

**Testimony of Dr. Richard W. Waterman of the University of Kentucky before the  
Senate Environment and Public Works Committee**

**June 28, 2006**

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

The first question is whether there is evidence that regional variations can be found in the way the Environmental Protection Agency enforces the law. We expect variations to exist simply because there are vast regional differences in what Susan Hunter and I called the nature of the “regulatory environment.” As we wrote, “In addition to its diverse sources of water and equally, if not more so, diverse sources of pollution, the United States is a conglomeration of geographical regions with differing environmental situations and problems. Each region has different geography, economic basis, population densities, and political pressures.” Thus, considerable variation is expected in the overall enforcement numbers. In fact, when asked for and were provided with enforcement data from the EPA NPDES (covering the years 1975-1988) we indeed

found wide variations in the number of enforcement actions from region to region. These variations may have been the result of some of the factors we described above. When, however, we controlled for a variety of these factors including the budget for each region, as well as measures of House and Senate oversight and court penalties assessed in each region, we still found variations in EPA inspection activity in seven out of the ten regions. Likewise, when we examined EPA referrals to the Justice Department, a higher level enforcement activity, we still found variations in four out of the ten regions. Hence, our results provided empirical evidence that regional variations exist, even when we control for other relevant economic and political factors. Again, it is important to note that some of this variation is understandable, given the different circumstances that EPA enforcement personnel face in each region. We therefore should not expect uniform enforcement across all regions. But variations do exist.

One reason why they exist could be found in the then operative 1986 NPDES Enforcement Manual. The manual advised EPA NPDES enforcement personnel that, “While it would be difficult, but not necessarily effective, to have identical enforcement responses for identical violations in different States, the enforcement should be directly related to the severity of the violation.” The manual then continued, “Given the decentralization of authority and responsibility in carrying out the NPDES program, implementation of the basic EMS principles should produce national consistency, while still accommodating differences between Regions and States.” The enforcement manual therefore called for promoting two contradictory goals: “national consistency” while “accommodating” State and regional differences. Given this contradictory goal, it is not surprising that many EPA enforcement personnel, as well as bureaucrats working at the

state level who have primacy to enforce the NPDES permit program, have approached enforcement in substantially different ways. In some states and regions, where there is more local pressure for aggressive enforcement, enforcement has reflected these goals. In other States and regions where there is an expectation that enforcement should be based on a negotiated approach with the regulated industry enforcement has been less aggressive. Thus, as a result of these differing regulatory expectations, combined with the very real geographical and other issues I described above, regional variations are bound to occur. If Congress is committed to limiting such discretion it will have to ensure that environmental laws are written more specifically so that it limits the potential for such discretion. More consistent oversight of EPA officials, not merely in Washington, but throughout the country is appropriate, as well. But it should be recognized that some variations in enforcement will continue to exist, even if all of these measures are adopted. Congress can reduce the level of regional variations, but it cannot eliminate them entirely.

Beyond the factors promoting regional variations that I have just described, there is another important reason for variations in EPA enforcement. To my knowledge this has been a largely overlooked area in academic studies of the EPA. Scholarly work tends to focus their attention on the activities of states with primacy or on the EPA officials in Washington, D. C. Yet, most EPA employees operate not in Washington, but in various regional offices around the country. These regional offices represent a major reason for variations in enforcement. EPA officials that I spoke to at the Washington or national office, during the Presidencies of both George H. W. Bush and Bill Clinton, described considerable frustration with the enforcement activities of the regional EPA offices. This

suggests to me that this is not a Democratic or a Republican problem, as frustration with regional variations was expressed during periods when both Democrats and Republicans controlled the White House, as well as when Democrats and Republicans controlled Congress. Both parties appear to be interested in a more uniform style of enforcement, even if they don't ultimately agree on what that style should be; that is, whether it should reflect a strict enforcement approach or a style that emphasizes a greater level of negotiating with business.

With regard to regional variations one particular appointive position stood out as the subject of concern. Most memorably, several years ago when I asked one top agency official in the EPA Water Office why there was so much variation in enforcement from region to region, I was surprised to be treated to a rather candid and colorful exposition of how a particular regional administrator was enforcing the law, not in accordance with the wishes of the then current presidential administration, but rather in accord with the desires of the "political culture" of that region. When I asked for more detail on this point I was informed that some regions are naturally more aggressive in their enforcement zeal, while others are not. I was told that regional administrators represented one of the last vestiges of the practice of "senatorial courtesy" and that often the administrators represented the political viewpoints of the region rather than national interests.

As a result of this and other discussions with EPA, state enforcement personnel, and members of environmental groups, I ultimately conducted two surveys with two of my graduate students from the University of New Mexico. One was a survey of the attitudes of EPA NPDES personnel, the other of state bureaucrats working for the New Mexico Environment Department. Among the many questions on our surveys, we asked

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

What our results suggest, then, is that particularly among EPA bureaucrats, Regional Administrators are perceived as exerting considerable influence. Given the obvious frustration expressed by U. S. EPA officials regarding Regional Administrators, it is also clear that this is a point of contention within EPA itself. In particular, there is a

sense that EPA Regional Administrators tend to reflect the viewpoints of their regional offices and personnel rather than the national office. One EPA official in the national office said that Regional Administrators tend to be co-opted by personnel in their offices, as well as by the political culture of their region. Again, I want to note that this level of frustration has been expressed to me in conversations that I had with EPA officials during both Democratic and Republican administrations.

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

In this process it is clear that elected officials have a legitimate role in overseeing the bureaucracy. First, while presidents often pay close attention to the qualities of their national EPA officials, past experience suggests that they are less attentive to the types of individuals they appoint to the regional EPA offices. This may be due to the fact that they inherently believe that such officials will follow directives from US EPA. Since my research suggests this is not the case, the first recommendation is that presidents should

be more attentive when they appoint Regional Administrators. As noted, these ten officials are perceived by EPA officials to have slightly more influence than the EPA Administrator. Presidents of both parties should be aware of this point when they make these appointments.

Beyond appointments, which is clearly identified in the Constitution as a means of presidential oversight of the bureaucracy, is it appropriate for elected officials to have continuing oversight of the bureaucracy? I believe the answer here is yes. In an extended research agenda that I conducted with B. Dan Wood, we found that not only can presidents can influence the bureaucracy through the appointments they make, but also that the budget is a powerful means of controlling the bureaucracy. We also found that congressional oversight of the EPA exerted some influence, as well, though the impact was more temporary. In fact, what we refer to as “political control of the bureaucracy” can be conceptualized as part of our necessary system of checks and balances. While our Constitution is largely silent on the bureaucratic state, it is clear that elected officials can and should exert influence over the bureaucracy. Bureaucrats have a wide array of expertise that should not be ignored, but elected officials represent the public interest in a different way. They can make sure that bureaucrats are applying the law fairly and in accordance with the intent of Congress, as well as representing public opinion. Each is an important attribute. Thus, while bureaucrats clearly have a legitimate role in enforcing laws as enacted by Congress, Congress and the president have an equally legitimate right to make sure that the law is being enforced as intended. Here, of course, there will always be debate as to what did the law intend and is it being implemented fairly. These are political questions that will be decided according to the political interests of a

particular time. The fundamental point, however, is that elected officials have a legitimate role in this process and in fact they shirk their responsibility if they do not act to oversee the bureaucracy's performance.

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