in a penalty in exchange for the defendant's implementing a SEP if the defendant solicits community input as part of the process.<sup>62</sup> The agency notes that its intention in issuing the guidance is to "encourage EPA personnel to involve communities in supplemental environmental projects."<sup>63</sup>

Citizens may participate in administrative and civil enforcement cases in certain other circumstances as well.<sup>64</sup> Citizens may intervene in some cases.<sup>65</sup> Citizens also may comment on proposed settlements of such cases.<sup>66</sup> The United States Depart-

<sup>61</sup> Supplemental Environmental Projects Policy, 63 Fed. Reg. at 24,796.

<sup>62</sup> Interim Guidance, *supra* note 59 at 35,886. The EPA notes that inclusion of the community in the SEP process may benefit the defendant, the community, the environment, and the EPA, for a variety of reasons. The agency suggests that, for example, communities can be a "valuable source of SEP ideas." *Id.* at 35,887.

<sup>63</sup> *Id.* at 35,884.

<sup>64</sup> Citizens participate in agency environmental decision-making processes in numerous ways other than those discussed in the text, including in state and federal environmental permitting processes. See Gerrard & Herz, *supra* note 30 (reviewing strategies for improving citizen participation in NEPA); 2003 PUBLIC INVOLVEMENT POLICY, *supra* note 51, at 2 (supporting public participation, "particularly in environmental permitting programs"); Leroy Paddock, *Environmental Accountability and Public Involvement*, 21 PACE ENVTL. L. REV. 243, 244, 258-60 (2004) (suggesting that "most existing public participation techniques do little to enhance accountability," but also noting that the EPA has taken some steps to improve public participation in the permitting arena). The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides technical assistance grants (TAG) to encourage public involvement in the CERCLA cleanup process. See 40 C.F.R. § 300.430(c)(2)(ii) (2004). Citizens also may directly sue a violator under citizen suit provisions in many environmental laws. See, e.g., Clean Water Act, 33 U.S.C. § 1365(a)(1) (2000).

<sup>65</sup> A citizen may intervene in EPA proceedings if the citizen "claims an interest relating to the cause of action; a final order may impair the citizen's ability to protect that interest," and the citizen's "interest is not adequately represented by existing parties." 40 C.F.R. § 22.11(a). Alternatively, a citizen may request to file a non-party brief. *Id.* § 22.11(b).

<sup>66</sup> See, e.g., Clean Water Act, 33 U.S.C. § 1319(g); Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(3)(A)-(B); 40 C.F.R. § 22.45 (supplemental rules governing public notice and comment); Clean Air Act (CAA) § 113(g), 42 U.S.C. § 7413(g) (requiring notice and an opportunity for written public comment before a final consent order or settlement is issued).



ment of Justice (DOJ) notices consent decrees that it settles on behalf of the EPA in the Federal Register and allows comment prior to final entry by the court. Public comment also sometimes is allowed in the administrative enforcement realm.<sup>67</sup>

In addition, the EPA has created a process that allows citizens to petition the agency to withdraw authorization of state programs in cases in which citizens believe that a state is not performing its enforcement responsibilities effectively.<sup>68</sup> Given the substantial extent of program delegations,<sup>69</sup> opportunities for citizens to express concerns to the EPA about state performance clearly hold important potential. However, based on their use to date, the value of such mechanisms remains in question.<sup>70</sup>

Citizens also work with government officials by supplementing government compliance-promotion and environmental enforcement efforts through citizen monitoring of natural resources and releases. Several observers have suggested that enforcement agencies are typically under-staffed, and therefore citizens fill an important role by providing such supplementary monitoring capacity.<sup>71</sup> As two commentators put it: “[t]he sheer size of the

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<sup>67</sup> See 42 U.S.C. § 9622(i); 42 U.S.C. § 7413(g); 28 C.F.R. § 50.7 (addressing opportunities for public comment on consent decrees); 33 U.S.C. § 1319(g)(4)(A) (providing for notice and comment on proposed administrative penalties); Mark Seidenfeld & Janna Satz Nugent, “*The Friendship of the People*”: *Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 1701, 1708-09 (2005) (discussing public participation in administrative enforcement penalty actions). The DOJ files any comments it receives in federal court and it reserves its right to withdraw from the settlement based on the comments. 42 U.S.C. § 6973(d); 28 C.F.R. § 50.7(b). Van Heuvelen and Breggin cite specific cases in which citizen comments have affected the terms of the final settlement. R.I. Van Heuvelen & Linda K. Breggin, *Citizen Participation in U.S. Environmental Enforcement*, 1 INT’L CONF. ON ENVTL. ENFORCEMENT PROC. 573, 576 (1992).

<sup>68</sup> 40 C.F.R. § 123.64(b)(1); see CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* 329-35 (Env’tl. Law Inst. 2003).

<sup>69</sup> See *infra* Part II.A.

<sup>70</sup> RECHTSCHAFFEN & MARKELL, *supra* note 68, at 329 (“This threat [of withdrawing state program authorization] is more theoretical than real . . . since EPA has never fully withdrawn a state environmental program, and probably is unlikely to do so in the near future.”). A November 2004 article indicates that nineteen petitions have been filed asking the EPA to withdraw NPDES permitting authority from fourteen states, and that the EPA “probably will not address” these petitions until it completes a “comprehensive review of state permitting programs . . .” *Permit Review Initiative Delays Action on Petitions to Withdraw State Authority*, Nat’l Env’t Daily (BNA), (Nov. 22, 2004), at A-9.

<sup>71</sup> See Barton H. Thompson, Jr., *The Continuing Innovation Of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 190-92, 223-24 (2000) (suggesting that “[a]ny increase in monitoring, so long as the monitoring does not invade privacy, generates a

citizenry . . . enables individual citizens to monitor compliance throughout the nation and identify violations an understaffed investigative agency might miss.”<sup>72</sup> The EPA itself has highlighted the value that citizens can add in the monitoring context, noting that “[c]itizens can contribute to monitoring by tracking industrial environmental performance through independently-compiled emissions data or compliance reports produced by regulated entities.”<sup>73</sup> In a 1998 report, the EPA offered the illustration that “Virginia has established a coordinator of citizens who volunteer to monitor streams in the state. This program allows citizens to collect information needed by the state water program to detect potential problems or violations around the state.”<sup>74</sup> Legal incentives have been established to encourage citizen monitoring and reporting in some cases.<sup>75</sup> Incident reporting hotlines have facilitated such partnering.<sup>76</sup> Riverkeepers, Baykeepers, and similar natural resource-oriented citizens’ orga-

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potential benefit to all members of society, with no significant downside,” and that in some cases citizen monitoring may surpass the quality of government efforts because “citizen monitoring groups can produce innovations of broad use in enforcement. Freed of governmental constraints and spurred by the need to attract funding from private sources, many volunteer monitoring groups have developed sophisticated monitoring systems that rival and sometimes exceed the capabilities of local public enforcement agencies.”). Van Heuvelen and Breggin identify a number of mechanisms the EPA has adopted to encourage active citizen participation in identifying and reporting potential violations and discuss potential downsides to citizen involvement, but conclude that these downsides are offset by the potential benefits: “[T]he disadvantages . . . for the government are outweighed by the advantages that private enforcement activity brings to environmental enforcement in the United States.” Van Heuvelen & Breggin, *supra* note 67, at 574-81.

<sup>72</sup> E. Roberts & J. Dobbins, *The Role of the Citizen in Environmental Enforcement*, 1 INT’L CONF. ON ENVTL. ENFORCEMENT PROC. 531, 532 (1992). See also Ken Currie, *Are Environmental Complaints from Citizens of Any Value?*, ECOSTATES 36 (Spring 2004), available at [http://www.complianceconsortium.org/StoredDocuments/ECC/SAS\\_Ecostates\\_article.pdf](http://www.complianceconsortium.org/StoredDocuments/ECC/SAS_Ecostates_article.pdf).

<sup>73</sup> EPA CITIZEN ENFORCEMENT, *supra* note 54, at 8 (1998).

<sup>74</sup> *Id.*

<sup>75</sup> See Thompson, Jr., *supra* note 71, at 226-35 (discussing three such incentives: (1) whistleblower provisions, which protect employees who report violations from employer retaliation, are included in nearly every federal environmental statute; (2) federal reward provisions, which entitle an informant to a reward if there is a successful enforcement action, are included in some federal and state statutes; and (3) The False Claims Act and *qui tam* actions, which allow the informant to either receive a percentage of the penalties or, if the government does not prosecute, to prosecute the violator himself.)

<sup>76</sup> *Id.* at 226 (citing H. Jane Lehman, *In Search of Coolant Scofflaws*, WASH. POST, Feb. 13, 1993, at E1).

nizations have played an important role in this area.<sup>77</sup>

In light of the broad range of government (and citizen and regulated party-driven) initiatives of this sort, it is no surprise that some commentators have suggested that efforts to enhance transparency and public engagement have taken center stage in environmental governance, and have gained an increasing role in environmental policymaking.<sup>78</sup> Yet, as noted above, I believe that digging a little deeper into the actual operation of the administrative state may provide a different picture of its operation in terms of opportunities for public involvement and government accountability than one might draw based on the types of developments described above.<sup>79</sup> In Part II, I identify two central features of our environmental “compliance-promotion” apparatus that seemingly have the potential, independently and in tandem, to reduce government accountability and openness, as well as its effectiveness.<sup>80</sup>

## II

### CENTRAL FEATURES OF HOW AGENCIES APPROACH COMPLIANCE-PROMOTION IN THE ENVIRONMENTAL ARENA AND IMPLICATIONS FOR TRANSPARENCY AND ACCOUNTABILITY IN GOVERNANCE

For the past thirty years or so, “cooperative federalism” has

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<sup>77</sup> See *id.* at 220-23 (discussing the evolution of a second strand of citizen monitors, or “keeper” organizations”).

<sup>78</sup> THOMAS C. BEIERLE & JERRY CAYFORD, *DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 1* (Resources for the Future 2002). For other examples of a focus on public participation, see, for example, Executive Order 12,898, 59 Fed. Reg. 7629, 7632 (Feb. 11, 1994), directing federal agencies to facilitate public participation and access to information. Not everyone who has observed this apparent trend concurs that participation is a good idea. See, e.g., Rossi, *supra* note 41, at 174-75 (noting the “fetish for public participation”). As noted *supra* note 40, there has been a retreat from transparency in some contexts, because of security and other concerns.

<sup>79</sup> See *supra* note 22.

<sup>80</sup> For the most part, I devote little attention in this article to the issue of effectiveness. In the enforcement arena in particular, there is considerable uncertainty regarding optimal levels of compliance. See, e.g., Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 316 (1999); David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 2-4 (2000). At the same time, numerous commentators have raised concerns in recent years concerning the efficacy of government enforcement. See, e.g., Farber, *supra*, at 301 (raising the concern that the failure to comply is “endemic”). See also *infra* note 87.

served as the *modus operandi* for much of the administrative state in the environmental regulatory arena.<sup>81</sup> Under this system, Congress had adopted a series of environmental laws intended to address some of the nation's most pressing environmental challenges, such as protection of the air, water, and land from various types of pollution.<sup>82</sup> Congress charged the EPA with implementing these laws and achieving their goals, while also empowering the EPA to delegate primary responsibility for implementing (including enforcing) these laws to qualified states.<sup>83</sup>

A significant development in environmental governance since the enactment of the major federal environmental laws has been the widespread delegation to the states of front line authority for implementing these laws. For example, the EPA has authorized forty-nine states to implement the basic Resource Conservation and Recovery Act (RCRA) program,<sup>84</sup> and forty-five states have primary responsibility for implementing the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program.<sup>85</sup> Thus, the EPA has considerably reduced front line responsibility for much of the work in environmental

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<sup>81</sup> I am referring primarily to the modern versions of the Clean Water Act, Clean Air Act, and the Resource Conservation and Recovery Act, each of which was adopted in the 1970s. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 1857 (2000)); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 120-21 (3d ed. 2000). Other federal laws, such as the Superfund law and the Toxic Substances Control Act (TSCA), follow very different models. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2000); see also Robert H. Abrams, Comment, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 266-67 (1997) (explaining why Congress might have diverted from the cooperative federalism model); David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1 (1993) (reviewing federal/state relations under CERCLA).

<sup>82</sup> See *supra* note 81.

<sup>83</sup> See *supra* note 81; ENVIRONMENTAL LAW INST., COMPARISON OF FEDERAL-STATE ALLOCATION OF RESPONSIBILITY IN FIVE ENVIRONMENTAL STATUTES (1995) (reviewing authorization requirements under several environmental statutes).

<sup>84</sup> See U.S. EPA, RCRA STATE AUTHORIZATION, KEY RULE STATUS AS OF MARCH 31, 2005, available at <http://www.epa.gov/epaoswer/hazwaste/state/stats/maps/keychrt.pdf> (last visited Feb. 15, 2005). The extent of devolution varies within statutes because statutes typically include several programs.

<sup>85</sup> See U.S. EPA, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM, SPECIFIC STATE PROGRAM STATUS, available at [http://cfpub.epa.gov/npdes/statestats.cfm?program\\_id=45&view=general](http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=general) (last visited Feb. 15, 2005).

regulatory implementation, such as drafting and issuing permits, monitoring compliance, and pursuing non-compliance when violations occur.<sup>86</sup> In many cases, the EPA has delegated such authority to the states.<sup>87</sup> In Steven Brown’s phrase, the states “have become the primary environmental protection agencies across the nation.”<sup>88</sup> The states now administer far more regulatory programs than does the EPA.

A second key aspect of contemporary environmental governance is the expansion of the EPA’s “tool box” for promoting compliance. A feature of the early years of implementation of

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<sup>86</sup> See *infra* Part II.A. The EPA’s role in environmental policy and implementation continues to be significant. In the norm-setting context, for example, because states must have programs at least as stringent as the EPA’s, EPA’s standards, at least in theory, set a floor for environmental protection throughout the country. See *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 174 (D.C. Cir. 1988). In fashioning its guidelines on both participation and penalties, the EPA endeavored to reconcile the competing objectives of regulatory uniformity and state autonomy by establishing a floor for citizen participation and state enforcement authority, while ensuring that states have the maximum possible independence. See also *Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,382 (May 19, 1980). The EPA similarly retains authority in the implementation context, including authority to review state permits and, if necessary, to veto them and issue its own; authority to conduct its own inspections; and authority to bring its own enforcement actions. U.S. EPA ENFORCEMENT REORGANIZATION TASK FORCE, INTEGRATED ENFORCEMENT APPROACHES FOR EPA 12 n.4 (1993); CORE EPA ENFORCEMENT AND COMPLIANCE FUNCTIONS 2 (Feb. 21, 1996); GLICKSMAN ET AL., *supra* note 51, at 949-50; cf. *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (holding that, at least under RCRA, the EPA may not overfile if a state has brought an enforcement action).

<sup>87</sup> See *supra* notes 84-85. U.S. EPA, INNOVATING FOR BETTER ENVIRONMENTAL RESULTS: A STRATEGY TO GUIDE THE NEXT GENERATION OF INNOVATION AT EPA 8 (Apr. 2002), available at <http://www.epa.gov/innovation/pdf/strategy.pdf>.

<sup>88</sup> See, e.g., R. Steven Brown, *The Funding Gap: One Billion Dollars Short*, ECO-STATES 3 (Winter 2004). Mr. Brown serves as Executive Director of the Environmental Council of the States (ECOS), the “national non-profit, non-partisan association of state and territorial environmental commissioners.” See [archive.gao.gov/d24t8/140941.pdf](http://archive.gao.gov/d24t8/140941.pdf)<http://www.sso.org/ecos/about/about.htm> (last visited Aug. 5, 2005). Numerous officials and commentators have emphasized the importance of the states. See, e.g., U.S. EPA, REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY 2 (1993), available at [http://www.epa.gov/ocirpage/nepps/pdf/2005\\_sem\\_pp1-9.pdf](http://www.epa.gov/ocirpage/nepps/pdf/2005_sem_pp1-9.pdf); U.S. GAO, REPORT TO CONGRESSIONAL COMMITTEES, FEDERAL-STATE-LOCAL RELATIONS: TRENDS OF THE PAST DECADE AND EMERGING ISSUES 3 GAO/HRD-90-34 (1990); Markell, *supra* note 81, at 32-33 (citing, *inter alia*, a former EPA enforcement head’s statement that the federal/state relationship is of central importance to the effective administration of the environmental laws); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196 (1977) (noting that “[t]he federal government . . . is dependent upon state and local authorities to implement these [federal environmental] policies”).

the federal environmental regulatory infrastructure was that the EPA primarily used a “deterrence-based” approach to induce regulated parties to comply with legal obligations under the environmental laws.<sup>89</sup> The Environmental Law Institute (ELI), for example, has observed that “[t]raditionally, compliance has been nearly synonymous with *enforcement*.”<sup>90</sup> The ELI explains that “[t]his approach reflects the view that policing and deterring violations are the essential core of environmental agencies’ activities and that other compliance activities are either (1) secondary and dispensable or (2) second-best compromises made to accommodate the realities of limited resources.”<sup>91</sup> Although its shift in focus might be characterized as halting, and certainly remains a work in progress,<sup>92</sup> the EPA generally has embraced a version of what has been characterized as an “integrated compliance program”<sup>93</sup> in which deterrence-based enforcement is only one piece in a large tool box of compliance-promotion approaches.<sup>94</sup> The states appear to have done so to an even greater degree.<sup>95</sup>

These now central features of environmental governance—states’ preeminent role as implementers<sup>96</sup> and the expansion in strategies to promote compliance<sup>97</sup>—did not sneak up on anyone. Instead, policy makers and multiple commentators have affirmatively endorsed and pursued them<sup>98</sup> and embraced progress

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<sup>89</sup> ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 2-3. As has been pointed out, there was a significant divide between the theory of enforcement and its practice during this extended formative period. *See, e.g.*, Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 L. & SOC’Y REV. 51 (2003); RECHTSCHAFFEN & MARKELL, *supra* note 68, at 61, 81-83.

<sup>90</sup> ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 2.

<sup>91</sup> *Id.*

<sup>92</sup> *See infra* Part III.A.; ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 67 (“integrated compliance programs are still in their infancy”).

<sup>93</sup> ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 2.

<sup>94</sup> *See infra* Part II.B. Mark Stoughton et al., *Toward Integrated Approaches to Compliance Assurance*, 31 ENVTL. L. REP. 11,266 (2001).

<sup>95</sup> RECHTSCHAFFEN & MARKELL, *supra* note 68, at 146-60; ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 2 (“Over the past decade, they [state environmental agencies] have begun to devote increasing resources to experimentation and have adopted a more varied set of compliance activities.”).

<sup>96</sup> *See supra* note 88.

<sup>97</sup> *See infra* Part II.B.

<sup>98</sup> *See, e.g.*, ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 21-24; SHELLEY H. METZENBAUM, STRATEGIES FOR USING STATE INFORMATION: MEASURING AND IMPROVING STATE PERFORMANCE 14-21 (IBM Center for The Business of Government 2003).

in making them a reality.<sup>99</sup>

I share the view that there is much promise in devolution, and in more flexible and contextually tailored application of compliance tools.<sup>100</sup> But I also believe that in the real world of regulatory implementation, each of these features, alone and in the aggregate, has some potential to reduce the transparency and accountability of governance, and that those interested in the formulation and implementation of environmental policy would be well-served by giving some attention and consideration to these potential impacts. This Part reviews these central elements of the basic operation of the regulatory state in the environmental compliance arena, with special attention to the issues of transparency and accountability in particular.

A. *Devolution: The States as Primary Implementers of the Federal Environmental Regulatory Infrastructure*

The division of responsibility between our federal and state governments is an important feature of the nation’s approach to implementation of the environmental laws, including ensuring compliance with those laws.<sup>101</sup> There has been considerable support for the past several years, transcending political administrations, for devolution of authority from the federal to the state governments. In 1999, President Clinton’s “Federalism” Execu-

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<sup>99</sup> For example, a joint state/EPA task force created the National Environmental Performance Partnership System in 1995 to develop and outline the cooperative nature of environmental enforcement. U.S. EPA, NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, available at <http://www.epa.gov/Region2/nepps/index.html> (last visited Dec. 10, 2004); see METZENBAUM, *supra* note 98, at 5; *infra* note 104 and accompanying text.

<sup>100</sup> My views stem in part from my experience as Director of the New York State Department of Environmental Conservation’s Division of Environmental Enforcement in the late 1980s and early 1990s. I have written elsewhere about various DEC initiatives, which in my view reflect some of the benefits of devolution and integrated compliance approaches. See, e.g., David L. Markell, *Enforcement Challenges and Priorities for the 1990s: A State Perspective*, 1 DUKE ENVTL. L. & POL’Y F. 30 (1991); *Enforcement Trends at the DEC*, 9 N.Y. STATE BAR ASSOC. ENVTL. L. SECTION J. 14 (1989); *Some Thoughts on Running a Superfund Enforcement Program: A State Perspective*, 5 NAT’L ENVTL. ENFORCEMENT J. 3 (1990); *States as Innovators: It’s Time for a New Look to Our “Laboratories of Democracy” in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994) [hereinafter *States as Innovators*].

<sup>101</sup> See, e.g., *supra* note 88. Review of the large scholarly literature concerning the benefits and disadvantages of devolution is well beyond the scope of this article. See generally Stewart, *supra* note 88, at 1210-11; RECHTSCHAFFEN & MARKELL, *supra* note 68, at 21-43; Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 579 (2001).

tive Order directed that federal agencies “grant the States the maximum administrative discretion possible” to implement federal programs.<sup>102</sup> The Bush Administration has evidenced at least equal interest in devolving authority to the states in the environmental arena.<sup>103</sup>

At a framework level, the EPA and the states have taken numerous steps to foster increased state autonomy. These actions have included the creation of the National Environmental Performance Partnership System (NEPPS), which was intended to fundamentally change the state-federal relationship by, *inter alia*, giving states greater flexibility in their choice of strategies while also holding them accountable for results.<sup>104</sup> The Environmental Law Institute has characterized NEPPS as “the most substantial reform in the EPA-state relationships since those relationships were first established over twenty-five years ago.”<sup>105</sup>

At an operational level, states largely have taken over environmental program implementation. That is, the essential alignment of roles and responsibilities for implementation of our environmental laws, including enforcement, has the states in the lead role, with the EPA providing oversight.<sup>106</sup> Executive Director of the Environmental Council of the States (ECOS) Steven Brown indicates that by 1996 states were administering seventy-five percent of the major federal delegable environmental programs.<sup>107</sup>

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<sup>102</sup> Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

<sup>103</sup> RECHTSCHAFFEN & MARKELL, *supra* note 68, at 17-18. The phenomenon of the United States contracting out its responsibilities extends beyond the states and the particular context of devolution, and certainly beyond the environmental arena. Jerry L. Mashaw, *Accountability and Institutional Design: Some thoughts on the Grammar of Governance*, in RETHINKING PUBLIC ACCOUNTABILITY (forthcoming 2005) (on file with author) (highlighting the need for the administrative state to “develop means to hold contracted-out private power accountable,” a different issue than devolution but a related one).

<sup>104</sup> OFFICE OF STATE & LOCAL RELATIONSHIPS, U.S. EPA, JOINT COMMITMENT TO REFORM OVERSIGHT AND CREATE A NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM 1, 5 (1995). See also METZENBAUM, *supra* note 98, at 5 (noting that “NEPPS was embraced . . . as a way to make clear that, instead of the EPA’s historical emphasis on assuring state completion of a negotiated number of explicitly specified activities, the federal agency could use environmental progress and compliance outcomes as the dominant criteria for program accountability.”). We provide a fairly detailed overview of NEPPS in RECHTSCHAFFEN & MARKELL, *supra* note 68, at 169-91.

<sup>105</sup> ENVIRONMENTAL LAW INSTITUTE, *An Independent Review of the State-Federal Partnership Agreements for 1996*, at 6, 11 (1996).

<sup>106</sup> See *supra* notes 84-88.

<sup>107</sup> Brown asserts that “the last 20 years has seen a rapid growth in state assumption of these federal programs.” R. Steven Brown, *The States Protect the Environ-*



Intuitively, at least at first glance, there may be reason to think that it should make little difference whether the states or the EPA has the lead in implementing our environmental laws. The cooperative federalism model includes several features that are intended to ensure that authorized states have the capacity and will to implement environmental laws effectively, and thereby, *inter alia*, avoid a “race-to-the-bottom.”<sup>108</sup> The federal environmental statutes, for example, generally allow an individual state to take the lead in implementing a particular federal environmental program (for example, the permitting program under the Clean Water Act that allows the discharge of pollutants from “point sources”) only if its laws are at least as stringent as the federal counterpart.<sup>109</sup> Further, the EPA serves as a gatekeeper and must satisfy itself that a state has the capacity to implement a federal program effectively, beyond simply having the legal authority to do so.<sup>110</sup> In addition, the EPA develops annual agree-

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ment, ECOSTATES (Summer 1999); *see also* Brown, *supra* note 88, at 3; METZENBAUM, *supra* note 98, at 9 (noting that agencies such as the Department of Education, the Department of Transportation, the Department of Health and Human Services, the Department of Labor, and several others “depend heavily on other levels of government to accomplish their goals”).

<sup>108</sup> While there is an ongoing debate about the extent to which there ever was a “race-to-the-bottom” and whether one is occurring now, there appears to be a consensus that Congressional fears about such a race played an important role in adoption of the federal environmental laws. RECHTSCHAFFEN & MARKELL, *supra* note 68, at 15, 21-25.

<sup>109</sup> *See, e.g.*, Clean Water Act, 33 U.S.C. § 1370 (2000) (“[A] State . . . may not adopt or enforce any . . . standard of performance which is less stringent than the . . . standard of performance under this chapter . . . .”); 40 C.F.R. § 123.27(c) (2004) (CWA NPDES); *id.* § 271.16(c) (RCRA). The ELI has compiled a helpful summary of authorization requirements under a variety of federal environmental laws. ENVIRONMENTAL LAW INSTITUTE, *supra* note 83. *See generally* RECHTSCHAFFEN & MARKELL, *supra* note 68, ch. 3.

<sup>110</sup> *See, e.g.*, 33 U.S.C. § 1342(b); 40 C.F.R. § 123.22 (allowing the administrator to approve the submitted program only if the state has standards at least as stringent as those in federal law, and shows that they have enough personnel and other capacity to administer the program). Numerous observers have suggested that the EPA has authorized states to serve as primary enforcers even though the states lack basic legal enforcement authorities that the EPA has determined are central to the operation of an effective enforcement program. *See, e.g.*, ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 61-62 (noting that “[s]ome states lack critical enforcement tools,” such as administrative penalty authority and sufficient penalty authority, and also have overly complex procedural requirements for enforcement); Markell, *supra* note 80, at 38-39. *See* ABA Administrative Law and Regulatory Practice Section Report to the House of Delegates (Aug. 2004) (on file with author) (recommending that a regulatory agency should use administratively imposed monetary penalty regimes as part of its enforcement scheme); ABA House of Delegates Daily Journal, 2004 Annual Meeting (Aug. 9-10, 2004) (on file with author) (approv-

ments with states that commit states to perform pursuant to EPA expectations.<sup>111</sup> Finally, the EPA oversees state performance.<sup>112</sup> The EPA retains the power in authorized states to conduct its own inspections and to pursue its own enforcement actions if it deems necessary.<sup>113</sup> The EPA also has the power to withdraw state authorization under appropriate circumstances.<sup>114</sup> At least in theory, in short, several structural features of the federal-state relationship are intended to limit the difference in government regulatory performance, regardless of whether the EPA or a state has primary responsibility for implementing the environmental laws in a particular state.<sup>115</sup>

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ing the Administrative Law and Regulatory Practice Section's recommendation). For a view that the EPA should play a stronger role as gatekeeper, see RECHTSCHAFFEN & MARKELL, *supra* note 68, at 291-95.

<sup>111</sup> RECHTSCHAFFEN & MARKELL, *supra* note 68, at 116-23.

<sup>112</sup> The EPA has been unwilling to implement a strategy of differential oversight or any meaningful kind of a public spotlighting approach to call public attention to comparative state performance, despite the potential that some commentators, including this author, claim for such approaches based on their use in other contexts. RECHTSCHAFFEN & MARKELL, *supra* note 68, at 319-29; *see also* Markell, *supra* note 80, at 102-08, nn. 393 & 408. For what struck me as an unusually forthright statement about the federal/state relationship, see Leslie Carothers, *Outside Judicial Opinions, States Need EPA Oversight*, THE ENVIRONMENTAL FORUM 56 (Sept./Oct. 2004).

The provision for federal oversight of state regulation of new or expanded major [air pollution] sources in particular is more critical than ever for both political and scientific reasons . . . . The litigation now occurring over New Source Review between states and EPA and among states is a sign of the need for EPA oversight of key state permitting decisions and of a loss of confidence that adequate oversight is occurring. This is the real world.

*Id.*

<sup>113</sup> The case law on this issue is still evolving. *See generally* GLICKSMAN ET AL., *supra* note 51, at 949. A recent article identifies some initiatives to enhance coordination between state and federal enforcers. James O. Payne, Jr. et al., *Partners in Pursuit of Polluters: State/Federal Civil Environmental Enforcement*, 18 NAT. RESOURCES & ENV'T 24, 24 (Spring 2004) (noting that the United States DOJ has instituted a system for early discussion of cases with state enforcers and that "[i]n recent years . . . state and federal governments have been joining together as co-plaintiffs in record numbers"). The authors suggest that "[s]tate/federal collaboration is leading to increased information sharing, stronger case resolutions, and better leverage of scarce enforcement resources." *Id.* at 26.

<sup>114</sup> *See, e.g.*, 42 U.S.C. § 6926(e) (2000); 40 C.F.R. § 271.23 (2004) (RCRA provision and EPA regulations relating to program withdrawal). The agency can withdraw authorization on its own, *sua sponte*, or in response to a citizen petition. For an example of the latter, see U.S. EPA, DETERMINATION AS TO WHETHER CAUSE EXISTS TO COMMENCE PROCEEDINGS TO WITHDRAW THE LOUISIANA RCRA PROGRAM, RESPONSE TO THE PETITIONERS (Apr. 28, 2004) (denying the petition and determining not to commence such a proceeding) (on file with author).

<sup>115</sup> It became clear early on in the implementation of this cooperative federalism

But the reality appears to be far different. The state-federal relationship has not been particularly smooth.<sup>116</sup> Intuitively, this result should not be surprising. As Professor Shelley Metzenbaum, former EPA Associate Administrator for the Office of State and Local Relations and currently Executive Director of the Environmental Compliance Consortium<sup>117</sup> (“a voluntary collaboration among state environmental agencies to improve the effectiveness of their compliance and enforcement programs”<sup>118</sup>) has observed, “Federal agencies that set goals for or measure the performance of states often find themselves in testy territory. For both political and practical reasons, states resent efforts by the federal government to influence their goals and their performance levels.”<sup>119</sup>

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experiment in the environmental arena that the EPA was not interested in micro-managing the states or in demanding a cookie cutter approach to implementation of the environmental laws, but instead intended to cede considerable autonomy to the states. *See, e.g.*, *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 174 (D.C. Cir. 1988) (upholding EPA regulations that allowed states to take over primary responsibility for the Clean Water permitting program even if their penalty authorities were far weaker than the EPA’s, rejecting the claim that the EPA must require states to mirror federal approaches, and holding that the EPA had the discretion to “reconcile the competing objectives of regulatory uniformity and state autonomy by establishing a floor for . . . state enforcement authority, while ensuring that states have the maximum possible independence”). Some states nevertheless would undoubtedly assert that the EPA has, in fact, engaged in considerable micro-management. RECHTSCHAFFEN & MARKELL, *supra* note 68, at 133, 144-45. For reasons why devolution might enhance environmental protection or otherwise might have welfare-inducing effects, and for concerns that devolution is likely to undermine environmental protection, see, for example, *id.* at 22-35.

<sup>116</sup> RECHTSCHAFFEN & MARKELL, *supra* note 68, at 144-45.

<sup>117</sup> *See* University of Maryland School of Public Policy, Shelley Metzenbaum, at <http://www.puaf.umd.edu/facstaff/faculty/metzenbaum.html> (last visited July 23, 2005).

<sup>118</sup> Environmental Compliance Consortium, About the ECC, at <http://www.complianceconsortium.org/About/About.asp> (last visited Feb. 16, 2005).

<sup>119</sup> METZENBAUM, *supra* note 98, at 9. As Professor Metzenbaum observes, the EPA has exacerbated this situation by providing oversight in highly inconsistent ways from region to region. “Because of this variation, many states perceived EPA oversight more as a reflection of individual personalities . . . than as consistent national policies designed to improve environmental quality and fairness.” *Id.* at 17. Part of the tension, however, was likely because as states began to build their capacity, they began to “chafe” under the EPA’s traditional activities-based oversight scheme and they began to push for an oversight system that gave them more flexibility. *Id.*

In part because of pressure from the states, the general direction of EPA/state relations appears to be toward greater state autonomy and, correspondingly, less EPA leverage in its oversight capacity. A central objective of the NEPPS discussions was to reform the state/federal relationship in a way that would provide states with greater flexibility and reduce certain types of EPA oversight. The flip side was

The cooperative federalism model, because of this tension and for other reasons, has created several challenges for managing and implementing environmental laws. One of the seemingly more important challenges, for purposes of this article, is that devolution appears to have significantly complicated management of relevant data.<sup>120</sup> The result is that devolution has made it much more difficult to monitor government activity—to understand and to follow what government officials are doing, and what they are accomplishing.<sup>121</sup>

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that states and the EPA would use new and improved measures of performance to heighten state accountability. *See, e.g.*, RECHTSCHAFFEN & MARKELL, *supra* note 68, at 187. As indicated below, progress toward this latter objective has been slow and halting and, certainly, progress remains incomplete. *See infra* note 121.

<sup>120</sup> The discussion in the text is intended to be illustrative of the multiple challenges that government officials have faced in managing data because of the extant federal system, rather than to provide comprehensive treatment of this issue. For more on this topic, see U.S. GAO, ENVIRONMENTAL PROTECTION: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT (2000), available at [www.gao.gov/new.items/rc00108.pdf](http://www.gao.gov/new.items/rc00108.pdf) [HEREINAFTER GAO, ENVIRONMENTAL PROTECTION]; U.S. OFFICE OF INSPECTOR GEN., EPA SHOULD TAKE FURTHER STEPS TO ADDRESS FUNDING SHORTFALLS AND TIME SLIPPAGES IN PERMIT COMPLIANCE SYSTEM MODERNIZATION EFFORT (2003), available at [www.epa.gov/oigearth/reports/2003/20030520\\_2003-M-00014.pdf](http://www.epa.gov/oigearth/reports/2003/20030520_2003-M-00014.pdf); RECHTSCHAFFEN & MARKELL, *supra* note 68. The EPA has long been aware of data-related problems, and it continues to work on these issues. *See, e.g.*, *States, Tribes Awarded \$20 Million in Grants To Expand Environmental Exchange Network*, Nat'l Env't Daily (BNA), Oct. 18, 2004, at A-4 (noting that the EPA has awarded 67 grants to states and others, for a total of more than \$20 million, "to help the continued expansion of an upgraded computer network to allow EPA to receive environmental data from their computers"). BNA notes that "[f]or years, EPA has grappled with a way to tie in separate national data systems" and that the Bush Administration is pursuing an "'E-Government' initiative." *Id.* Problems with data extend far beyond the enforcement realm. *See, e.g.*, Environmental Integrity Project, *Flying Blind: Water Quality Monitoring and Assessment in the Great Lakes States* vii (March 2004), available at [www.environmentalintegrity.org/pubs/Report\\_-\\_Flying\\_Blind.pdf](http://www.environmentalintegrity.org/pubs/Report_-_Flying_Blind.pdf) (concluding that because "the states are far from achieving comprehensive, accurate, and reliable water monitoring and assessment . . . national and regional 'pictures' of water quality are overstated and often misleading"). Devolution raises numerous other concerns as well. *See supra* note 115.

<sup>121</sup> While the focus in the text is mostly on state performance, the EPA bears considerable responsibility for this performance. The 2001 NAPA panel indicates that, for example, in ECOS's view, data problems are due to at least four significant issues: (1) flaws in EPA's main-frame databases, which include "outmoded designs and difficult data entry protocols"; (2) guidance interpretations, which are "problems with interpretation of EPA guidance for using the systems, including frequent coding changes"; (3) time lags in terms of when data are entered; and (4) differences in definitions of key terms. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, EVALUATING ENVIRONMENTAL PROGRESS: HOW EPA AND THE STATES CAN IMPROVE THE QUALITY OF ENFORCEMENT AND COMPLIANCE INFORMATION 16 (2001), available at [http://www.napawash.org/pc\\_economy\\_environment/environ-](http://www.napawash.org/pc_economy_environment/environ-)

Professor Metzenbaum has explained some of the reasons why dependence on states has been particularly problematic in terms of data management. After explaining that states had historically submitted data to the EPA, but that the EPA provided little of value back to the states, Metzenbaum describes the states’ natural reaction:

With little data coming back to states from EPA, many states built their own information systems over the years so they could more easily retrieve information they needed to manage their programs. As states built their own systems, system incompatibilities arose, requiring many states to enter data separately into both EPA’s systems and their own. Not surprisingly, since states primarily relied upon their own systems, they spent little time worrying about the quality of the information in EPA’s systems.<sup>122</sup>

Professor Metzenbaum continued by noting that the compliance-related data in the EPA’s systems are fraught with problems: “A spate of analysis on state compliance and inspection programs conducted by public interest groups in 1999 and 2000 using the EPA’s compliance databases made clear how seriously flawed data in some of the EPA’s systems were.”<sup>123</sup>

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mental.pdf [hereinafter EVALUATING ENVIRONMENTAL PROGRESS]. Concerns have been raised (by this author, among others) about the EPA’s willingness or capability to perform its oversight role responsibly. See Markell, *supra* note 81, at 3-5, 31-35; Clifford Rechtschaffen & David L. Markell, *Improving State Environmental Enforcement Performance Through Enhanced Government Accountability and Other Strategies*, 33 ENVTL. L. REP. 10,559, 10,560 (2003); John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); Farber, *supra* note 80, at 303.

<sup>122</sup> METZENBAUM, *supra* note 98, at 17. States also collected more data than they were required to report to the EPA and incorporated such data into their own systems. Mary Blakeslee, ECOS (Jan. 26, 2005 e-mail, on file with author). See also DAVID FREDERICKSON, THE POTENTIAL OF THE GOVERNMENT PERFORMANCE AND RESULTS ACT AS A TOOL TO MANAGE THIRD-PARTY GOVERNMENT 8, 12 (Price-waterhouse Coopers Endowment for the Bus. of Gov’t, 2001), available at [www.businessofgovernment.org/pdfs/Frederickson\\_Report.pdf](http://www.businessofgovernment.org/pdfs/Frederickson_Report.pdf) (noting that, based on a study of HHS agencies, “[a]dding to the difficulty of measuring performance in the federal system is the fear of state and local governments that performance measurement will be used as another form of federal mandate”).

<sup>123</sup> METZENBAUM, *supra* note 98, at 17 (citing ECOS, Report to Congress: State Environmental Agency Contributions to Enforcement and Compliance 53-70 (April 2001)). For others that have reached the same conclusion, see, for example, EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 23 (“The Academy Panel concludes that, as the studies by ECOS and GAO note, there are fundamental problems with existing enforcement and compliance data.”); U.S. EPA OFFICE OF INSPECTOR GEN., EPA SHOULD TAKE FURTHER STEPS TO ADDRESS FUNDING SHORTFALLS AND TIME SLIPPAGES IN PERMIT COMPLIANCE SYSTEM MODERNIZATION EFFORT 7 (2003), available at [www.epa.gov/oigearth/reports/2003/20030520\\_](http://www.epa.gov/oigearth/reports/2003/20030520_)

The disincentives for states to be full partners in EPA data management efforts that Professor Metzenbaum describes is part of the issue when it comes to data, but others exist too.<sup>124</sup> First, developing and reaching agreement on common definitions of key terms for compliance-related data has proven to be a major challenge. “Standardization” and “normalization” of data, in other words, have been greatly complicated because of our cooperative federal system.<sup>125</sup> The National Academy of Public Administration (NAPA), after reviewing the compliance-related data that the states themselves compiled and provided,<sup>126</sup> concluded that the utility of the data was quite limited because “[the data] are not comparable.”<sup>127</sup> Among other flaws, “the definitions of key enforcement terms used by states to report their activity statistics to ECOS are not uniform, making it difficult to compare one state to another.”<sup>128</sup>

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2003-M-00014.pdf (“Without a modernized [data system], EPA’s Office of Water cannot effectively manage its Clean Water . . . program.”).

<sup>124</sup> To provide one example not discussed in the text, the EPA and the states have had enormous problems integrating data across the media programs. As NAPA and ELI found, “data systems in several of the states are not integrated across the various media programs, making the information difficult to use and difficult for the public to access or understand.” ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 5, 68. They concluded that all five states covered in the 2003 study need to “improve their information systems so they can integrate data across media programs and can provide the public with more understandable data on both environmental progress and facility compliance.” *Id.*; see also EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 2 (noting that the problem is a combination of the EPA’s traditional medium-specific structure and state deficiencies: “[t]he current single-medium EPA data systems that manage and monitor the performance of state and EPA enforcement and compliance programs are seriously flawed. The state activities data recently compiled for ECOS suggest that many state data systems also have serious limitations.”).

<sup>125</sup> The EPA and the states are aware of the normalization issue, and they are seeking to address it through the core performance measures they have negotiated and through their creation of the Environmental Data Standards Council, a new organization that is intended to “agree on common definitions for state measurement efforts.” METZENBAUM, *supra* note 98, at 47-48. Prof. Metzenbaum suggests that Congressional mandates should be considered if progress is slower than desired. *Id.* at 46-47.

<sup>126</sup> For background on the state data in the ECOS report and why it was developed, see ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 61; THE ENVIRONMENTAL COUNCIL OF THE STATES, STATE ENVIRONMENTAL AGENCY CONTRIBUTIONS TO ENFORCEMENT AND COMPLIANCE (2001).

<sup>127</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 18.

<sup>128</sup> *Id.*; U.S. OIG, SPECIAL REPORT, CONGRESSIONAL REQUEST ON EPA ENFORCEMENT RESOURCES AND ACCOMPLISHMENTS, Report No. 2004-S-00001, at 36 (Oct. 10, 2003) (citing an OMB evaluation that found a “lack of good quality data to accurately determine compliance and monitor the effectiveness of enforcement ac-

Further, “state data on compliance rates and return to compliance, although valuable, provide only a general sense about the effectiveness of these tools because ECOS did not ask the states how they determined those rates.”<sup>129</sup> As a result, the NAPA Panel cautioned that “the aggregated data and the conclusions drawn from them in the ECOS study should be used very cautiously.”<sup>130</sup> More generally, the NAPA Panel ultimately concluded that the magnitude of data discrepancies due to normalization-related deficiencies effectively made it impossible to determine the nature of state enforcement activity or the results such activities were producing:

[T]hese data discrepancies point out that it is very difficult to aggregate state data, to compare performance across states, or to draw nationwide conclusions on enforcement efforts using current state data. Similarly, it is not possible to aggregate data and draw conclusions about state inspection programs when the data are not comparable. For example reported data on inspection rates show wide variations from state to state. These differences likely have more to do with the number of programs reporting or differences in inspection definitions than the actual rate of inspections.<sup>131</sup>

In short, while the EPA has had more than its fair share of problems in getting its own staff to be consistent in its approach to data collection and management,<sup>132</sup> the federalism structure of environmental law implementation has likely made the EPA’s

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tivities”) [hereinafter OIG SPECIAL REPORT]. The EPA did not agree with all of OMB’s findings. *Id.*

<sup>129</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 24.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 25.

<sup>132</sup> See, e.g., U.S. EPA, A PILOT FOR PERFORMANCE ANALYSIS OF SELECTED COMPONENTS OF THE NATIONAL ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM 7 (Feb. 2003) (on file with author) (noting that “[t]he quality of data for pollutant reductions from EPA actions has been gradually improving but continues to need improvement in accuracy, consistency, and completeness.”) [hereinafter A PILOT FOR PERFORMANCE ANALYSIS]; U.S. OIG, ENFORCEMENT: COMPLIANCE WITH ENFORCEMENT INSTRUMENTS, Report No. 2001-P-00006 at i (Mar. 2001) (finding that the EPA’s regions did not always adequately monitor compliance with enforcement instruments or consider supplementary enforcement actions even when such actions might be appropriate); U.S. EPA GAO, ENVIRONMENTAL PROTECTION, *supra* note 120; U.S. OIG, INFORMATION TECHNOLOGY: UNRELIABLE DATA AFFECTS USABILITY OF DOCKET INFORMATION, Report No. 2002-P-00004 Executive Summary (Jan. 18, 2002) (finding that, *inter alia*, “our audit determined the DOCKET system . . . contained significant instances of inaccurate and incomplete data.”). DOCKET, at the time, was the EPA’s “official database for tracking and reporting on civil judicial and administrative enforcement actions.” *Id.* at 1.

task of creating a useable and accessible set or sets of compliance-related data enormously more difficult because of the challenge of getting fifty state governments to cooperate on an enormous array of basic elements, including adoption of common definitions, use of the same methodologies, and the like. Accountability and transparency of environmental compliance-related information have suffered as a result.<sup>133</sup>

Similarly, collection and compilation of data have been made much more challenging because of our federal system. There have been enormous problems with states' data entry in terms of the sufficiency of the data collected, data accuracy and reliability, and the timeliness of data entry. No doubt this is due, at least in part, to the lack of value some states traditionally have attributed to EPA data systems and to states' creation of their own parallel data management operations, as Professor Metzenbaum has suggested.<sup>134</sup> In its discussion of "partner benefits" associated with participating in the Environmental Information Exchange Network, the Network's fact sheet summarizes concerns about data quality as follows: "[i]n the past, the quality of environmental data has been compromised due to traditional exchange meth-

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<sup>133</sup> Numerous studies have found data normalization problems of the sort highlighted in the text. *See, e.g., supra* notes 128, 132; U.S. OIG, EPA SHOULD TAKE FURTHER STEPS TO ADDRESS FUNDING SHORTFALLS AND TIME SLIPPAGES IN PERMIT COMPLIANCE SYSTEM MODERNIZATION EFFORT, Report No. 2003-M-00014 (May 20, 2003); OIG SPECIAL REPORT, *supra* note 128, at 39 (discussing the EPA's Permit Compliance System (PCS), which tracks formal enforcement actions under the CWA. The OIG notes that PCS "has been identified as an Agency weakness since 1999. Reasons include its reported unreliability due to missing data and data quality problems." The OIG indicates that the effort to modernize PCS began in 1997 and that this effort is now in the "detailed design phase"). The EPA and the states are working on addressing these issues, and indeed have been doing so for decades. The National Environmental Information Exchange Network is an ongoing initiative that is intended to surface and resolve data-related challenges, such as the creation of common definitions. *See generally*, U.S. EPA OFFICE OF ENVTL. INFO., FISCAL YEAR 2005 ENVIRONMENTAL INFORMATION EXCHANGE NETWORK GRANT PROGRAM SOLICITATION NOTICE (Oct. 2004). The Exchange Network is "an Internet- and standards-based, secure information network that facilitates the electronic reporting, sharing, integration, analysis, and use of environmental data from many different sources." *Id.* at 1. The Solicitation Notice indicates that fiscal year 2005 will be the fourth year of its grant program, and that the program has disbursed about \$65 million to states, tribes, and territories to date. It appears from the notice that efforts to update and upgrade the CWA NPDES system are, at least in the EPA's view, moving ahead nicely. *Id.* at App. B-14. The EPA's relatively new Enforcement Compliance History Online (ECHO) system is an effort to improve accessibility to facility-specific compliance and enforcement information. *See, e.g.,* 67 Fed. Reg. 70,079 (Nov. 20, 2002) (announcing the availability of ECHO).

<sup>134</sup> *See supra* note 122 and accompanying text.



ods, which include faulty data entry, double data entry, transmitting wrong data types through file formats, and sporadic use of data standards.”<sup>135</sup>

A candid EPA self-evaluation of its NPDES permitting program notes that data collection and compilation are compromised or undermined because the EPA is less demanding of states than it is of its own staff in terms of the types of data that must be reported:

The data that we have for enforcement is relatively plentiful, but there are known problems with the data, and undoubtedly other unknown problems. For example, states are not required to report some of the data that would be ideal for answering certain key questions (e.g., data on penalties, injunctive relief, and pounds of pollutants reduced).<sup>136</sup>

Finally, dissemination of enforcement and compliance-related information has suffered considerably because of reliance on the states to serve as primary implementers of the environmental laws in our cooperative federalism system of governance. Federal agencies have the potential to play an important “clearing-house” or “information wholesaler” role in governance, particularly in a cooperative federalism system.<sup>137</sup> One commentator highlights this possibility as follows:

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<sup>135</sup> Environmental Information Exchange Network, Fact Sheet 2, at [http://www.exchangenetwork.net/resources/documents/en\\_fact\\_sheet\\_2004.pdf](http://www.exchangenetwork.net/resources/documents/en_fact_sheet_2004.pdf) (last visited Feb. 16, 2005). The EPA has indicated on several occasions that results are improving on this front. See, e.g., U.S. EPA, FISCAL YEAR 2003 ANNUAL REPORT Ch. 6, p. 4 (noting that “In FY 2003, EPA . . . expanded state access to the Environmental Information Exchange Network, a unified network that integrates access to high-quality and integrated air, water, and waste information systems. Currently, 49 states are reporting data electronically through EPA’s network portal, reducing their reporting burden while increasing the timeliness and accuracy of their reported data.”).

<sup>136</sup> A PILOT FOR PERFORMANCE ANALYSIS, *supra* note 132, at 3 (noting that “[t]here is a commitment . . . for states to submit penalty data,” but, as of February 2003, the effective date of the data system that would handle such data had been postponed). *Id.* at 17 (noting that “States are not . . . required to report penalty data . . . which limits our ability to draw conclusions about the effect of penalties on compliance and deterrence.”). Many states collect penalty and other data for their own use.

The EPA also acknowledges that timeliness traditionally has been a significant concern in terms of the entry and dissemination of data, with the result being that data are outdated by the time they are available for distribution: “The current time-consuming approaches to data exchange often lead to exchanging outdated information.” Environmental Information Exchange Network, *supra* note 135, at 2.

<sup>137</sup> See METZENBAUM, *supra* note 98, at 44 (noting that “[f]ederal agencies can play a valuable role few others can play simply by gathering performance informa-

To encourage use and analysis of the information, federal agencies that depend on state and local governments for the accomplishment of their goals should annually compile state information into a single compendium that is easy to find and interpret. This information should be made available in print form and accessible online through a single portal, produced on a regular schedule, and broadly disseminated.<sup>138</sup>

The Government Performance and Results Act (GPRA) offers at least one ready framework for doing so.<sup>139</sup> As Professor Metzenbaum suggests: “[f]ederal agencies could use their annual GPRA performance reports for this purpose. At a minimum, they should cross-reference where relevant state data can be found in the annual GPRA performance reports.”<sup>140</sup> The EPA is seemingly well-situated to perform this role. Its serving this function would significantly advance accountability and transparency in governance by facilitating access to information on government performance.

Unfortunately, the gap appears to be enormous between promise and reality in terms of dissemination of enforcement and compliance-related information. For example, it appears that the 2001 NAPA panel reviewed five EPA annual enforcement accomplishments reports, those issued for 1995-1999, inclusive.<sup>141</sup> These reports are intended to summarize the nation’s enforcement and compliance assistance efforts and the results they have produced.<sup>142</sup> The NAPA panel concluded that the reports contain little information about state performance, despite the fact that states are doing most of the work. The panel notes that the accomplishments reports “have only reflected state enforcement

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tion from each state, organizing it to facilitate interpretation, and making it broadly available.”).

<sup>138</sup> *Id.* at 7.

<sup>139</sup> Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 [hereinafter GPRA] (codified in scattered sections of 31 U.S.C.). The EPA’s “Policy Framework” offers another possible framework. U.S. EPA, REVISED POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS (1986) [hereinafter EPA REVISED POLICY FRAMEWORK]. For a detailed review of this Framework, see RECHTSCHAFFEN & MARKELL, *supra* note 68. Some state regulators recognize this framework as an important mechanism and source of guidance. See Statement of Mark Coleman, Executive Dir., Okla. Dep’t of Env’tl. Quality, The Current Relationship between States and the Environmental Protection Agency (June 10, 1997).

<sup>140</sup> METZENBAUM, *supra* note 98, at 7.

<sup>141</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 46, app. 3.

<sup>142</sup> *Id.* at 24.

activities in two years, 1996 and 1997."<sup>143</sup> Further, the numbers "captured in the Reports . . . cover only a limited range of enforcement actions reported to EPA through its data systems."<sup>144</sup> As a result, as the NAPA panel concluded, "Congress and the public have not had good information on the full extent and nature of EPA and state enforcement and compliance assistance activities."<sup>145</sup>

I reviewed the EPA enforcement accomplishments reports for 2000-2004, inclusive, in an effort to update the NAPA panel's work.<sup>146</sup> These reports do not appear to be meaningfully better in terms of providing information on state activities or accomplishments. The EPA's 2004 Annual Enforcement Accomplishments Report, its most recent at the time this article was being developed, focuses on "national environmental results and enforcement and compliance activity" and pollution reduction "as a result of EPA enforcement actions," with relatively little mention of state enforcement action.<sup>147</sup> Discussions of state enforcement

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> U.S. EPA, FY 2004 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE RESULTS (Nov. 15, 2004); U.S. EPA, FY 2003 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE RESULTS (Dec. 11, 2003); U.S. EPA, FY 2002 END OF YEAR ACCOMPLISHMENTS; U.S. EPA, FY 2001 ENFORCEMENT & COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT. Documents relating to the EPA's Enforcement and Compliance Accomplishment Reports for years 2001 through 2004 may be found through links at <http://cfpub.epa.gov/compliance/resources/reports/endofyear/>.

<sup>147</sup> Press Release, U.S. EPA, Enforcement Secures Cleanups Worth a Record \$4.8 Billion Preventing One Billion Pounds of Pollution (Nov. 15, 2004), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/04b3e855d5a0b21785256f4d006bd344?OpenDocument>. The EPA's fiscal year 2004 enforcement "End of Year Accomplishments" currently are packaged as multiple electronic documents, rather than as a single report. Florida State University law librarian Mary McCormick kindly compiled the following list of electronically-available documents, which together appear to represent the EPA's end of year accomplishments report: Press Release, FY2004 End of Year Accomplishments: One Billion Pounds Less Pollution, at [http://www.abuse.com/environment/EPA\\_Home/Compliance\\_and\\_Enforcement/Planning\\_and\\_Results/Results/End\\_of\\_Year\\_Accomplishments/FY2004\\_End\\_of\\_Year\\_Accomplishments/index.html](http://www.abuse.com/environment/EPA_Home/Compliance_and_Enforcement/Planning_and_Results/Results/End_of_Year_Accomplishments/FY2004_End_of_Year_Accomplishments/index.html) (last visited July 15, 2005); FY 2004 End of Year Compliance Assistance Activities Highlights, at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/2004cahighlights.html> (last visited July 15, 2005); Civil Enforcement Highlights FY-2004, at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy004/2004civilhighlights.html> (last visited July 15, 2005); Criminal Enforcement Highlights FY-2004, at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/2004criminalhighlights.html> (last visited July 15, 2005); FY2004 End of Year Case Highlights, at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/2004highlights.html> (last visited July 15, 2005); Enforcement and

activity appear to be anecdotal, such as the mention of a state-EPA partnership in the settlement of a civil enforcement case.<sup>148</sup> In fact, Eric Schaeffer, former Director of Enforcement for the EPA and now Executive Director of the Environmental Integrity Project (EIP), charges that the EPA is now providing less information about its own enforcement activities than it did in previous years. Schaeffer claims, for example, that “[i]n the past, EPA has always reported the number of judicial cases settled or concluded. That data was not included in EPA’s announcement today.”<sup>149</sup> Thus, our cooperative federalism model appears to have had very significant negative consequences for dissemination of national enforcement and compliance-related information because the EPA, at least in its annual Enforcement Accomplishments Reports, does not appear to have “stepped up to the plate” to perform a clearinghouse function concerning state data.<sup>150</sup>

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Compliance Results: Numbers at a Glance, at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/2004numbers.html> (last visited July 15, 2005). Ms. McCormick contacted EPA Associate Director for Public Affairs, Office of Enforcement and Compliance Assurance, Pat Reilly, and learned that the EPA intends to publish an Accomplishments Report which will put end of year numbers in context and provide a retrospective of the past ten years. While this Report was due out in April 2005, it had not been released as this article was going to press in August 2005. The EPA does not intend to include a substantial amount of information on state performance in the forthcoming report because the lack of uniformity in state approaches (different definitions of basic concepts like inspections, etc.) makes presentation of such information problematic. Further, the EPA is not interested at the current time in creating a “report card” for evaluation of state performance in the compliance/enforcement arena. Ms. Reilly indicated that the EPA’s regions collect considerable data on state performance that is not incorporated into the EPA’s publicly available reports but is maintained in internal management systems. Mary McCormick, telephone call with Pat Reilly (Jan. 28, 2005); E-mail from Pat Reilly to Mary McCormick (Feb. 23, 2005) (copy on file with author).

<sup>148</sup> See, e.g., Civil Enforcement Highlights FY-2004, *supra* note 147 (noting that the EPA joined New York, New Jersey and other states in Clean Air Act settlement actions against private industries).

<sup>149</sup> Statement of Eric Schaeffer, Director, Environmental Integrity Project (Nov. 15, 2004) (on file with author) (Mr. Schaeffer attributes the EPA’s decision not to publish the data about judicial cases to the EPA’s poor record in the area: “[A]nd no wonder: the Agency’s online data base shows that the Justice Department was able to conclude fewer than 160 enforcement actions in 2004, the lowest by far in the ten years that such data has been publicly tracked by EPA.”).

<sup>150</sup> The EPA’s Web site is not particularly user-friendly, at least in my experience. Ms. McCormick and I contacted several individuals at the EPA to try to determine whether the most likely places to look for state-related enforcement-related data would be the annual enforcement accomplishments reports and the fiscal year annual reports, or whether the EPA develops other reports or materials that would contain this information and be publicly accessible. See, e.g., E-mail from David L.

Congress's adoption of the GPRA in 1993 required the EPA to begin reporting the results of government activities, including activities in the enforcement arena.<sup>151</sup> The EPA has now issued six annual reports in fulfilling its obligations under the GPRA.<sup>152</sup> Again, I reviewed the relevant section of each of these reports.<sup>153</sup> As with the annual Enforcement Accomplishments Reports, the GPRA-driven reports appear to include minimal coverage of state performance. The 2004 Annual Report, for example, discusses what the EPA is doing to encourage states to develop new enforcement techniques,<sup>154</sup> but does not discuss what the states themselves are doing in response to this encouragement. Additionally, in each annual report, the Annual Performance Goals speak only to EPA performance, not state performance.<sup>155</sup> In her 2003 report, Professor Metzenbaum concludes that the EPA is reporting little state enforcement information publicly, suggesting that this is probably because of a fear of negative state reaction to EPA evaluations.<sup>156</sup>

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Markell, Steven M. Goldstein Professor, Florida State University College of Law, to Lynn Vendinello, U.S. EPA Headquarters (Dec. 16, 2004, 17:37 EST) (on file with author).

<sup>151</sup> Government Performance and Results Act of 1993, Pub. L. No. 103-62 (codified at 31 U.S.C. § 1115 (2000)).

<sup>152</sup> See U.S. EPA FISCAL YEAR 2004 ANNUAL REPORT; U.S. EPA FISCAL YEAR 2003 ANNUAL REPORT; U.S. EPA FISCAL YEAR 2002 ANNUAL REPORT; U.S. EPA, FISCAL YEAR 2001 ANNUAL REPORT; U.S. EPA, FISCAL YEAR 2000 ANNUAL REPORT; U.S. EPA, FISCAL YEAR 1999 ANNUAL PERFORMANCE REPORT. All EPA Annual Reports can be found at <http://www.epa.gov/ocfo/finstatement/apr.htm> (last updated Nov. 16, 2004).

<sup>153</sup> For 1999 through 2002, goal 9 was the relevant section, entitled "A Credible Deterrent to Pollution and Greater Compliance with the Law." See U.S. EPA, FISCAL YEAR 2002 ANNUAL REPORT 99-110; U.S. EPA, FISCAL YEAR 2001 ANNUAL REPORT 83-91; U.S. EPA, FISCAL YEAR 2000 ANNUAL REPORT 93-101; U.S. EPA, FISCAL YEAR 1999 ANNUAL PERFORMANCE REPORT 97-103. After the EPA changed its Strategic Plan in 2003, more recent reports have reported enforcement-related information in goal 5, entitled "Compliance and Environmental Stewardship." See U.S. EPA, FISCAL YEAR 2004 ANNUAL REPORT 106-21; U.S. EPA, FISCAL YEAR 2003 Annual Report 91-108. It is unclear whether the EPA's consolidation of its strategic goals so that it no longer treats compliance independently as a single goal reflects an effort to diminish the importance of enforcement.

<sup>154</sup> U.S. EPA, FISCAL YEAR 2004 ANNUAL REPORT 106.

<sup>155</sup> See, e.g., *id.* at 110 (reporting the planned target and actual performance for the EPA's ten annual performance goals).

<sup>156</sup> METZENBAUM, *supra* note 98, at 17. These reports do not approach the standard that Professor Metzenbaum recommends. The lack of state information in EPA Annual Reports may not be unexpected, given that the GPRA "says little about how federal agencies should integrate information about state and local performance into their GPRA reports." METZENBAUM, *supra* note 98, at 9. On the other hand, Professor Metzenbaum concludes that Congress's failure to require re-

The bottom line appears to be that neither the EPA's annual Enforcement Accomplishments Reports nor the agency's GPRAs-driven Fiscal Year annual reports contains much information on state performance. The result is that dissemination of information about government performance has suffered because the EPA has opted not to report in detail on state performance as well as provide information on its own record.<sup>157</sup>

While, as noted above, it would seem to make the most sense for the federal government to play a clearinghouse role in disseminating national enforcement information that includes data on state as well as federal performance, other alternative frameworks conceivably could be effective in promoting accountability and transparency. One such framework would involve a division of responsibilities. The EPA would provide information about its performance and the states independently would do the same for their performance. Thus, the EPA, through its annual Enforcement Accomplishments Reports and its GPRAs-driven annual Fiscal Year reports (and possibly through other reporting as well), could report on its performance. The states, independently or collectively, could report on their performance.

There appears to be some expectation that states will serve in an "information-dissemination" capacity, but progress on this front appears to be uneven. NEPPS anticipated that states would conduct self-assessments and that they would share those assessments with the public.<sup>158</sup> Indeed, NEPPS provided that state self-evaluations were a key element of the framework of greater state autonomy and flexibility that NEPPS was intended to cre-

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porting of state information is surprising given our cooperative federalism system: "Given federal reliance on states and localities to accomplish their programmatic goals, GPRAs's silence on the subject of states is surprising, as is the limited discussion of this subject in the policy guidance documents issued by the U.S. Office of Management and Budget pertaining to GPRAs implementation." *Id.* at 9.

<sup>157</sup> The EPA generates a wide variety of other reports that may, and in some cases do, contain enforcement-related information. While such efforts contribute to transparency, they do not seem to offset the failure to include state information in the fiscal year annual reports or in the annual enforcement accomplishment reports. *See, e.g.,* JERRY ELLIG, PERFORMANCE REPORT SCORECARD: WHICH FEDERAL AGENCIES INFORM THE PUBLIC? 4 (George Mason Center May 3, 2000) (noting that ease of access to these types of reports and awareness of their content are important aspects of agency accountability: "[p]ublic accountability can only be served if members of the public can actually find out what the agency is doing for them. The annual report should be made accessible to the public."), available at <http://www.mercatus.org/pdf/materials/187.pdf>.

<sup>158</sup> METZENBAUM, *supra* note 98, at 17.

ate.<sup>159</sup> But, little such self-assessment has occurred, according to the EPA’s Office of Inspector General.<sup>160</sup>

More generally, individual states have made some progress in developing independent annual reports,<sup>161</sup> but it appears that much remains to be done if state reporting is to fill the void that exists because of the lack of state data in federal reports. State reporting is uneven in a variety of ways, including frequency of reporting, formats used to present information, content of information presented, and accessibility of the state reports.<sup>162</sup> To return to a theme discussed earlier,<sup>163</sup> normalization or standardization issues are currently impediments to accountability and transparency of state performance, as is the uneven commitment to reporting such performance.<sup>164</sup>

In addition to the limited nature of the progress that individual states have made in compiling and disseminating their own com-

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<sup>159</sup> U.S. OIG, EPA NEEDS TO MORE ACTIVELY PROMOTE STATE SELF ASSESSMENT OF ENVIRONMENTAL PROGRAMS 2-4, Report No. 2003-P-00004 (Dec. 27, 2002) (noting that “[s]elf assessment is one of the principal components of NEPPS,” and also noting that “The NEPPS policy envisioned the self assessment as one of the tools for . . . allowing states greater flexibility.”).

<sup>160</sup> *Id.* at 2 (noting that the “EPA and states had not widely adopted the self assessment concept. Many states were not performing self assessments, their content varied, and they had little impact on environmental performance agreements.” The OIG also stated that “[t]his occurred because EPA had not taken a leadership role to define to staff and states its expectations for self assessments.”); *see also id.* at 3 (“Since the NEPPS policy was issued in 1995, EPA had done little to develop and promote greater reliance on self assessment. EPA had not issued any additional guidance or training on self assessments. As a result, few regions and states were performing and effectively using self assessments.”). The OIG noted that it did not review whether the EPA and the states were performing joint evaluations in lieu of self-assessments. *Id.* at 2. It further indicated that based on its discussions with the EPA, the self assessment process “may be overtaken by improved priority setting and joint evaluation processes.” *Id.* at 4. In its comments to the OIG about the report, the EPA’s Office of Congressional and Intergovernmental Relations states that it “appreciate[d]” the OIG’s bringing the joint planning process to its attention, and that the Office “plan[s] to formally include joint evaluation in our work with the States.” *Id.* at 9. The Office characterized a joint evaluation process as “much needed.” *Id.* at 10.

<sup>161</sup> One commentator refers to this progress as significant. This “significant progress” includes “agree[ing] on measures for assessing state performance . . . increas[ing] public access to information about state environmental performance . . . and heightening attention to priority environmental problems.” METZENBAUM, *supra* note 98, at 5.

<sup>162</sup> *See generally*, Environmental Compliance Consortium, at <http://www.complianceconsortium.org> (last visited Feb. 16, 2005) (providing access to a limited set of state compliance-related reports).

<sup>163</sup> *See supra* notes 124-36 and accompanying text.

<sup>164</sup> *See supra* notes 124-36 and accompanying text.

pliance-related information,<sup>165</sup> the limited success to date in aggregating state information (for example, in compiling such information in one easily accessible place, and in aggregating compliance-related information for the different states), which would simplify access and facilitate comparisons and other types of analyses of the relative and absolute performance of states, also undermines the effectiveness of state reporting efforts in promoting accountability and transparency. Two state consortium-type bodies, ECOS<sup>166</sup> and the Environmental Compliance Consortium (ECC),<sup>167</sup> have made efforts to compile state data and they have made some progress. These bodies deserve credit for their initiatives, but these efforts appear to be in their early stages. As indicated above, ECOS is the national body that coordinates state agency environmental efforts and conveys the states' positions to the federal government and the public,<sup>168</sup> while the ECC is a collaborative effort among states to "improve the effectiveness of their compliance and enforcement programs."<sup>169</sup> I reviewed the Web sites of each of these organizations, and I also contacted officials with each organization to ask about compilations of state enforcement-related data and ways to obtain such compilations, if they existed.<sup>170</sup>

ECOS has compiled state data once so far. The data in its 2001 report, *State Environmental Agency Contributions to Enforcement and Compliance*, has been called the "most complete information to date on state enforcement and compliance activities,"<sup>171</sup> despite obvious shortcomings, some of which

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<sup>165</sup> See *supra* note 160.

<sup>166</sup> The Environmental Council of the States, at <http://www.ecos.org> (last visited Feb. 17, 2005).

<sup>167</sup> Environmental Compliance Consortium, at <http://www.complianceconsortium.org> (last visited Feb. 17, 2005).

<sup>168</sup> The Environmental Council of the States, at <http://www.ecos.org> (last visited Feb. 17, 2005).

<sup>169</sup> Environmental Compliance Consortium, Linking States to Protect the Environment, at <http://www.complianceconsortium.org> (last visited Feb. 17, 2005).

<sup>170</sup> See E-mail from Mary Blakeslee, Deputy Director for Information Management, ECOS, to David L. Markell (Dec. 16, 2004, 17:33 EST) (on file with author); E-mail from David L. Markell to ECOS (Dec. 16, 2004, 14:12 EST) (on file with author); E-mail from David L. Markell to Shelley Metzbaum, Executive Director, Environmental Compliance Consortium (Dec. 6, 2004, 09:12 EST) (on file with author).

<sup>171</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 24. The EPA provided ECOS with funding support for this report. ECOS, STATE ENVIRONMENTAL CONTRIBUTIONS TO ENFORCEMENT AND COMPLIANCE (2001) (acknowledgments page).



ECOS acknowledges.<sup>172</sup> An ECOS official informed me that ECOS currently is conducting another survey for information covering 2000-2003, and it hopes to issue a new report in 2005.<sup>173</sup> In terms of obtaining state-specific reports on enforcement and compliance-related performance, the ECOS official indicated that "[m]ost states have some type of publicly available report but there is no easy way . . . to get that information."<sup>174</sup>

The ECC appears to have more of an ongoing initiative to collect and present state compliance-related data than ECOS. The ECC Web site provides a "State Environmental Information Portal" that enables the user to search by state and choose between various reports, including compliance and enforcement reports.<sup>175</sup> The following table is an effort to present the ECC's available enforcement and compliance reports from the states, indicating which states provided reports in particular years. The data was obtained by searching for "compliance and enforcement reports" within the State Environmental Information Portal.<sup>176</sup> While the ECC's effort is an important and valuable step in increasing transparency of state information, it also seemingly reflects the distance that still needs to be traveled in order to create a current, easily accessible "information infrastructure" for state data. Fewer than twenty states have reports posted, and the

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<sup>172</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 24 (noting that the usefulness of the ECOS data was "limited because [the data from the different states] are not comparable"). ECOS gathered the data by sending requests to states for information. See ECOS, STATE ENVIRONMENTAL CONTRIBUTIONS TO ENFORCEMENT AND COMPLIANCE 18 (2001).

<sup>173</sup> E-mail from Mary Blakeslee, Deputy Director for Information Management, ECOS, to David L. Markell (Dec. 16, 2004, 17:33 EST) (on file with author). The EPA again is providing ECOS with funding support for this report. See The Environmental Council of the States, at <http://www.ecos.org/section/projects/?id=1016>.

<sup>174</sup> E-mail from Mary Blakeslee, Deputy Director for Information Management, ECOS, to David L. Markell (Dec. 16, 2004, 17:33 EST) (on file with author). ECOS's broad overview of EPA delegation of program authority to states is a helpful starting point in determining which states might be expected to prepare reports on their enforcement activities, but it does not contain information concerning which states are issuing enforcement reports. See The Environmental Council of States, Enforcement, at <http://www.ecos.org/section/states/enforcement> (last visited Dec. 16, 2004).

<sup>175</sup> Environmental Compliance Consortium, State Environmental Information Portal, at <http://www.complianceconsortium.org/cgi-bin/StateReports.asp> (last visited Feb. 17, 2005).

<sup>176</sup> Policy statements, articles, and newsletters, which are included by the ECC in its compliance and enforcement reports category were not included in the data. I am especially grateful to Sarah Lindquist for developing this chart and to the Oregon Law Review staff for reviewing its contents.

ECC officials were quite candid in discussing the limited value of the data that the ECC had been able to collect from the states and post on its Web site. The executive director indicated that, for example, the information only indicates “how many states are posting reports on-line in a location we could find, not how many are producing environmental reports.”<sup>177</sup> Similarly, the executive director highlighted the ad hoc nature of the ECC methodology—the ECC essentially did a one-time sweep of all state Web sites and thereafter updates the portal when it runs across other relevant state information on-line.<sup>178</sup> As a result, the ECC portal may not contain the most recent information. Some links to state data are no longer active and more recent information for some states is available at state department Web sites.<sup>179</sup>

TABLE 1

State	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total Rpts*
AL										0
AK						X				1
AZ										0
AR										0
CA										0
CO						2001-03*	2001-03*	2001-03*	X**	4
CT		X	X	X	X	X	X	X		7
DE						2001-03*	2001-03*	2001-03*		3
FL										0
GA										0
HI										0
ID										0
IL										0
IN										0
IA										0
KS										0
KY										0
LA										0
ME										0

<sup>177</sup> E-mail from Shelley Metzenbaum, Executive Director, Environmental Compliance Consortium, to David L. Markell (Dec. 7, 2004, 21:11 EST) (on file with author).

<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

“Slack” in the Administrative State

MD					X	X	X	X	X	5
MA					X	X	X	X	X**	5
MI										0
MN										0
MS			X		X		X	X	X	5
MO										0
MT										0
NE										0
NV										0
NH										0
NJ						X	X	X	X	4
NM										0
NY***							X	X		2
NC****					X					1
ND										0
OH						X	X	X		3
OK										0
OR*****					X	X	X	X	X	5
PA										0
RI				X	X	X	X	X**		5
SC							X	X	X	3
SD										0
TN										0
TX*****			X	X	X	X	X	X	X	4
UT										0
VT	X	X	X	X	X	X	X	X**		8
VA										0
WA					X					1
WV										0
WI										0
WY										0
TOTALS	1	2	3	3	9	12	14	14	8	66

\* Report covers years shown. Each year included was counted toward the total reports.

\*\* Report was not shown on the ECC website but was found through the State’s own Web site.

\*\*\* ECC’s link for the 2002 report is not active, the 2003 report is available at <http://www.dec.state.ny.us/website/dar/boss/fffy2003.html>. One would assume there was, at one time, a 2002 report but only current reports are kept at the NY Web site.

\*\*\*\* ECC only shows the 2000 report & notes that this is the 1st year NC compiled any such report. One would assume this means there are reports for later years, but none were found.

\*\*\*\*\* State Web site shows monthly reports starting in March of 2000.

\*\*\*\*\* ECC only shows the 2003 annual report & the monthly reports for 1998-2003. At the TX Web site, there are monthly reports available from 1994 and annual reports since at least 2001.

A third possible approach to accountability and transparency, seemingly less desirable and less accessible than either of the two described above, would involve having enterprising citizens access relevant government files to compile their own reports on state and federal enforcement-related performance. State versions of the Freedom of Information Act (FOIA) seemingly provide a mechanism for such an approach already.<sup>180</sup> But the experience of some citizen-initiated efforts of this sort in the realm of state enforcement-related data suggests that citizens are not likely to have smooth sailing in their quest to develop their own reports from government-housed data. An April 2003 report reviewed the efforts of a prominent environmental non-governmental organization (NGO), the Environmental Integrity Project (EIP),<sup>181</sup> to obtain enforcement-related data from five Midwestern states: Illinois, Indiana, Michigan, Wisconsin, and Minnesota.<sup>182</sup> The EIP had a very difficult time obtaining the data, as it reports:

EIP found that, in general, basic data on state actions that address significant violations of federal environmental law are not readily available to the public . . . .

In many cases . . . citizens can only obtain the information through laborious, file-by-file hand searches. Often these files are scattered among state offices and can only be accessed by citizens through time-consuming [FOIA] or comparable state “sunshine” law requests. In addition, some states charge fees for public information that extend well beyond the means of the average citizen or non-profit organization.<sup>183</sup>

In sum, in terms of transparency and accountability, it should not be a surprise that devolution, which inherently involves a sharing of responsibility for program implementation, has the potential to undermine government accountability and trans-

<sup>180</sup> Freedom of Information Act, 5 U.S.C. § 552 (2000). For example, New York’s Freedom of Information Law (FOIL) provides for access to state-held information under various circumstances. N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 2005); PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE & PRACTICE §§ 5.9-5.11 (West Publishing 2d ed. 1998).

<sup>181</sup> ENVIRONMENTAL INTEGRITY PROJECT, ASSESSING STATE ENFORCEMENT: TOO MANY CLAIMS, TOO LITTLE DATA 2 (April 2003). Among other advantages compared to at least some other NGOs, the EIP has support from the Rockefeller Brothers Fund, and its Executive Director is a former high-ranking EPA enforcement official. See ENVIRONMENTAL INTEGRITY PROJECT, ABOUT EIP, at <http://www.environmentalintegrity.org/page1.cfm> (last visited Feb. 17, 2005).

<sup>182</sup> ENVIRONMENTAL INTEGRITY PROJECT, *supra* note 181, at 2.

<sup>183</sup> *Id.*

parency. As one commentator has noted, "[o]ne of the hallmarks of third-party government is difficulty in achieving accountability of performance and results."<sup>184</sup> The purported advantages of a federal system (flexibility, competition, etc.) are "accompanied by immense accountability and management challenges."<sup>185</sup>

Further, the intuitive truth that it is, and should be, easier for the EPA to manage the data its regions generate than to manage data from all of the states has proven all-too-true in practice. While experience has shown that the EPA faces an enormous challenge in developing and managing compliance-related data compiled by its own offices,<sup>186</sup> these challenges appear to be magnified considerably by reliance on a federal regulatory structure that incorporates most of the fifty states as its primary implementers, but that lacks the mechanisms to collect, manage, and disseminate state information effectively. The fact that, according to the EPA and ECOS, states are responsible for the "collection and submission of [eighty-three to ninety-nine] percent of the environmental pollutant data contained in six key EPA data systems [air pollution stationary sources, air pollution ambient sources, drinking water, wastewater discharges, waterway quality, and hazardous waste]," and similarly conduct more than eighty percent of all enforcement,<sup>187</sup> raises the stakes in terms of grappling with these data-related issues in order to enhance accountability and transparency in our cooperative federal system.

The consequences have been disconcerting for those who are interested in understanding what government is doing and the results it is producing (i.e., in government transparency and accountability). As the NAPA panel concluded:

Most significantly, EPA and state data systems are hard to use . . . for evaluating the environmental and compliance performance of individual facilities, groups of facilities, and responsible government agencies. As a result, Congress, EPA, state agencies, state legislatures, and the public cannot readily eval-

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<sup>184</sup> FREDERICKSON, *supra* note 122, at 5; Behn, *supra* note 1, at 73.

<sup>185</sup> FREDERICKSON, *supra* note 122, at 10. In the environmental arena, the architects and proponents of the recast state/federal partnership anticipated these concerns to some extent, highlighting the importance of accountable devolution.

<sup>186</sup> See *supra* note 132.

<sup>187</sup> ENVIRONMENTAL COUNCIL OF STATES & U.S. EPA, ENVIRONMENTAL POLLUTANT REPORTING DATA IN EPA'S NATIONAL SYSTEMS: DATA COLLECTION BY STATE AGENCIES 1 (Sept. 30, 1999).

uate the effectiveness, efficiency, or equity of state and EPA enforcement and compliance assistance programs.<sup>188</sup>

There is the potential for improved data collection, reporting, and dissemination to redress many of the problems discussed in the text, and it is not my intention to paint an overly dismal picture of the complications that data management in our federal system creates for government accountability and transparency.<sup>189</sup> At a basic level, some of the key tasks are well understood. To quote the 2001 NAPA panel: “EPA and the states should ensure the accuracy of the data . . . by standardizing definitions, adopting common data standards, developing compatible data-sharing systems, and establishing consistency checks and other automated systems that will minimize post-collection debates over accuracy.”<sup>190</sup> Further, there are signs of significant progress on many data-related fronts.<sup>191</sup>

However, despite these positive developments, the underlying reality appears to be that our use of a cooperative federalism model has had very real and significant costs in terms of the accountability and transparency of governance. The extent of devolution suggests that these costs will continue to be substantial unless and until we more fully develop “federal agency capacity to understand how to manage performance effectively in a federalist system,”<sup>192</sup> and the related state will and capacity to operate

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<sup>188</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 3. Other observers have reached similar conclusions. *See, e.g.*, U.S. GAO, ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS 6 GAO/RCED-98-113 (May 1998) (noting that “most of the alternative [compliance] strategies GAO examined either were not being systematically evaluated or were still being assessed on the basis of outputs . . . rather than results.”). The GAO identified the following as “key barriers” to program evaluation: (1) absence of baseline data; (2) difficulty of quantifying outcomes; and (3) difficulty in establishing causal links. *Id.*

<sup>189</sup> Some commentators, such as Professor Metzenbaum, have found that “[t]he quality and quantity of information states provide the public has improved markedly since 1995 [the onset of the NEPPS].” METZENBAUM, *supra* note 98, at 20-21 (identifying the Illinois Fiscal Year 2001 self-assessment, and reports from Maryland, Connecticut, and New Jersey as particularly good). To some extent, the question of information dissemination is a half-empty/half-full issue. It is clear that some progress has been made, but it also is clear that much remains to be done, and devolution has complicated the challenge considerably.

<sup>190</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 24. There also has been at least some progress in reaching agreement on other issues, such as the question of what should be measured.

<sup>191</sup> METZENBAUM, *supra* note 98, at 52.

<sup>192</sup> *Id.* In addition to collecting, managing, and disseminating state data, the EPA also could add value by providing national analyses concerning priority compliance-

as effective partners in this system.<sup>193</sup>

*B. The EPA’s Expanding Enforcement Tool Box and Some Potential Implications for Accountability and Transparency*

In recent years, the EPA has expanded its “tool box” for promoting compliance with the environmental laws in significant ways. Traditionally, the EPA’s official policy for promoting compliance fit within what sometimes is characterized as a “deterrence-based” model. That is, the EPA sought to identify significant violators and then pursued such violators through formal enforcement actions that sought to penalize the violators by imposing sanctions that exceeded the economic benefit the violators reaped through non-compliance, while also requiring a timely return to compliance.<sup>194</sup> More recently, the EPA has substantially expanded its enforcement tool box to include a variety of “compliance assistance” strategies (EPA initiatives to provide educational and technical assistance, etc., that will facilitate compliance) as well as a menu of “compliance incentive” approaches (initiatives that offer violators a variety of “carrots,” such as reduced penalties, including in some cases no penalty at all, in exchange for various “beyond compliance” and other commitments by violators) in an effort to provide a more cooperative govern-

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related issues that require attention, and by providing data regarding successful initiatives that are worth replicating.

<sup>193</sup> While many states have upgraded their capacity substantially in recent years, significant gaps exist. *See generally* RECHTSCHAFFEN & MARKELL, *supra* note 68. Devolution often is claimed to enhance transparency by making decision-making more localized. *See, e.g., id.* at 33-34. One of my suggestions in this article is that this oft-stated rationale for devolution may not hold in all contexts and deserves more contextualized scrutiny than it sometimes receives.

<sup>194</sup> *See, e.g.,* U.S. EPA, OFFICE OF ENFORCEMENT, PRINCIPLES OF ENVIRONMENTAL ENFORCEMENT 2-3 (1992) [hereinafter U.S. EPA, PRINCIPLES OF ENVIRONMENTAL ENFORCEMENT]; U.S. EPA, Policy on Civil Penalties (Feb. 16, 1984). The reality is considerably different from theory in the sense that the EPA has historically used a blend of enforcement approaches that included formal enforcement actions, but the agency also included forms of cooperation and a wide variety of informal strategies to promote compliance. *See* Rechtschaffen & Markell, *supra* note 68, at 81-83 (discussing “environmental enforcement as a hybrid”); Kagan et al., *supra* note 89, at 65 (noting that “regulators tailor facility-level permits and informal orders to individual mills’ inputs, technologies, surrounding environmental exigencies, and investment cycles . . . . In no jurisdiction do regulations and regulators make all facilities march exactly together, as in close order drill; rather, like cowboys during a long, slow cattle drive, they prod a group of individuals in the same general direction.”).

ment posture.<sup>195</sup>

This Part suggests that while there are many reasons to be optimistic about the promise of the “expanded tool box” approach,<sup>196</sup> there are reasons to believe that this quite central aspect of contemporary governance,<sup>197</sup> like devolution, has the potential to undermine government transparency and accountability. The mere increase in tools and approaches adds a *layer of complexity* to governance that has the potential to increase accountability and transparency concerns.<sup>198</sup> Further, the existence of a variety of approaches offers secondary opportunities for reductions in accountability. For example, a regime with multiple possible strategies for promoting compliance expands the potential for government officials to obfuscate—for instance, a government official, assailed for a putatively weak enforcement posture because the “enforcement numbers” (cases brought, penalties collected, etc.) are down, might seek to *deflect* this criticism by pointing to the array of other enforcement tools being used, such as compliance assistance, or compliance incentives policies that forego penalties in exchange for certain other types of desired regulated party behavior.<sup>199</sup> Ferreting out the truth of such claims may be quite difficult for the interested onlooker. In addition, as Professor David Dana and others have suggested<sup>200</sup> the *character* of many of the new tools is contractarian in nature; that is, these tools seem potentially to increase the influence of regulated parties and diminish the role of interested members of the public.<sup>201</sup> Finally, while accountability and performance measures seemingly have the potential to ameliorate these concerns

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<sup>195</sup> See *infra* note 215; Paddock, *supra* note 64, at 244 (noting that the EPA has turned to more compliance-based approaches); ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 19 (dividing compliance programs into four basic types: (1) enforcement actions, (2) compliance assistance, (3) compliance incentives, and (4) beyond-compliance incentives).

<sup>196</sup> See *infra* Part II.B.2.

<sup>197</sup> These types of developments do not appear to be unique to the EPA. See *supra* note 24 and accompanying text.

<sup>198</sup> Levine & Forrence, *supra* note 1, at 185 (noting that complexity can present high information, monitoring, and organization costs and that such costs “create ‘slack,’ which shields officials from accountability to the general polity”); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1548-49 (1999) (suggesting that the risk of capture may be particularly great in the environmental arena because of the complexity of environmental regulation).

<sup>199</sup> See *supra* note 95.

<sup>200</sup> See, e.g., David A. Dana, *The New ‘Contractarian’ Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35 (2000).

<sup>201</sup> *Id.* at 52-57.



(for example by providing information about government and regulated party performance that enables the public to understand what government is doing and why, what it is accomplishing, and how the compliance behavior of regulated parties has changed), *existing measures of performance* do not seem up to the task at the present time of delivering accountability and transparency to the degree needed to allay the preceding concerns. If anything, at least for the short term, the evolution in performance measures paradoxically seems to have potential to exacerbate accountability and transparency issues, to the extent that reduced emphasis on activity measures is allowed without sufficient progress in implementing outcome-based measures.<sup>202</sup> In short, there are a variety of reasons why it is plausible that the EPA’s expansion of its enforcement tool box may bring with it significant potential to diminish accountability and transparency in governance.

### 1. *The Traditional Enforcement Tool Box*

Traditionally, the EPA’s official policy for promoting compliance fit within what is sometimes characterized as a “deterrence-based” model.<sup>203</sup> Key elements of this model included: (1) monitoring compliance by the regulated community; (2) identifying violations; and (3) pursuing timely and appropriate enforcement actions against significant violators.<sup>204</sup> The EPA has issued a series of documents over the past twenty or so years in which it has

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<sup>202</sup> See *infra* notes 258-61; U.S. EPA, MANAGING FOR BETTER ENVIRONMENTAL RESULTS: A TWO-YEAR ANNIVERSARY REPORT ON REINVENTING ENVIRONMENTAL PROTECTION 1 EPA 100-R-97-004 (1997). The gap between desired and actual levels of accountability and transparency, and the inadequacy of traditional measures in narrowing this gap, is a key reason why interest in new measures has been so great.

<sup>203</sup> See *supra* note 89.

<sup>204</sup> See, e.g., U.S. GAO, ENVIRONMENTAL PROTECTION, *supra* note 120, at 4. U.S. EPA, RCRA CIVIL PENALTY POLICY 5 (June 2003) (stating that its purposes are to “ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008 [of RCRA]; that penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained”).

The term “significant violators” is a term of art. See *infra* note 207. The EPA does not pursue the vast majority of violators through formal enforcement actions. Instead, it uses a variety of strategies, such as warning letters, to try to promote compliance without the need for formal enforcement. See RECHTSCHAFFEN & MARKELL, *supra* note 68, at 64.

articulated and elaborated upon the details of its approach to deterrence-based enforcement. In its 1992 *Principles of Environmental Enforcement*, for example, the EPA outlines what it considers to be four key elements of an effective enforcement program: “(1) There is a good chance violations will be detected; (2) The response to violations will be swift and predictable; (3) The response will include an appropriate sanction; and (4) Those subject to requirements perceive that the first three factors are present.”<sup>205</sup>

The EPA has developed a variety of strategies to implement this four-part framework. For example, the agency established protocols for conducting various types of inspections.<sup>206</sup> The agency has similarly established guidelines concerning the types of violations that warrant formal enforcement action, as well as guidelines concerning the types of sanctions that are appropriate.<sup>207</sup> The EPA’s definitions of “timely and appropriate” enforcement activity are important elements of this framework.<sup>208</sup>

<sup>205</sup> U.S. EPA, *PRINCIPLES OF ENVIRONMENTAL ENFORCEMENT*, *supra* note 194, at 2-3; Michael Stahl, *Beyond the Bean Count: Measuring Performance of Regulatory Compliance Programs*, 28 *THE PUB. MANAGER* 31 (1999); Kagan et al., *supra* note 89, at 61 (noting that under this deterrence model firms “abate environmental impacts only as required to by law and when they believe that noncompliance might be detected and penalized”). Research suggests that the United States tends to be more deterrence-oriented than many other countries, including Canada. Kathryn Harrison, *The Regulator’s Dilemma: Regulation of Pulp Mill Effluents in the Canadian Federal State*, 24 *CANADIAN J. POL. SCI.* 3 (1996) (finding that United States officials enforced their regulations more legalistically and required more frequent penalties than their Canadian counterparts, and that compliance was better in the United States); Kagan et al., *supra* note 89, at 62-63 (noting that “pulp and paper officials at a corporation with mills in Canada and the United States contrasted the ‘enforcement frenzy’ in the United States with the partnering approach regulatory officials took in Canada” while finding “no consistent difference among regulatory jurisdictions in the environmental performance of pulp mills”). As is suggested below, the United States is by no means monolithic in its approach. RECHTSCHAFFEN & MARKELL, *supra* note 68, at 149; Kagan, et al., *supra* note 89, at 62-63, n.18 (noting a contrast between the approaches and attitudes of state and federal officials).

<sup>206</sup> EPA has also developed “Environmental Audit Protocols” that are intended to assist regulated parties with conducting their own environmental audits. *See, e.g.*, U.S. EPA, *PROTOCOL FOR CONDUCTING ENVIRONMENTAL COMPLIANCE AUDITS FOR MUNICIPAL FACILITIES UNDER U.S. EPA’S WASTEWATER REGULATIONS* (2000).

<sup>207</sup> *See, e.g.*, *OIG SPECIAL REPORT*, *supra* note 128, at 31 (noting that the EPA’s various enforcement policies identify the most significant violators, and that most policies call these regulated entities “significant non-compliers,” except for the air program, which calls them high priority violators. The OIG also notes that the “exact criteria for significant non-compliers vary with each statute.”); U.S. EPA, *RCRA CIVIL PENALTY POLICY* 5 (June 2003).

<sup>208</sup> For a more in-depth discussion of these issues, see, for example, RECHTSCHAF-

The EPA has traditionally taken the position that for significant violations that warrant enforcement action (and the EPA has defined significant violations under its various statutory schemes),<sup>209</sup> a penalty should be recovered that requires the violator to disgorge the economic benefit it gained from its violations. The EPA, in the words of one commentator, “has made the recapture or disgorgement of this financial gain—or ‘economic benefit’—a cornerstone of its civil penalty policy for environmental enforcement.”<sup>210</sup> In addition, the EPA’s policies also require the violator to pay an additional amount as a penalty so that the violator is in a worse financial position than a regulated party that met its environmental obligations.<sup>211</sup> The EPA refers to this additional component as the “gravity” component of a penalty.<sup>212</sup>

The primary goals of a deterrence-based model include: (1) specific deterrence—the specific violator pursued through an enforcement action will learn its lesson and not violate again; and (2) general deterrence—other regulated parties will take heed of the government’s enforcement presence and activity and will be more likely to comply with their legal obligations as a result.<sup>213</sup> This model is based on the theory that regulated parties are rational economic actors and, as a result, the goal of enforcement agencies is to “make penalties high enough and the probability of detection great enough that it becomes economically irrational for regulated entities to violate the law.”<sup>214</sup>

The EPA has lauded its deterrence-based approach on numerous occasions over the years. In a 1995 article entitled *Enforce-*

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FEN & MARKELL, *supra* note 68, at 100-03; *see also* U.S. EPA, POLICY ON CIVIL PENALTIES (Feb. 16, 1984); U.S. EPA, REVISED INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY, 25 ELR 35618 (Mar. 1, 1995).

<sup>209</sup> For the EPA’s definition of “significant violation” *see*, for example, U.S. EPA, OPERATING PRINCIPLES FOR AN INTEGRATED EPA ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM 5 (1996) [hereinafter EPA OPERATING PRINCIPLES]; *see also* sources cited *supra* note 207.

<sup>210</sup> Jonathan S. Shefftz, *EPA’s Economic Benefit Analysis Policy and Practice*, NAT. RESOURCES & ENVT. 74 (Fall 2004). There has been considerable debate about how best to calculate economic benefit. This debate has raised a host of interesting questions, but these questions are beyond the scope of this article. *Id.*

<sup>211</sup> *See, e.g.*, EPA REVISED POLICY FRAMEWORK, *supra* note 139. For an in-depth discussion of this framework, *see* RECHTSCHAFFEN & MARKELL, *supra* note 68, at 98-108.

<sup>212</sup> *See, e.g.*, EPA REVISED POLICY FRAMEWORK, *supra* note 139.

<sup>213</sup> RECHTSCHAFFEN & MARKELL, *supra* note 68, at 60.

<sup>214</sup> *Id.*

*ment in Transition*, Michael Stahl, then an EPA Deputy Assistant Administrator for the EPA's enforcement office, summarized the EPA's views about the benefits of the deterrence-based model:

Over the last quarter century, enforcement based on deterrence has been a critical factor in motivating business toward environmentally responsible behavior. Through rigorous inspection, detection of violations, and the resulting sanctions and penalties, companies are forced to correct violations and discouraged from future noncompliance . . . .

This level of deterrence-based enforcement activity has provided a strong source of motivation for regulated entities. Fear of enforcement action and its attendant public embarrassment has caused many companies and facilities to move into compliance. Deterrence has prevented many noncomplying parties from gaining an unfair competitive advantage over those who comply. And it has helped drive the application of technologies that can improve business performance and profitability. Deterrence will always have an important role in environmental protection.<sup>215</sup>

## 2. *Expansion of the Enforcement Tool Box in Recent Years*

Although agency officials have continued to highlight the importance of a deterrence-based enforcement presence, in recent years the EPA has evinced increasing willingness to depart from its traditional deterrence-based approach, or at least to expand its enforcement tool box to include other strategies intended to promote compliance.<sup>216</sup> Indeed, in the mid-1990s the EPA significantly revamped the structure of its enforcement office, in part because of its desire to pursue a more flexible, and more integrated, approach to its environmental enforcement and compliance work.<sup>217</sup> In his 1995 *Transition* article, EPA's Stahl noted

<sup>215</sup> Michael M. Stahl, *Enforcement in Transition*, THE ENVTL. FORUM, Nov.-Dec. 1995, at 19. For similar views from a former head of the EPA's enforcement office, see Steven A. Herman, *NCSL Study Finds that State Environmental Audit Laws Have no Impact on Company Self Auditing, and Disclosure of Violations*, NAT'L ENVTL. ENFORCEMENT J., Dec. 1998-Jan. 1999, at 18; Steven A. Herman, *EPA's FY 1997 Enforcement and Compliance Assurance Priorities*, NAT'L ENVTL. ENFORCEMENT J., Feb. 1997, at 3-5.

<sup>216</sup> EPA OPERATING PRINCIPLES, *supra* note 209; Paddock, *supra* note 64, at 244 (noting that "environmental agencies have increasingly turned to more collaborative methods of assuring compliance"); *see also id.* at 248 (noting that "[g]overnment agencies have, in the last few years, begun to use a 'systems approach' for their enforcement and compliance programs").

<sup>217</sup> *See, e.g.*, REPORT OF THE EPA ENFORCEMENT REORGANIZATION TASK FORCE, INTEGRATED ENFORCEMENT APPROACHES FOR EPA (Sept. 1, 1993); EPA

that:

[E]nforcement is moving beyond its adversarial and antagonistic beginnings. For the past several years, practitioners of environmental enforcement, from Washington to state capitals to city halls, have begun to transform their philosophy and methods, redefining the roles of government, business, and the public in ensuring environmental compliance and thereby improving environmental protection.<sup>218</sup>

Mr. Stahl summarized some of the key reasons for the EPA’s decision to use a more integrated approach to enforcement. He noted that: (1) deterrence is “largely reactive” in that its focus is on identifying and addressing violations after they occur – it prevents future violations “only as a by-product rather than through proactive approaches;”<sup>219</sup> (2) its focus largely is on punishment (sticks) and is incomplete because it does not offer carrots to encourage desired behavior because it does not focus on “enhancing or rewarding voluntary compliance”;<sup>220</sup> and (3) it is increasingly clear that the “full coverage” paradigm on which it purportedly is founded (i.e., complete coverage of the regulated universe and “uniform enforcement of the law”) is an “unattainable ideal” because of the size of the regulated community universe and limited government resources.<sup>221</sup>

In his *Transition* article, Mr. Stahl identified use of a more diverse set of tactics as a key element of the EPA’s effort to transform its approach to enforcement. Mr. Stahl highlighted

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OPERATING PRINCIPLES, *supra* note 209, at 2. The EPA changed the name of its Office of Enforcement to the Office of Enforcement and Compliance Assurance (OECA) as part of its effort to demonstrate its plan to pursue a wider range of compliance-promotion approaches. RECHTSCHAFFEN & MARKELL, *supra* note 68, at 160. The EPA’s decision to recast itself has not taken place in a vacuum. For support for changes of this sort, see, for example, MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 132 (2000); LeRoy Paddock & Suellen Keiner, *Mixing Management Metaphors: The Complexities of Introducing a Performance-Based State/EPA Partnership System into an Activity-Based Management Culture*, (2000) at [http://www.napawash.org/pc\\_economy\\_environment/epafile11.pdf](http://www.napawash.org/pc_economy_environment/epafile11.pdf).

<sup>218</sup> Stahl, *supra* note 215, at 19.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* Mr. Stahl also asserts that a problem with deterrence-based enforcement is that the “definition of success tends to devolve to counting activities (the number of enforcement actions taken or penalty dollars collected)” rather than paying attention to environmental protection and that this leads to confusion over ends and means. *Id.* There are significant questions, at least in my view, about the merits of this concern, at least conceptually, but there is no need to address this issue in this article.

“compliance assistance” strategies intended to “prevent violations,” “compliance incentive” programs intended to “encourage and facilitate responsible behavior,” and “programs to recognize excellence in environmental management.”<sup>222</sup> Over the past decade, the EPA has initiated a large variety of new initiatives that fit into one or more of these categories as part of its effort to move toward an “integrated compliance system,”<sup>223</sup> or towards what the EPA has characterized as “a smart enforcement” framework.<sup>224</sup> These include the Agency’s Supplemental Environmental Projects (SEPs) Policy,<sup>225</sup> its “Self-Audit” Policy,<sup>226</sup> its Small Business and Small Local Government compliance policies,<sup>227</sup> and its Performance Track program.<sup>228</sup> We are into our second or third generation or iteration of some of these initiatives as the EPA has refined them over time.<sup>229</sup>

Experimentation with a variety of strategies to promote compliance seems to be a particularly sensible strategy in a context such as compliance-promotion, which is characterized by signifi-

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<sup>222</sup> *Id.* Mr. Stahl also mentions “affirmative use of compliance data to inform the public about environmental performance of companies or facilities.” *Id.*; see also EPA OPERATING PRINCIPLES, *supra* note 209, at 3 (discussing “compliance assistance” and “compliance incentive” approaches).

<sup>223</sup> Stahl, *supra* note 215, at 19, 20-21. NAPA and the ELI have observed that these initiatives have proliferated. ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 2 (“Over the past several years, state compliance assistance services . . . and initiatives promoting beyond-compliance behaviors have proliferated.”).

<sup>224</sup> U.S. EPA, FISCAL YEAR 2003 ANNUAL REPORT, Goal 5, p.1. The EPA defines “smart enforcement” as “the use of the most appropriate enforcement or compliance tools to address the most significant problems to achieve the greatest impact for environmental protection.” *Id.*

<sup>225</sup> See *supra* notes 59-63.

<sup>226</sup> Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

<sup>227</sup> Small Business Compliance Policy, 65 Fed. Reg. 19,630 (Apr. 11, 2000) (the EPA initially issued this Policy in 1996, 61 Fed. Reg. 27,984 (June 3, 1996), modified it in 1999, 64 Fed. Reg. 41,116 (July 29, 1999), and then revised it again in 2000); Small Local Governments Compliance Assistance Policy, 69 Fed. Reg. 31,278 (June 2, 2004). The EPA called its initial effort to develop a special compliance policy for small governments its “Policy on Flexible State Enforcement Responses to Small Community Violations.” 67 Fed. Reg. 3185-01 (Jan. 23, 2002).

<sup>228</sup> National Environmental Performance Track Program, 69 Fed. Reg. 21,737-01 (Apr. 22, 2004). Performance Track is an initiative that the EPA launched in 2000 and as of the issuance of EPA’s second annual progress report in 2004, included 344 members and was intended to “recognize[ ] and reward[ ] facilities that consistently exceed regulatory requirements, work closely with their communities, and excel in protecting the environment and public health.” U.S. EPA, PERFORMANCE TRACK SECOND ANNUAL PROGRESS REPORT: BUILDING ON THE FOUNDATION 3 (2004).

<sup>229</sup> This is true for the EPA’s Self-Auditing policy, the SEPs policy, and the Small Business Compliance policy, among others. See *supra* notes 59, 226-27.

cant uncertainty about the relative effectiveness of different approaches.<sup>230</sup> Nevertheless, with a multiplicity of approaches come opportunities for internal confusion about how best to match means to ends, as well as challenges in monitoring performance. Furthermore, it becomes potentially more complicated for the public to understand what government is doing and accomplishing.

The “contractarian” nature of many of the new tools in EPA’s tool box, to borrow a term that Professor David Dana has used,<sup>231</sup> has the potential to exacerbate accountability and transparency concerns. Professor Dana characterizes a contractarian approach as consisting of “deals” in which “regulators contractually commit not to enforce some requirements that are formally applicable to the regulated entities in return for the regulated entities’ contractual commitments to take measures not required under existing formal law.”<sup>232</sup> For purposes of this article, I define the contractarian approach more broadly to also include deals in which regulators contractually commit to more mild forms of enforcement, like reduced penalties, in exchange for various types of commitments by regulated parties.<sup>233</sup>

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<sup>230</sup> Kagan et al., *supra* note 89, at 53 (suggesting that enforcement and compliance policy makers and others operate in a context in which there is enormous uncertainty about what works best: “We still know little about why individual corporations behave the way they do in the environmental context, or why some companies but not others choose to move beyond compliance, or what social policy tools are likely to prove most effective in achieving improved corporate environmental performance.”); Paddock, *supra* note 64, at 244-45; ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 17; RECHTSCHAFFEN & MARKELL, *supra* note 68. In the interest of full disclosure, I endorsed experiments with different approaches to environmental governance in the compliance/enforcement arena, among others, a decade ago. See *States as Innovators*, *supra* note 100. Experiments within the context of an “adaptive management” approach that has the capacity to track such experiments and the results they produce, and to adapt accordingly, would seem to be particularly useful. See, e.g., J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 IDAHO L. REV. 385, 402-03 (2002) (describing an “adaptive management framework”). Objective and ongoing program assessment, including viable outcome-focused (performance) measurement, would seem to be a key feature for maximizing the benefit of such experiments.

<sup>231</sup> Dana, *supra* note 200, at 52-57.

<sup>232</sup> *Id.* at 36. Professor Dana ascribes the increasing popularity of a “contractarian” approach to governance to “perceived failings in substantive environmental regulation.” *Id.* He suggests that political divisions have led to paralysis in changing a substantially flawed environmental regulatory infrastructure that is overly complex and rigid, and that contractarian regulation has emerged as a result. *Id.*

<sup>233</sup> As discussed above, the EPA and many states have adopted a number of policies that authorize such contractarian arrangements.

For our purposes, an important feature of such contractarian regulation is that it is “highly decentralized and contextualized.”<sup>234</sup> The efficiencies that such regulation seeks to produce are achieved through “case-by-case negotiations and agreements between regulators and the regulated.”<sup>235</sup> Professor Dana described the EPA’s contractarian strategies as programs that “principally rely on highly particularized, do-it-this-way requirements—requirements that might be dubbed ‘negotiate and control’ rather than ‘command and control.’”<sup>236</sup> Professor Dana voices the concern that this potential “genuine paradigm shift in American environmental regulation” from command and control regulation to contractarian regulation may “entail[ ] greater participation and monitoring costs for environmentalists than does more centralized, command-and-control-style regulation.”<sup>237</sup> In other words, he suggests that this potential paradigm shift in approaches to regulation may have the consequence, unintended or not, of reducing accountability and transparency in governance.

This reduction in accountability may manifest itself in at least three ways. First, regulated parties may gain additional leverage over the disposition of cases.<sup>238</sup> Second, regulators may gain additional discretion to address cases as they believe appropriate—

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<sup>234</sup> *Id.* at 37.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Conventional environmental regulation has been subject to an enormous amount of criticism for being inflexible. The oft-used term is “command and control” regulation. See, e.g., Eric W. Orts, *Reflexive Environmental Law*, 89 Nw. U. L. REV. 1227, 1235-41 (1995).

<sup>237</sup> Dana, *supra* note 200, at 37-38. Jim Salzman and J.B. Ruhl have suggested that increased use of trading approaches has implications for agency/applicant discretion in the context of habitat protection negotiations under the Endangered Species Act, and that environmental groups have complained about lack of public participation in such processes. James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 683-87 (2000). See also Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine-Tuning” Regulatory Reforms*, 37 STAN. L. REV. 1267, 1271-73, 1281-84, 1301, 1323 (1985) (asserting that uniform standards are likely more effective than fine-tuned approaches because of advantages of the former, including: 1) “decreased information collection and evaluation costs;” 2) “greater accessibility of decisions to public scrutiny and participation;” and 3) “reduced opportunities for obstructive behavior by regulated parties”).

<sup>238</sup> Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327 (2004). Some strategies may shift the balance by increasing the monitoring expectations for regulated entities and lead government to reduce or shift its own monitoring resources. While there are good reasons for such shifts, including government resource constraints, there are risks as well. See METZENBAUM, *supra* note 98, at 11.



the surfeit of options may provide additional insulation from public oversight or scrutiny.<sup>239</sup> Third, as indicated above, there is the possibility that the expanded tool box will reduce accountability in the sense that it will relieve pressure on regulators to produce traditional results.<sup>240</sup> Because of these possible consequences, Professor Dana and others have suggested that contractarian approaches are likely to benefit the regulated community and have the potential to disenfranchise the interested public, at least to some degree.<sup>241</sup> The ELI, among others,

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<sup>239</sup> As Professor Robert Kuehn and others have noted, government officials already possess enormous discretion in determining the appropriate enforcement response under a traditional deterrence-based scheme; for example, whether to enforce, the size of penalty to demand and settle for, and the type of injunctive relief that is required. Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2387 (1996). Thus, one question for further research that the breadth of discretion in this context (*i.e.*, the degree of "decentralization" and "contextualization") naturally raises involves the extent to which, if at all, empowering government enforcers to select from a more extensive tool box extends that discretion in a meaningful way. The efforts that the EPA made in the early 1990s to require its staff to document their enforcement approaches in individual enforcement cases would probably be relevant to this analysis. *See, e.g.*, U.S. OFFICE OF INSPECTOR GEN., FOLLOW-UP REVIEW ON EPA'S MITIGATION OF PENALTIES, Report No. E1GMG4-05-6009-4400107 (Sept. 15, 1994) (finding improvements in the EPA's documentation of penalties, among other things).

<sup>240</sup> *See supra* notes 231-37 and accompanying text.

<sup>241</sup> Dana, *supra* note 200, at 52, 53 (suggesting that the "content of contractarian regulation may be more in tune with the . . . agenda of regulated entities than with the agenda of environmentalists." And "[i]t may well be more difficult for environmentalists and environmentally oriented citizens to influence the formation of contractarian environmental regulation than it is for them to influence the formation of command-and-control environmental regulation."); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 144 (1998) (raising similar concerns regarding the EPA's Project XL initiative); Mark Seidenfeld, *Bending the Rules: Flexible Regulation & Constraints on Agency Regulation*, 51 ADMIN. L. REV. 429, 459 (1999) (suggesting that "[a]s regulators' discretion increases, so does the potential for special interest groups to influence agency policy."); Rechtschaffen, *supra* note 238, at 1353 (suggesting that "providing regulators with additional enforcement discretion could exacerbate the already-existing tendency toward special interest influence or domination."). While citizen suits, expanded standing, and judicial "hard look" review have been posited as mechanisms to reduce risks of capture, these oversight mechanisms might not always be available in the EPA's expanded tool box. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (suggesting that standing should be expanded to offset "capture"); Mark Seidenfeld, *A Synco-pated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128 n.239, 129 (1994) (discussing "hard look" review as a way to mitigate concerns about agency capture); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183-84 (1992) (noting that courts highlighted the concern that agencies were "captured"); Matthew D. Zinn, *Policing Environmental Regulatory Enforce-*

has asserted that, more generally, governance via “expanded tool boxes” requires a heightened commitment to accountability and transparency compared to more simple systems of governance: “[b]eyond the general principle of public accountability, integrated compliance demands a particularly high level of openness and public involvement. Transparency is essential to building public confidence in an agency and in the performance of regulated facilities.”<sup>242</sup>

This ELI sentiment concerning the need for enhanced accountability and transparency in a regulatory environment that involves multiple compliance-promotion options raises the question of whether, at least conceptually, an improved (including a more open and transparent) accountability or performance measures regime might help to ameliorate accountability concerns stemming from an expanded EPA tool box that contains several “contractarian” tools. Therefore, it is seemingly propitious that renewed interest in improving accountability regimes has emerged concurrently with heightened interest in expanding government tool boxes. The enactment of the GPRA is only the tip of the iceberg in terms of the interest in strengthening performance measures in order to enhance government accountability, in the environmental arena among others.<sup>243</sup>

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*ment: Cooperation, Capture and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 83-84 (2002) (noting that the risks of capture are particularly high in environmental enforcement context and one reason why Congress created citizen suit provisions).

<sup>242</sup> ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 25. In his article, *A Manifesto for the Radical Middle*, J.B. Ruhl suggests that increased transparency in government decision-making may justify limiting public participation in contractarian types of arrangements. Ruhl, *supra* note 230, at 404-05.

<sup>243</sup> See, e.g., SHELLEY METZENBAUM, MAKING MEASUREMENT MATTER: THE CHALLENGE AND PROMISE OF BUILDING A PERFORMANCE-FOCUSED ENVIRONMENTAL PROTECTION SYSTEM (Brookings Inst. Center for Public Management 1998); Stahl, *supra* note 215; GPRA, *supra* note 139, § (2)(b)(1) (providing that one of the purposes of the act is to “improve the confidence of the American people in the capability of the Federal Government, by systematically holding Federal agencies accountable for achieving program results”); FREDERICKSON, *supra* note 122, at 5 (noting that “[a]ccountability is one of GPRA’s central objectives”). Implementation of the GPRA is still relatively new. *Id.* at 6 (noting that, although it became law in 1993, government-wide implementation did not begin until 1997). Further, while nearly all federal agencies rely on third parties to carry out their work, “there is no systematic approach to managing federal programs in which third parties play significant roles.” *Id.* at 4; METZENBAUM, *supra* note 98, at 11. Nevertheless, at least some commentators suggest that the GPRA has had some successes. FREDERICKSON, *supra* note 122, at 4. Further, at least one observer suggests that “GPRA can lead to improvements in the relationship between federal agencies and the third parties they oversee or with whom they collaborate to produce public services.” *Id.*

The EPA and the states have made a concerted effort in recent years to move from an accountability system that focused primarily on government activities toward a performance-based or results-based approach to management.<sup>244</sup> Traditionally, the EPA and the states focused primarily on measuring inputs (the level of government activity devoted to enforcement, such as numbers of work years) and outputs (the number of government actions, such as inspections, enforcement actions initiated, penalties collected, and the like).<sup>245</sup> In recent years, there has been a push to emphasize “outcome” or other measures more directly related to results—measures, such as compliance rates, which purport to demonstrate the impact of different enforcement and compliance activities.<sup>246</sup> The NAPA panel, for example, notes “the states’ interest in focusing on compliance rates rather than the numbers of enforcement cases initiated.”<sup>247</sup>

There is good reason for expanding performance measures to include measures that provide information on outcomes, as numerous observers have noted. Professor William Gormley, for example, commented that “[o]utputs do not tell policymakers or managers whether progress has been made towards achieving an agency’s stated goals. At worst, ‘bean-counting’ becomes an end in itself, with outputs or ‘beans’ displacing statutory goals as values to be maximized. This is highly dysfunctional.”<sup>248</sup>

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at 8. Mr. Frederickson urges federal agencies to “use GPRA as the vehicle through which federal agencies expand their monitoring activities to include the universe of third-party relationships.” He offers a number of recommendations on how to advance this goal. *Id.* at 25-27 (suggesting that the OMB should require that agencies include information on third party collaboration).

<sup>244</sup> See, e.g., GPRA, *supra* note 139; see also METZENBAUM, *supra* note 98, at 20-21 (summarizing recent development in the EPA and state relationship that emphasizes outcome indicators for performance rather than the process).

<sup>245</sup> See *supra* note 99; EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 10 (noting that “[t]he primary accountability mechanism used by Congress and EPA [for the states] has . . . been counting activities that states provide for EPA’s media-specific databases, such as numbers of permits, inspections, enforcement actions, and penalty dollars.”); JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 119 (1995) (noting that “EPA’s . . . system for evaluating the successfulness of its enforcement work is based on a set of numerical indicators. EPA officials keep a record of the number of administrative orders, civil referrals, and criminal referrals issued or made by the agency over the course of a fiscal year, as well as the total amounts of administrative and civil penalties it has assessed against environmental violators.”).

<sup>246</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 10.

<sup>247</sup> *Id.* at 27.

<sup>248</sup> *Id.* at 12 (quoting Professor William Gormley). The NAPA panel offered a

There has also been some progress in expanding accountability measures so that such measures provide information about the outcomes of government performance, as well as information about the nature and level of government activities.<sup>249</sup> Further, the EPA has reported increased use of outcome measures in recent years.<sup>250</sup>

But, at least in the short term, there are reasons to believe that the burgeoning industry of performance measurement is unlikely to be a panacea that will fully ameliorate concerns about government accountability and transparency. As experience has shown, the move to a performance-based approach is not likely to be seamless, but instead is likely to encounter numerous pitfalls. To identify a few of the challenges that are inherent in moving to

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similar perspective concerning the challenges the EPA faces in the performance measures realm:

The data systems that currently support EPA and state compliance and enforcement programs are focused almost exclusively on counting types of enforcement actions, compliance assistance initiatives, and other regulatory activities . . . . [T]he information provides little insight into how EPA and state enforcement and compliance initiatives contribute to improving environmental quality, increasing compliance with regulatory requirements, or producing regulatory fairness across industries, among states, and within communities. As a result, Congress, EPA, state agencies, state regulations, the regulatory community, and the public cannot readily assess the effectiveness, efficiency, or fairness of federal and state environmental programs.

*Id.* at 26.

<sup>249</sup> See, e.g., Memorandum from U.S. EPA & ECOS, to Senior Environmental Protection Agency Officials & Senior State Environmental Officials (Aug. 20, 1997) (on file with author) (Joint Statement between the EPA & ECOS reaffirming state and EPA “commitment to use core performance measures as tools to track progress in achieving environmental results”); cf. ENVIRONMENTAL INTEGRITY PROJECT, ASSESSING STATE ENFORCEMENT: TOO MANY CLAIMS, TOO LITTLE DATA, *supra* note 181, at 3 (suggesting that the paradoxical “perfect is the enemy of the good” phenomenon may be undermining progress: “We have reached the point where the search for a consensus behind an ideal set of performance measures for state and federal environmental agencies has been used to justify postponing good practices that could be put into place today.”).

<sup>250</sup> See, e.g., U.S. EPA, FISCAL YEAR 2003 ANNUAL REPORT, ch. 6 at 2 (noting that “[a]gency efforts in FY 2003 increased the percentage of the Agency’s annual goals and measures that focus on environmental outcomes”); OIG SPECIAL REPORT, *supra* note 128, at 22-23 (noting that the EPA’s Criminal Investigative Division [CID] began using additional enforcement measures in 2003, notably aggregate amounts of pollution reduced or curtailed as a result of criminal proceedings, which the CID apparently began to collect in 2000 and 2001, but which it found were sufficiently reliable beginning in FY 2002 to include in the annual performance reports); EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 13 (noting that OECA has attempted to capture some outcomes in its “Core Enforcement Measures”).

such a new system,<sup>251</sup> new measures need to be agreed upon,<sup>252</sup> complexities inherent in the measures themselves need to be addressed,<sup>253</sup> strategies for monitoring performance in light of the new measures need to be developed and implemented,<sup>254</sup> and decisions need to be made about how to integrate such data into existing data reporting schemes.<sup>255</sup>

The ELI’s 2003 report on enforcement reflects the “in progress” nature of the effort to expand performance measures in order to enhance accountability.<sup>256</sup> The report notes a widely held “lack of confidence” in state performance in the compliance realm and suggests that this lack of confidence in part “may . . . reflect [state agencies’] failure to obtain data for measuring whether new compliance initiatives are producing improved environmental results . . . .”<sup>257</sup> The report points out that, for example, while states have

[C]ommitted significant resources to compliance assistance . . . [u]nfortunately, the effectiveness of the states’ compliance assistance efforts is simply measured by numbers of contacts with the regulated community. Instead, given the large amount of resources dedicated to these programs in all five states, more robust ways of determining the value of various approaches to compliance assistance need to be developed.<sup>258</sup>

<sup>251</sup> For discussions of these challenges, see METZENBAUM, *supra* note 243; Stahl, *supra* note 215. An expansive body of literature has grown up around the issue of performance measurement. The purpose of this discussion is limited to attempting to highlight some of the issues that shifting to a new performance-based system may raise in terms of government accountability.

<sup>252</sup> See EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 27.

<sup>253</sup> See, e.g., *infra* notes 263-64 regarding compliance rates.

<sup>254</sup> In some cases this is likely to be a significant challenge because the variety of government activities has expanded. Measuring the impact of such changes is likely to be difficult and potentially resource-intensive. See, e.g., Peter J. May, *Performance-Based Regulation and Regulatory Regimes: The Saga of Leaky Buildings*, 25 L. & POL’Y 381, 392-95 (Oct. 2003) (noting that it sometimes can be “prohibitively costly to develop accurate monitoring technology for gauging performance”).

<sup>255</sup> See *supra* Part II.A. regarding the challenges associated with managing reporting schemes more generally.

<sup>256</sup> ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56.

<sup>257</sup> *Id.* at 4.

<sup>258</sup> *Id.* at 6. The 2001 NAPA panel is of the same view:

[W]hen states identified the measures they used to “calculate success of compliance [assistance] programs for the time period 1995-1999,” the most common was on-site visits. This indicator has two problems. First, the number of visits provides little information about how these visits really affected compliance, much less how they affected environmental outcomes. Second, the number of visits reported relative to the number of regulated

ELI concludes that “[a]ll five states lack meaningful measures for evaluating the effectiveness of their compliance assistance programs in terms of pollution reduced or other environmental outcomes. The most common measure—number of contacts with the regulated community—provides little information about the efficacy of compliance assistance initiative efforts.”<sup>259</sup>

The ELI reached similar conclusions concerning the states’ leadership programs for high performers: “All five states lack useful data on the environmental outcomes produced by their voluntary leadership programs.”<sup>260</sup> The EPA’s Office of Inspector General similarly has found that the “EPA lacks outcome measures that would allow EPA and others to evaluate the environmental results achieved.”<sup>261</sup>

Many states, among other parties, have identified compliance rates as one of the best measures (and perhaps the best measure) of enforcement performance. NAPA, for example, found that the “EPA and the states believe that compliance rates could be an important measure of program success . . . .”<sup>262</sup> Yet, the calculation of such rates in a credible way is a significant challenge. NAPA, like many others, has noted that “calculating compliance rates is a difficult task.”<sup>263</sup> NAPA concluded that “far more work

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facilities suggests that the compliance program applies to a small sub-set of the regulated universe.

EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 27-28.

<sup>259</sup> ENVIRONMENTAL LAW INSTITUTE ET AL., *supra* note 56, at 63.

<sup>260</sup> *Id.* at 64. The challenges associated with an expanded tool box in the cooperative federalism context extend well beyond performance measures to include planning and implementation as well. ELI found in its five state study that there is a significant divide between the way in which states should implement an integrated compliance approach and current operations. For example, ELI concluded that states should rely on a “broad range of compliance tools, including technical and compliance assistance, enforcement, and leadership programs” and that in “deciding when to deploy these tools, states need an integrated strategy that first identifies key environmental problems and then enables managers to select the tool or tools best suited to solving the problems.” *Id.* at 68. ELI’s conclusion was that “these five states are only beginning to develop such integrated compliance programs.” *Id.*

<sup>261</sup> OIG SPECIAL REPORT, *supra* note 128, at 11; Paddock, *supra* note 64, at 249-50 (suggesting that the EPA has failed to put into place measures of performance that monitor the results of its arsenal of approaches in a timely and accurate way). The EPA reports that its use of outcome measures has increased in recent years. *See, e.g.*, U.S. EPA, FISCAL YEAR 2003 ANNUAL REPORT ch. 6 at 2 (noting that “[a]gency efforts in FY 2003 increased the percentage of the Agency’s annual goals and measures that focus on environmental outcomes”).

<sup>262</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 27.

<sup>263</sup> *Id.* The NAPA panel elaborates on the difficulty of determining compliance rates as follows:

needs to be done on refining the definitions of data elements and developing a method for calculating compliance rates before using them as a reliable indicator of program effectiveness.”<sup>264</sup>

Further, another detail of implementation that will likely influence the efficacy of new measures involves the extent to which the rush to these new measures comes at the expense of retention of traditional measures. I discuss above some of the significant challenges involved with effectively managing data relating to existing measures of performance.<sup>265</sup> The question here is whether new measures will result in less attention to “getting traditional measures right.” Some states, among other parties, have objected to having to do both—to having to collect and report outcome and other performance-based data in addition to their traditional obligation to do the same for activity data.<sup>266</sup> Further, some parties have asserted that traditional enforcement outputs

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Compliance rates are notoriously difficult to calculate . . . because they rely on a number of data elements that must be explicitly and consistently defined . . . . [The] EPA and the states believe that compliance rates could be an important measure of program success, but far more work needs to be done on refining the definitions of data elements and developing a method for calculating compliance rates before using them as a reliable indicator of program effectiveness. It is important that the EPA and the states work both separately and together on developing more rigorous, reliable, and uniform approaches to calculating and comparing compliance rates.

*Id.* NAPA’s characterization of the ECOS report discussed above, *see* EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 24, seems to reflect considerable skepticism of the ECOS findings:

[T]he ECOS report purports to show that almost half the state programs responding to the survey achieved compliance rates between 90 and 100 percent. Although this information is useful in understanding the states’ views of compliance rates, it does not indicate whether any of the states have overcome the obstacles noted above or whether they have found a reliable method of calculating accurate compliance rates.

*Id.* (citation omitted); *see also* Tiffin Shewmake, Calculating and Communicating Environmental Compliance Rates, ECOSTATES 23 (Spring 2003), available at <http://www.complianceconsortium.org/ECCAuthored/ComplianceRateArticle.pdf> (noting that “[t]he idea of using compliance rates . . . is conceptually simple and appealing. Despite the obvious appeal, surprisingly few states routinely generate compliance rates for most of their programs. Nor does the Environmental Protection Agency do so.”). Ms. Shewmake, assistant director of the Environmental Compliance Consortium (ECC), reports that the ECC and individual states have made progress in developing better ways to calculate and use compliance rates. *Id.*; Tiffin Shewmake, Using Compliance Rates to Manage, ECOSTATES 17 (Fall 2004).

<sup>264</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 27. As noted above, progress is occurring on this front. Tiffin Shewmake, *Using Compliance Rates to Manage*, ECOSTATES 17 (Fall 2004).

<sup>265</sup> *See supra* Part II.A.

<sup>266</sup> *See* RECHTSCHAFFEN & MARKELL, *supra* note 68, at 187.

provide little meaningful information about the efficacy of government efforts to promote compliance. ECOS, for example, has asserted that output data answer the wrong question, or at least do not answer the right question – that is, substantively, any drop-off in the level of enforcement activity is of little import because it is not at all clear that the number of enforcement actions “actually reveals anything of value about the environment.”<sup>267</sup> There is probably also resistance to maintaining “output” data because of concerns about underlying performance.<sup>268</sup>

In short, there is reason to believe that to be effective, performance-based management needs to be implemented in a way that makes sense in light of this contextual reality.<sup>269</sup> Figure 1 reflects the additional challenges that expanding tools and new measures pose for the EPA and the states. Traditionally, the EPA’s focus was limited to data within Box A, while its current focus has been substantially expanded to include data that fit within any of the four parts of the figure. Given the challenges that the EPA has faced in “getting Box A right,” the heightened challenges it faces in this new regulatory landscape of expanded tools and additional measures are obvious.

FIGURE 1

A Traditional Strategies/Traditional Measures	B Traditional Strategies/New Measures
C New Strategies/Traditional Measures	D New Strategies/New Measures

<sup>267</sup> EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 121, at 17.

<sup>268</sup> See generally RECHTSCHAFFEN & MARKELL, *supra* note 68.

<sup>269</sup> See Seidenfeld, *supra* note 1, at 512-26 (noting, for example, that whether accountability improves decision-making depends on the context). It is by no means certain that expanding performance measures will result in insufficient attention to activity-based measures. Performance measure experts recommend interpreting activity data in the context of outcome data, not dispensing with the former. Further, as indicated *supra* Part II.A., there are significant historic deficiencies in the EPA’s activity-oriented data. I am not suggesting that blame for flaws in such data should be placed on performance-focused efforts. Nevertheless, resources to implement and monitor new strategies may be siphoned from other activities. Deficiencies in routine systems for measuring outcomes (e.g., compliance rates), coverage (e.g., inspection rates), activities (e.g., numbers of inspections), and resources (e.g., staff time) obviously undermine efforts to understand trade-offs that are being made.



Related to the challenges discussed in the preceding paragraphs, in a study of the building industry in New Zealand, Peter May noted that “[u]nder performance-based regulation, the pendulum is clearly swinging away from tight controls and toward increased discretion and flexibility,”<sup>270</sup> and that “obtaining accountability [in a performance-based framework] for results can be especially problematic.”<sup>271</sup> His conclusion about the implications of performance-based regulation for accountability was one of skepticism: “Accountability is a fundamental and thorny issue for performance-based regulations and as such is the Achilles’ heel of this form of regulation.”<sup>272</sup> Mr. May concluded that the shift from relatively prescriptive regulation to performance-based approaches led to the “systemic failure” of the industry because, *inter alia*, it led to increased flexibility without sufficient accountability—a recipe, in his view, for deficient performance and results.<sup>273</sup>

In short, while there is good reason to applaud the effort to revisit and improve upon the EPA’s traditional enforcement measures, there also is good reason to question whether new and improved performance measures are likely in the short term to fully ameliorate potential accountability concerns associated with devolution and an expanded tool box.

#### CONCLUSION

Scholars have posited that there has been an ebb and flow in the shape and operation of the administrative state over the past twenty-five years or so in terms of its openness and accountability to the public.<sup>274</sup> Theorists have offered different visions of the regulatory state, including the role(s) that they anticipate

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<sup>270</sup> May, *supra* note 254, at 387.

<sup>271</sup> *Id.* at 397.

<sup>272</sup> *Id.* at 387. Mr. May endorsed Malcolm Sparrow’s statement that “[t]oo much discretion creates opportunities for corruption and discrimination and opens a regulatory agency to capture by the regulated community.” *Id.* (citing SPARROW, *supra* note 217, at 238). And he notes that “[t]he issue of accountability is closely related to the traditional regulatory concern about potential for regulatory capture . . . the issues of regulatory capture do not necessarily disappear under a performance-based regulatory regime. They simply appear in more subtle forms.” *Id.* at 398. Mr. May’s conclusion was that the movement to performance-based regulation for the building industry in New Zealand produced “a form of global capture in that the public interest was not well served and the building industry gained . . . in the process by having inexpensive construction methods.” *Id.*

<sup>273</sup> *Id.* at 392-95.

<sup>274</sup> See *supra* notes 2-17 and accompanying text.

(and desire) different stakeholders playing in it.<sup>275</sup> The details of agency behavior obviously hold important insights for the merits of different histories and theories. Such details provide guideposts for assessing the past, current, and possible future content of the regulatory state and inform those who are inclined to pursue reforms.

The United States is said to be a worldwide trend-setter in fostering transparency in government and in maintaining a system of governance that is accountable to its constituents. Other countries and new forms of governance such as regional organizations are increasingly thought to be embracing reforms that will move them in this direction. In recent years, United States federal and state government officials have been vocal members of this chorus of voices in favor of greater openness and accountability in government. The mantra of “open government” has flowed easily from the lips of public officials as well as the more obvious proponents of such governance in the “public interest” community. And indeed, numerous steps have been taken to increase the openness of the administrative state, particularly in the rulemaking realm. Based on this dialogue and activity, many scholars believe that the United States is continuing to build on past initiatives in order to still more increase transparency and accountability.<sup>276</sup>

Intuitively, it may seem paradoxical to raise questions about possible trends in government accountability and transparency, given the current state of rhetoric and the recent advent of accountability-focused approaches throughout our government infrastructure (witness legislative products such as the GPRA and administrative initiatives such as the EPA’s pursuit of more “results-oriented” measures of government performance).

But, as this Article points out, at least in the environmental enforcement arena, several of the underlying features of government activity—including, notably, widespread devolution and the significant expansion of the government’s “tool box”—have the potential to cut the other way. These seemingly fundamental features of governance have the potential to create substantial “slack” and to reduce rather than increase openness and accountability in governance.

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<sup>275</sup> See *supra* note 20.

<sup>276</sup> See, e.g., *supra* note 41. But see *supra* note 40 for the view that security and other issues have engendered restrictions on openness and accountability.

These essential elements of the architecture of the administrative state have important implications for the debate between “civic skeptics” and “counter-reformationists.”<sup>277</sup> They also have implications for who is “right” among public choice, neopluralist, civic republican and other theorists about the actual workings of the state, and for the challenges that proponents of different versions of the administrative state face in making their preferred vision a reality.<sup>278</sup> Hopefully, this Article, by reviewing some of the implications of central features of the administrative state, notably devolution and expansion of approaches to governance in the compliance arena, will contribute to these debates.

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<sup>277</sup> See *supra* notes 7-17 and accompanying text.

<sup>278</sup> See *supra* note 20 and accompanying text.

