

GOOD ENOUGH FOR GOVERNMENT WORK?: THE GOVERNMENT PERFORMANCE RESULTS ACT OF 1993 AND ITS IMPACT ON FEDERAL AGENCIES

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I. INTRODUCTION

There have been critics of the federal government from its very inception, attacking its inadequacies before the Revolution was even won.¹ Disparaging the government remains a popular pastime, spawning cottage industries of dissent,² criticism from within,³ and even inspiring a little humor.⁴ Excessive federal spending is a typical complaint—the Department of Defense is frequently vilified for cost overruns. In the 1980s, military contracting gaffes led to Congressional outcry over \$400 hammers, \$600 toilet seats, and even \$9000 wrenches.⁵ Internal government discourse continues to excoriate examples of poor management and wasteful spending at federal agencies.⁶

As a response to the public's loss of confidence in the federal government,⁷ Congress passed the Government Performance & Results Act of 1993 ("GPRA").⁸ GPRA requires federal agencies to develop long-term strategic plans to clarify their missions, develop short-term performance plans to identify performance measures for outputs and outcomes, and report to Congress how they

¹ Alexander Hamilton thoroughly ridiculed the Articles of Confederation in a letter dated September 3, 1780 to James Duane. See 2 THE PAPERS OF ALEXANDER HAMILTON 400, 402 (Harold C. Syrett ed. 1961) ("[T]he confederation itself is defective and requires to be altered; it is neither fit for war, nor peace.").

² The non-profit group Citizens Against Government Waste ("CAGW") has been targeting government spending it disagrees with since 1984. See Citizens Against Government Waste, Mission/History, http://www.cagw.org/site/PageServer?pagename=about_Mission_History (last visited Mar. 19, 2008). No stranger to criticism, the CAGW has itself been accused of representing corporate interests for the right price. See Bill Adair, *For Price, Watchdog Will Be an Advocate*, ST. PETERSBURG TIMES, Apr. 2, 2006, at 1A.

³ See 1 SEN. FRED THOMPSON, S. COMM. ON GOVERNMENTAL AFFAIRS, GOV'T AT THE BRINK (2001), available at http://hsgac.senate.gov/_files/thompsongovrpt01vol1.pdf. (In 2001, Sen. Fred Thompson presented the new administration with a multi-volume report analyzing problems in federal agency spending and management.)

⁴ See TENACIOUS D, *The Government Totally Sucks*, on THE PICK OF DESTINY (Epic Records 2006).

⁵ See *Adjusting the Bottom Line*, TIME, Feb. 18, 1985, at 23. Critics have even attacked government spending associated with efforts to reform the government. See Sean Paige, *Taxpayers Getting Hammered by Gore Reinvention Award*, INSIGHT ON THE NEWS 47, Nov. 20, 2000.

⁶ See GOV'T AT THE BRINK, *supra* note 3, at 3–4.

⁷ S. REP. NO. 103-58, at 2 (1993), as reprinted in 1993 U.S.C.C.A.N. 327, 328.

⁸ Government Performance and Results Act of 1993 [hereinafter "GPRA"], Pub. L. No. 103-62, 107 Stat. 285 (codified in scattered sections of 5, 31 & 39 U.S.C.)

performed against those goals.⁹ The primary purpose of GPRA 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.”¹⁰

GPRA has been hailed as a panacea for government reform, as both a means of “ensuring coherent implementation of goals that involve many different administrative agencies,” and also as a “way of moving toward greater coherence in program design and implementation.”¹¹ Other views have been less charitable. One commentator characterized GPRA as yet another momentary initiative destined to disappear with the next presidential administration.¹² While GPRA has not disappeared, the current administration has taken a jaundiced view of the “impotence of GPRA,” stating it “has had little positive impact on Government programs.”¹³

This Note will show that GPRA has driven change in the operation of federal agencies and will then ask whether that change has improved how those agencies do business. Part II of this Note evaluates the requirements of the statute itself and how it developed as a regulatory reform initiative. Part III evaluates reactions to GPRA and its implementation, both inside and outside of government. Part IV examines empirical evidence available from the United States Environmental Protection Agency (“EPA”), in an effort to determine if compliance with GPRA has produced tangible improvement in how one agency does business. Part V reflects a limited inquiry into the impact of GPRA requirements at other agencies.

While GPRA required agencies to develop new performance measures, government agencies existed long before GPRA and reported out on their accomplishments. It should be possible to

⁹ See 5 U.S.C. § 306, 31 U.S.C. § 1105, 31 U.S.C. §§ 1115–16 (2000).

¹⁰ 31 U.S.C. § 1115 note (Congressional Findings and Statement of Purposes).

¹¹ John C. Dernbach, *Toward a National Sustainable Development Strategy*, 10 BUFF. ENVTL. L.J. 69, 117 (2003) (describing the utility of GPRA).

¹² See John Freemuth, *Environmental Policy Getting Too Dense*, ADVOC. (Idaho State Bar), June 1997, at 10.

¹³ THE WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS 9 (2001) [hereinafter UNLEVEL PLAYING FIELD], available at <http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf>.

determine if agencies have improved under the influence of GPRA, if they have traded old goals for new GPRA-related goals, or if they have not shown any significant change under GPRA.

II. WHAT WAS GPRA INTENDED TO ACCOMPLISH?

In January 1993, Senator William Roth (R-Delaware) introduced Senate Bill 20 ("S. 20"), later enacted as GPRA, claiming it would "[improve] the efficiency, effectiveness, and responsiveness of governmental institutions."¹⁴ Senator John Glenn (R-Ohio) agreed, believing GPRA would "help to improve the effectiveness of federal programs by promoting a new focus on results, on service quality and on customer satisfaction."¹⁵ Senator William Cohen (R-Maine) also supported GPRA as a welcome change from the "traditional notion of accountability in the Federal government" where "programs are deemed successful as long as the money is spent."¹⁶

There was support from the other side of the aisle as well. Representative Maloney (D-New York), commenting on H.R. 826, the companion bill to S. 20, noted that GPRA "will be a force in making fundamental changes in the Federal bureaucracy. The purpose of H.R. 826 is to improve the efficiency and effectiveness of Federal programs"¹⁷ Senator Roth noted that the Clinton administration also evidenced strong support for the bill.¹⁸ Indeed, when Director Leon Panetta of the White House's Office of Management and Budget ("OMB") testified before Congress on the status of the Clinton administration's National Performance Review, he congratulated Congress on S. 20, saying that GPRA will "eventually help us make more informed choices about budget priorities."¹⁹

Congress listed some scathing criticisms of federal agencies in the Act itself, finding: 1) federal programs were riddled with

¹⁴ 139 CONG. REC. 802 (1993).

¹⁵ 139 CONG. REC. 806 (1993).

¹⁶ 139 CONG. REC. 5310 (1993).

¹⁷ 139 CONG. REC. 11,043 (1993).

¹⁸ 139 CONG. REC. 13,833 (1993).

¹⁹ *National Performance Review: Hearing Before H. Comm. on Gov't Operations*, (Oct. 14, 1993) (statement of Leon Panetta, Director, White House Office of Mgmt. and Budget), 1993 WL 748136 (Federal Document Clearing House).

“waste and inefficiency”; 2) goals and performance measures were so poorly defined in federal programs that improvements were “seriously disadvantaged”; and 3) Congress itself was “seriously handicapped” in managing federal programs due to insufficient monitoring of federal program performance and results.²⁰ Congress’s stated purpose in GPRA was “to improve the efficiency and effectiveness of Federal programs by establishing a system to set goals for program performance and to measure results.”²¹

A. Mechanics of GPRA: The Statute Demands Plans and Reports

To achieve its goal of improving accountability in administrative agencies, Congress demanded that agencies produce three key elements: 1) a five-year strategic plan, 2) annual performance plans, and 3) annual program performance reports.²² The first requirement called for agencies to submit a five-year strategic plan by the end of fiscal year 1997 to both Congress and the Director of OMB.²³ The strategic plan defines the mission of the agency in terms of outcome-related goals and objectives, and how the agency expects to achieve them using the underlying performance plans.²⁴ Congress stressed the importance of the strategic plan as the “basic underpinning for a system” of improving government agencies by requiring them to clearly define their mission, goals in pursuit of that mission, and resource needs to achieve those goals.²⁵

Agencies must consult with Congress when producing the strategic plan, and are also required to update it every three years.²⁶ Congress took the consultation requirement seriously, conceiving the strategic plan as “the principal means for obtaining and reflecting, as appropriate, the views of Congress, and those governmental and non-governmental entities potentially affected by or interested in the agencies’ activities” and demanding that

²⁰ 31 U.S.C. § 1115 note (2000) (Congressional Findings and Statement of Purposes).

²¹ S. REP. NO. 103-58, at 2 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 327, 328.

²² 5 U.S.C. § 306, 31 U.S.C. § 1105, 31 U.S.C. §§ 1115–16.

²³ 5 U.S.C. § 306(a)–(b).

²⁴ 5 U.S.C. § 306(a)(2)–(4).

²⁵ S. REP. NO. 103-58, at 15, *as reprinted in* 1993 U.S.C.C.A.N. at 341.

²⁶ 5 U.S.C. § 306(b), (d).

agencies "solicit and consider views of interested members of the public."²⁷ The Senate Governmental Affairs Committee also viewed the strategic plan as a method of maintaining agency momentum, even as political appointees in charge of those agencies come and go with passing administrations.²⁸

The second requirement of GPRA is the agency performance plan. GPRA demands that the Director of OMB submit to Congress a "Federal Government performance plan for the overall budget."²⁹ Each agency is in turn required to submit an annual performance plan to OMB for every program activity included in the agency budget, beginning in fiscal year 1999.³⁰ The government-wide performance plan is comprised of those individual performance plans from each agency.³¹ These agency performance plans are more focused than their overarching strategic plans, and are developed around "objective, quantifiable, and measurable" performance goals.³² The performance plans must also define indicators for measurement of actual results of the agency's efforts against the performance goals.³³

The House stated that typical performance measures were "quantity, quality, timeliness, cost, and outcome."³⁴ It also distinguished between outcomes and outputs, defining outcomes as "the actual results, effects, or impact of a program activity," whereas outputs are defined merely as "levels of activity."³⁵ Outcomes are ranked over other outputs as the "key set of measures," reflecting the desire to magnify results over process.³⁶ At the same time, it also stressed cost per unit, seeking to

²⁷ H.R. REP. NO. 103-106, at 13; S. REP. 103-58, at 25, *as reprinted in* 1993 U.S.C.C.A.N. at 351.

²⁸ S. REP. NO. 103-58, at 15, *as reprinted in* 1993 U.S.C.C.A.N. at 341.

²⁹ 31 U.S.C. § 1105(a)(28).

³⁰ 31 U.S.C. §§ 1105(a)(28), 1115(a).

³¹ 31 U.S.C. § 1115(a).

³² 31 U.S.C. § 1115(a)(2).

³³ 31 U.S.C. § 1115(a)(4).

³⁴ H. R. REP. NO. 103-106, at 17 (1993); S. REP. NO. 103-58, at 29 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 327, 355.

³⁵ H. R. REP. NO. 103-106, at 19; S. REP. NO. 103-58, at 31-32, *as reprinted in* 1993 U.S.C.C.A.N. at 357-58.

³⁶ H. R. REP. NO. 103-106, at 17; S. REP. NO. 103-58, at 29, *as reprinted in* 1993 U.S.C.C.A.N. at 355.

maximize the value received from spending federal dollars.³⁷ The Senate also pushed outcomes over outputs, emphasizing both quantity and quality of chosen goals to ensure that sufficient resources were dedicated toward achieving those goals.³⁸

The third requirement, the program performance report, is the feedback mechanism of GPRA. Agencies are responsible for providing a program performance report to both Congress and the President, detailing the agency's success or failure in achieving the performance indicators outlined in the performance plan for the previous fiscal year.³⁹ By 2002, the program performance reports were expanded to evaluate agency success in achieving performance indicators over the last three fiscal years.⁴⁰ The Senate indicated an interest in tracking performance goals against agency accomplishments with the overall goal of developing a trend analysis of agency performance.⁴¹ The program performance reports should explain any failures to achieve performance indicators, evaluate the current performance plan considering any failures during previous years, and explain how the agency intends to achieve any missed performance goals or why the agency believes those missed goals are infeasible.⁴² The Senate also desired to use program performance reports as an initial foray into performance budgeting, tying the various program costs to individual performance indicators, thereby providing data on how efficient federal expenditures actually were.⁴³

Other notable elements of the GPRA statute, which are beyond the scope of this Note, include an authorization for limited pilot projects to test GPRA on a few agencies before implementing it government-wide.⁴⁴ Agencies may also request, and OMB may approve, waivers of administrative limits on salary and bonuses for agency employees, which agencies could use to

³⁷ H. R. REP. NO. 103-106, at 17; S. REP. NO. 103-58, at 29, *as reprinted in* 1993 U.S.C.C.A.N. at 355.

³⁸ S. REP. NO. 103-58, at 15-16, *as reprinted in* 1993 U.S.C.C.A.N. at 341-42.

³⁹ 31 U.S.C. § 1116(a) (2000).

⁴⁰ 31 U.S.C. § 1116(c).

⁴¹ S. REP. NO. 103-58, at 16, *as reprinted in* 1993 U.S.C.C.A.N. at 342.

⁴² 31 U.S.C. § 1116(d)(1)-(3).

⁴³ S. REP. NO. 103-58, at 18-19, *as reprinted in* 1993 U.S.C.C.A.N. at 344-45.

⁴⁴ 31 U.S.C. § 1118.

provide incentives to employees in pursuit of performance goals.⁴⁵ OMB may exempt agencies with annual budgets under \$20 million from creating performance plans and program performance reports.⁴⁶ A few agencies are even expressly exempt from the requirements of GPRA.⁴⁷ Finally, Congress reserved the right to create, modify or eliminate any performance goal in an agency's performance plan.⁴⁸ Ultimately, the strategic plan, performance plans, and program performance reports constitute the framework of obligations under GPRA that drive agency planning.

III. REACTIONS TO GPRA

GPRA itself was novel, but the concept of regulatory reform certainly was not. Congressional reform efforts date back at least as far as the Hoover Commissions of 1947–49 and 1953–55,⁴⁹ or arguably even the Civil Service Reform Act of 1883.⁵⁰ Even as it considered GPRA, the Senate noted that “past efforts at comprehensive management reform, such as the Planning-Programming-Budgeting System (PPBS), and Zero-Based Budgeting (ZBB), though equally well-intended, were less than satisfactory.”⁵¹ The Senate also expressed hope that GPRA would be utilized to bring about positive change in agency management, rather than simply create another bureaucratic system.⁵²

⁴⁵ 31 U.S.C. § 9703.

⁴⁶ 31 U.S.C. § 1117.

⁴⁷ 5 U.S.C. § 306(f) (exempting the Central Intelligence Agency, the Government Accountability Office, the Panama Canal Commission, and the Postal Rate Commission from the definition of agency, and, therefore, from the above-discussed requirements of GPRA. The United States Postal Service is also exempted here, but has functionally similar provisions under § 7 of GPRA, which reflect the different statutory authorizations behind the Postal Service.).

⁴⁸ 31 U.S.C. § 1115 note (Congressional Oversight).

⁴⁹ Presidents Truman and Eisenhower both asked President Hoover to chair commissions to evaluate the “organization and methods of operation . . . of the executive branch of the Government,” and recommend changes “to promote economy, efficiency, and improved service.” Act of July 7, 1947, Pub. L. No. 80-162, 61 Stat. 246, 248; *see* Act of July 10, 1953, Pub. L. No. 83-108, 67 Stat. 142.

⁵⁰ *See* Civil Service Reform Act of 1883, ch. 27, 22 Stat. 403 (1883) (setting requirements for civil service appointments, passed in the wake of the assassination of President Garfield).

⁵¹ S. REP. NO. 103-58, at 20 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 327, 346.

⁵² *Id.*

Similarly, Director Frank Raines of OMB noted that GPRA follows a long line of “prior efforts to guide government decision making—ranging from program budgeting, program planning and budgeting systems back in the 1960s, to zero-based budgeting in the 1970s, to management by objectives in both the 1970s and the 1980s.”⁵³

In the wake of this parade of reforms, some have expressed clear skepticism regarding the longevity of GPRA, deriding GPRA as a blip on the radar of regulatory reform.

The Bush management agenda reflected this trend fifteen years ago. What was hot in this town? It was total quality management. The first President Bush pushed it hard. He created a quality institute right across the street from the General Accounting Office (GAO) in the Pension Building. There was nothing more important than total quality management until President Clinton entered office, when it became reinventing Government. Three different variations (at least) of reinventing Government are all now located at a cyber cemetery in north Texas. You can find every memo ever written on reinventing Government at a library in north Texas. It's all accessible. But, except for researchers, it just disappeared. Now it's competitive sourcing and the four other platforms. Incidentally, ten years ago, it was the Government Performance and Results Act and Chief Financial Officers Act. . . . We have a problem with perseverance in Government.⁵⁴

On the other hand, not everyone expected GPRA to be a momentary phenomenon. One commentator viewed GPRA as a method of localizing agency review directly to congressional committees that have agency oversight roles.⁵⁵ GPRA enables Congress to take a strong, continuing role in agency management through an ongoing “mandate to micromanage” agencies through specialized congressional committees.⁵⁶ Another commentator noted that GPRA was likely to persist because it gave Congress

⁵³ *The Results Act: Are We Getting Results?: Hearing Before the H. Comm. on Gov't Reform*, 105th Cong. 42 (1997) [hereinafter *1997 Results Hearing*] (statement of Frank Raines, Director, White House Office of Management and Budget).

⁵⁴ Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311, 315 (2004) (References removed).

⁵⁵ David H. Rosenbloom, 1946: *Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173, 194 (1998).

⁵⁶ *Id.*

greater ability to micromanage how agencies craft their goals through their strategic and performance plans.⁵⁷

A. *Congressional Responses to GPRA*

Since its passage in 1993, Congress has repeatedly complained that GPRA is a capable management tool which is insufficiently utilized by a recalcitrant Executive Branch. Once GPRA was in place, agencies were expected to comply with its requirements. Beyond the pilot projects, the first major deliverables were the initial five-year strategic plans required from agencies by the end of fiscal year 1997. GPRA itself contains a requirement for the Comptroller General of the United States to report directly to Congress on the success or failure of implementation of the provisions of GPRA by June 1, 1997.⁵⁸

Congressional committee hearings on these initial strategic plans revealed harsh criticisms. Rep. Dan Burton (R-Indiana) commented that initial drafts of strategic plans were "abysmal."⁵⁹ Laying blame on the White House, Rep. Burton expressed "[concern] that the Results Act is not a high enough priority for OMB, thus the slipping deadlines and the low quality of the agency plans."⁶⁰ Rep. Dick Armey (R-Texas) noted that Congressional oversight committees would become more involved in developing agency strategic plans.⁶¹ Rep. Armey also suggested that agency funding levels thereafter be tied to their performance results.⁶²

On the other hand, Director Raines of OMB testified that all ninety-five required strategic plans were submitted on time and compliant with GPRA.⁶³ Director Raines also indicated the initial strategic planning efforts took OMB two years to develop and

⁵⁷ Maj. Richard K. Johnson, *National Performance Review and Reinvention: Should It "Reinvent" Our Federal Labor-Management Relations?*, 40 A.F. L. REV. 131, 148 (1996).

⁵⁸ 31 U.S.C. § 1115 note (2000) (General Accounting Office Report).

⁵⁹ 1997 *Results Hearing*, *supra* note 53, at 2 (statement of Rep. Dan Burton, Chairman, H. Comm. on Gov't Reform).

⁶⁰ *Id.*

⁶¹ *Id.* at 20 (statement of Rep. Dick Armey, H. Majority Leader).

⁶² *Id.* at 22.

⁶³ *Id.* at 32 (statement of Frank Raines, Director, White House Office of Mgmt. and Budget).

involved nearly everyone on OMB's staff.⁶⁴ Although he admitted that quality varied among the strategic plans, he expected they would improve with successive iterations.⁶⁵ The House was unappeased and passed the Government Performance and Results Act Technical Amendments of 1998 in an unsuccessful attempt to solidify the reporting requirements of GPRA by expressly involving the various agencies' offices of inspector general in development of strategic and performance plans.⁶⁶

In 2000, Rep. Pete Sessions (R-Texas) expressed concern that agencies were not using GPRA effectively as a management tool. Rep. Sessions complained that agency directors regarded performance plans as "cumbersome and tedious . . . as another form to fill out or another hoop to jump through for Congress."⁶⁷ Like Rep. Arney before him, he suggested that agencies either embrace GPRA, or face the possibility of punitive budget cuts.⁶⁸ The incoming Bush administration shared Rep. Sessions's fears in 2001, believing "GPRA has devolved into a rote paperwork

⁶⁴ *Id.* at 32.

⁶⁵ 1997 *Results Hearing*, *supra* note 53, at 32–33 (statement of Frank Raines, Director, White House Office of Mgmt. and Budget).

⁶⁶ Government Performance and Results Act Technical Amendments of 1997, H.R. 2883, 105th Cong. (1997). Even though this amendment was never enacted into law, at least some agencies do include evaluations from their inspectors general in their annual program performance reports. *See e.g.* U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2005 PERFORMANCE AND ACCOUNTABILITY REPORT, PUB NO. EPA-190-R-05-001, at 180 (2005) [hereinafter EPA FY05 PAR], available at <http://www.epa.gov/ocfo/finstatement/2005par/par05.pdf>.

⁶⁷ *Seven Years of GPRA: Has the Results Act Provided Results?: Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the H. Comm. on Gov't Reform*, 105th Cong. 20 (July 20, 2000) [hereinafter 2000 *Results Hearing*] (statement of Rep. Pete Sessions, Chairman, Results Caucus).

⁶⁸ *Id.* at 21; Some commentators see GPRA not merely as management reform, but also as budget reform. They argue that traditional federal spending plans, referred to as "control budgets," encourage federal managers to exhaust agency appropriations simply to justify the size of the appropriation, resulting in waste. Conversely, the "performance budgeting" approach ties appropriations to demonstrated prior success in the relevant programs. Successful programs should see a corresponding increase in funding, while weaker programs receive funding cuts. GPRA could be used to include performance budgeting into agency planning. *See* Robert McNab & Francois Melese, *Implementing the GPRA: Examining the Prospects for Performance Budgeting in the Federal Government*, PUB. BUDGETING & FIN., Summer 2003, at 73, 74–79.

assignment that leverages little real change and influences few officials.”⁶⁹

As late as 2004, Rep. Edolphus Towns (D-New York) commented that the “intent of GPRA has only [been] partially fulfilled,” because some agencies chose not to utilize the performance improvements that GPRA could provide, but rather to meet only the bare minimum in reporting requirements.⁷⁰ Rep. Towns suggested this was due either to “a lack of agency leadership and commitment to the requirements under the statute, or an inadequate level of training and guidance from OMB for agency managers”⁷¹

As noted above, the implementation of GPRA has received Congressional criticism throughout its existence, but the legislature is not unique in finding fault with agency performance under GPRA reforms.

B. Executive Responses to GPRA

Echoing some of Congress’s dissatisfaction, the current Bush Administration expressed criticism of GPRA almost immediately after taking office.⁷² The current Administration introduced its own variant of government reform—the President’s Management Agenda.⁷³ Commenting directly on GPRA, the White House noted that “[a]fter eight years of experience, progress toward the use of performance information for program management has been discouraging.”⁷⁴ President Bush made it clear that he intended to focus strongly on government performance by directly linking performance to budgeting decisions, and develop an oversight

⁶⁹ UNLEVEL PLAYING FIELD, *supra* note 13, at 9.

⁷⁰ 10 Years of GPRA—Results, Demonstrated: Hearings Before the Subcomm. on Gov’t Efficiency and Fin. Mgmt. of the H. Comm. on Gov’t Reform, 108th Cong. 4 (March 31, 2004) (statement of Rep. Edolphus Towns, Member, Subcomm. on Gov’t Efficiency and Fin. Mgmt. of the H. Comm. on Gov’t Reform).

⁷¹ *Id.*; see also Charles Bingman, *Proposals for Improving GPRA Annual Performance Plans*, PUB. BUDGETING & FIN., Summer 2006, at 143 (arguing, *inter alia*, that GPRA performance plans suffer from the setting of unrealistic goals, a lack of long-term analysis of relevant data, a dearth of cost-benefit analysis, and fail to reflect the complexity of the programs they evaluate).

⁷² See UNLEVEL PLAYING FIELD, *supra* note 13, at 9.

⁷³ OFFICE OF MGMT. & BUDGET, THE PRESIDENT’S MANAGEMENT AGENDA (2002), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>.

⁷⁴ *Id.* at 27.

process that was focused on results.⁷⁵ The Administration's disillusionment with GPRA itself was obvious, and yet the overall goal of improving agency performance was functionally similar.

The President's results-focused initiative produced a method of government performance review that absorbed the requirements of GPRA within itself. Under the Administration's Budget and Performance Integration Initiative, OMB now evaluates agencies through the Program Assessment Rating Tool ("PART").⁷⁶ "The [PART] is used to assess individual program performance and identify actions to improve program performance."⁷⁷ The PART is a limited questionnaire used to examine an agency's management and performance.⁷⁸ OMB scores the answers provided by the agencies to determine if they are performing adequately, and then publicly discloses its conclusions on the Internet.⁷⁹ OPM also uses the PART to develop the administration's budgeting recommendations to Congress, suggesting increases for successful programs and cuts for ineffective programs.⁸⁰ Not without its detractors, the PART has been criticized as being too simplistic for making budgeting decisions regarding complicated federal programs.⁸¹

OMB regards the PART as a "vehicle for achieving the goals of the Government Performance and Results Act (GPRA)."⁸² OMB

⁷⁵ *Id.* at 29.

⁷⁶ OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET, § 26, at 2 (2006) [hereinafter OMB CIRCULAR NO. A-11].

⁷⁷ *Id.*

⁷⁸ See OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PROGRAM ASSESSMENT RATING TOOL (PART), <http://www.whitehouse.gov/omb/expectmore/part.html> (last visited Mar. 19, 2008).

⁷⁹ See Expect More.gov Home Page, <http://www.whitehouse.gov/omb/expectmore/index.html> (last visited Mar. 19, 2008).

⁸⁰ EILEEN C. NORCROSS & KYLE MCKENZIE, MERCATUS CENTER, GEORGE MASON UNIV., AN ANALYSIS OF THE OFFICE OF MANAGEMENT AND BUDGET'S PROGRAM ASSESSMENT RATING TOOL (PART) FOR FISCAL YEAR 2007, at 22 (May 2006).

⁸¹ Ayako Sato, *Development Goals and Indicators: The Millennium Challenge Account and The Program Assessment Rating Tool: The Difficulties of Measuring Accountability*, 6 SUSTAINABLE DEV. L. & POL'Y 51, 52 (2005); Another commentator has noted that administering the PART is a labor intensive ordeal for agencies, and can occasionally conflict with the goals of GPRA. Patrick Mullen, *Performance-Based Budgeting: The Contribution of the Program Assessment Rating Tool*, PUB. BUDGETING & FIN., Winter 2006, at 79, 86-87.

⁸² OMB CIRCULAR NO. A-11, *supra* note 76, § 26, at 4.

requires agencies to submit a performance budget which ties the performance goals of the agency to its funding requests, and considers agency performance under previous PART assessments. Acknowledging that GPRA requires agencies to submit strategic plans, performance plans, and program performance reports, OMB has interjected the PART into those requirements to adjust how GPRA functions. Strategic plans are designed to use the PART to connect the overall agency goals to focused annual performance goals.⁸³ OMB instructs agencies that the required performance budget must meet GPRA's statutory requirements for a performance plan.⁸⁴ Agencies are also required to produce a Performance and Accountability Report ("PAR"), which, among other things, meets the GPRA statutory requirements for a program performance report.⁸⁵ In sum, the requirements of GPRA are now filtered through the lens of the PART.

IV. REVIEWING THE EVIDENCE: EPA PERFORMANCE UNDER GPRA

The various requirements of GPRA, modified by the President's Management Agenda push for performance budgeting and use of the PART, are the theoretical framework behind agency management and funding policy. Each agency meets its GPRA program performance report requirement individually by issuing an annual PAR.

The administrative requirements of implementing GPRA are significant. For example, a United States Environmental Protection Agency's ("EPA") recent GPRA program performance report, contained in its Fiscal Year 2005 Performance and Accountability Report, is 451 pages long.⁸⁶ To be fair, this lengthy report not only includes the GPRA program performance report, but also satisfies several other legislative reporting requirements. These include a detailed analysis of the \$8 billion budget over the previous two fiscal years and managerial responses to concerns from EPA's Office of Inspector General and the U.S. Government Accountability Office (formerly the U.S. General Accounting

⁸³ *Id.* at Section 210, 1–2.

⁸⁴ *Id.* at Guide to OMB CIRCULAR A-11, at pg. xv.

⁸⁵ *Id.* at Section 230, 1.

⁸⁶ EPA FY05 PAR, *supra* note 66.

Office), as required by the Reports Consolidation Act of 2000.⁸⁷ EPA Administrator Stephen Johnson's cover letter to the President presents the PAR as a deliverable under the requirements of GPRA; it includes an analysis of how the Agency performed against the annual performance goals of fiscal years 2005 under the guidance of EPA's 2003–2008 Strategic Plan, consistent with OMB's instructions in Circular A-11.⁸⁸

The program performance report is just one of three accountability requirements of GPRA. First, EPA had to create the performance goals required by the GPRA performance plan against which to measure its performance. EPA's Annual Performance Plan for Fiscal Year 2005—containing those performance goals—is 379 pages long.⁸⁹ Those annual goals were derived from the 2003–2008 Strategic Plan—another 239 pages.⁹⁰

EPA has a multitude of enabling statutes directed toward different environmental problems, creating a complicated statutory framework driving the overall mission of the Agency.⁹¹ In addition, EPA created several different programs to address its regulatory mandates, which are reflected in the variety of strategic goals identified in its strategic plan.⁹² Because the breadth of the strategic and annual performance plans is so extensive, a full discussion of EPA's entire response to the demands of GPRA is beyond the scope of this Note. A narrower view of part of EPA's mission, like the RCRA Corrective Action Program, should provide some insight into how GPRA has impacted the way EPA does business.⁹³

⁸⁷ See EPA FY05 PAR, *supra* note 66; Reports Consolidation Act of 2000, Pub. L. No. 106-531, 114 Stat. 2537 (codified in 31 U.S.C.)

⁸⁸ See EPA FY05 PAR, *supra* note 66; see also OMB CIRCULAR NO. A-11, *supra* note 76.

⁸⁹ U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2005 ANNUAL PERFORMANCE PLAN, (2005), available at <http://www.epa.gov/cfo/budget/2005/2005ap/2005ap.htm>.

⁹⁰ U.S. ENVTL. PROT. AGENCY, 2003–2008 EPA STRATEGIC PLAN: DIRECTION FOR THE FUTURE (Sept. 20, 2003) [hereinafter EPA FY03–08 STRATEGIC PLAN], available at <http://www.epa.gov/ocfo/plan/2003sp.pdf>.

⁹¹ U.S. Env'tl. Prot. Agency, Laws that We Administer, <http://www.epa.gov/lawsregs/laws/index.html> (last visited Mar. 19, 2008) (listing over two dozen laws providing the statutory basis of EPA programs).

⁹² See EPA FY03–08 Strategic Plan, *supra* note 90.

⁹³ In the interest of full disclosure, the author was previously employed by EPA and worked in the RCRA Corrective Action Program for several years.

A. Background of the RCRA Corrective Action Program

The Resource Conservation and Recovery Act of 1976 ("RCRA"), as modified by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), is the primary statute that drives EPA's RCRA Corrective Action Program.⁹⁴ The modified RCRA is one of many laws that amends the Solid Waste Disposal Act of 1965, but the EPA program primarily responsible for regulating the handling of solid and hazardous wastes at active facilities is known as the RCRA program.⁹⁵ Specifically, EPA's authority to regulate facilities that generate, transport, treat, store, or dispose of hazardous waste comes from the RCRA, and is expanded in Title 40 of the Code of Federal Regulations.⁹⁶ This authority includes the ability of EPA to require corrective action at a facility that treats, stores, or disposes of hazardous waste and releases it into the environment.⁹⁷

Like many federal programs, the RCRA Corrective Action Program has a process through which facilities subject to RCRA corrective action requirements are required to progress. This process, which is outlined primarily in agency guidance, uses milestone events to measure facility progression rates.⁹⁸

1. The Old Way: The RCRA Corrective Action Process

Generally, the RCRA Corrective Action Program has little in the way of regulatory formality. In 1990, EPA proposed the RCRA Subpart S rule in order to give RCRA corrective action a more uniform structure across the nation, but this rule was not

⁹⁴ Resource Conservation and Recovery Act (RCRA) of 1976, Pub. L. 94-580, 90 Stat. 2795 (codified in 42 U.S.C. 6901-6992); Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, 98 Stat. 3221.

⁹⁵ U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA-530-R-99-063, RCRA, SUPERFUND & EPCRA HOTLINE TRAINING MODULE: INTRODUCTION TO RCRA STATUTORY OVERVIEW, 1-2 (Feb. 2000) available at <http://www.epa.gov/epaoswer/hotline/training/statov.pdf>.

⁹⁶ *Id.* at 7.

⁹⁷ RCRA §§ 3004(u), 3004(v), 3005(c)(3), 3008(h), 7003 (as amended).

⁹⁸ U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA-530-R-08-003, RCRA ORIENTATION MANUAL, at III-125, (March 2006) [hereinafter RCRA ORIENTATION MANUAL], available at <http://www.epa.gov/epaoswer/general/orientat/rom.pdf>.

finalized.⁹⁹ EPA created the RCRA Corrective Action Program through policy statements and technical guidance documents—a process that lacked traditional regulatory structure via notice and comment rulemaking.¹⁰⁰ The traditional milestones of the RCRA Corrective Action Program include: an initial site assessment, a full site characterization, an in-depth study of remedial options, and, ultimately, construction of a final remedy to clean up the site.¹⁰¹

The initial site assessment is the first milestone and is termed the RCRA Facility Assessment (“RFA”).¹⁰² “The general function of the RFA is to provide the basis for the Agency to make preliminary determinations as to whether or not there are, or are likely to be, releases of [hazardous waste] at a facility.”¹⁰³ The RFA is also used to rank facilities by the severity of contamination and accompanying risk to surrounding populations and the environment, via the National Corrective Action Prioritization System (“NCAPS”).¹⁰⁴

The second major milestone is the full site characterization, a more thorough investigation designed to fully “ascertain the nature and extent of contamination of a site,” referred to as the RCRA Facility Investigation (“RFI”).¹⁰⁵ The RFI is comprehensive and designed to inform EPA sufficiently to enable the agency to evaluate and select corrective measures appropriate to restore the environment affected by the contamination at the facility, and

⁹⁹ Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30798 (proposed July 27, 1990) (to be codified in 40 C.F.R. parts 264, 265, 270, and 271).

¹⁰⁰ Timothy O. Schimpf, *Unleash RCRA! Letting Loose the Corrective Action Process of RCRA Can Change the World*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 481, 488 (2005).

¹⁰¹ RCRA ORIENTATION MANUAL, *supra* note 98, at III-125–III-126.

¹⁰² *Id.* at III-125.

¹⁰³ Memorandum from J. Winston Porter, Assistant Administrator, EPA Office of Solid Waste and Emergency Response to Hazardous Waste Div. Dirs., Regions I–X (Aug. 21, 1986) (OSWER Policy Directive No. 9502.00-4 - regarding Implementation of RCRA Facility Assessments), available at [http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/49D43CFE81246E498525670F006C118E/\\$file/12716.pdf](http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/49D43CFE81246E498525670F006C118E/$file/12716.pdf).

¹⁰⁴ U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA530-K-02-017I, RCRA CORRECTIVE ACTION (RCRA, Superfund & EPCRA Call Center Training Module developed by Booz Allen Hamilton under EPA Contract 68-W-01-020), available at <http://www.epa.gov/epaoswer/hotline/training/cact.txt>.

¹⁰⁵ RCRA ORIENTATION MANUAL, *supra* note 98, at III-125.

identify whether immediate interim stabilization measures are required.¹⁰⁶

Once a site is fully investigated, the next step in the RCRA Corrective Action Program is the study of remedial options, called the Corrective Measures Study ("CMS").¹⁰⁷ "The purpose of the Corrective Measures Study (CMS) portion of the RCRA corrective action process is to identify and evaluate potential remedial alternatives for the releases that have been identified at a facility."¹⁰⁸

The last major step in the traditional RCRA Corrective Action Program is the final remedy selection and construction, typically referred to as a Corrective Measures Implementation ("CMI").¹⁰⁹ "The purpose of the Corrective Measures Implementation (CMI) portion of the RCRA corrective action process is to design, construct, operate, maintain and monitor the performance of the corrective measure(s) selected by the implementing agency."¹¹⁰

2. The New Way: GPRA Changed the RCRA Corrective Action Process

EPA, like nearly all federal agencies, was under pressure to reform its practices after the passage of GPRA. The RCRA corrective action program was no exception, having been described as "unbearably slow, bureaucratic, and utterly concerned with form over substance."¹¹¹ Perhaps reflecting the policy behind GPRA, EPA decided to withdraw the proposed Subpart S rule in 1999, stating "that it would be appropriate to

¹⁰⁶ U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE, PERMITS BRANCH, RCRA PUBLIC PARTICIPATION MANUAL, at 4-9 (Apr. 1996), available at <http://www.epa.gov/epaoswer/hazwaste/permit/pubpart/manual.htm>.

¹⁰⁷ RCRA ORIENTATION MANUAL, *supra* note 98, at III-126.

¹⁰⁸ U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE, OFFICE OF WASTE PROGRAMS ENFORCEMENT, OSWER POLICY DIRECTIVE NO. 9902.3-2A, RCRA CORRECTIVE ACTION PLAN (FINAL), at 47 (May 1994) [hereinafter RCRA CORRECTIVE ACTION PLAN], available at http://www.epa.gov/correctiveaction/resource/guidance/gen_ca/rcracap.pdf.

¹⁰⁹ RCRA ORIENTATION MANUAL, *supra* note 98, at III-126.

¹¹⁰ RCRA CORRECTIVE ACTION PLAN, *supra* note 108, at 59.

¹¹¹ Kristina M. Woods, *The Resource Conservation and Recovery Act: What It Is, Where Its [sic] Going*, SE55 ALI-ABA 95, 104 (2000).

recraft the proposed RCRA regulations to take the focus off process and place it on results.”¹¹²

EPA made significant adjustments in the RCRA Corrective Action Program. First, it tightened the number of facilities on which it was focusing. While over 6,500 facilities are estimated to be subject to the RCRA corrective action program, EPA established an RCRA Cleanup Baseline of 1,714 facilities for GPRA evaluations in July 1999.¹¹³ These facilities represent the more heavily contaminated facilities in the RCRA correction action facility universe, and were typically facilities that scored as higher priorities in the NCAPS scoring system.¹¹⁴ Second, EPA added two new measures, known as Environmental Indicators (“EIs”), beyond the traditional RCRA corrective action milestones, to evaluate its new GPRA/RCRA Cleanup Baseline.¹¹⁵ These EIs were directly tied to EPA’s decision to develop “results-based approaches for RCRA Corrective Action,” in line with the goals of GPRA.¹¹⁶ EPA described its two EIs as “near-term goals” and defined them as “current human exposures under control,” and “migration of contaminated groundwater under control.”¹¹⁷ The two EIs were conceived no later than 1994, possibly predating GPRA, but EPA utilized EIs in its efforts to comport with GPRA.¹¹⁸

¹¹² Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities—Partial Withdrawal of Rulemaking Proposal, 64 Fed. Reg. 54606 (Oct. 7, 1999).

¹¹³ U.S. Env’tl. Prot. Agency, Corrective Action: Basic Information, <http://www.epa.gov/correctiveaction/backgnd.htm> (last visited Mar. 19, 2008). The RCRA Cleanup Baseline was later expanded, but this Note focuses on the original Baseline established in 1999.

¹¹⁴ RCRA ORIENTATION MANUAL, *supra* note 98, at III-124.

¹¹⁵ See U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. EPA 530-F-99-018, RCRA CLEANUP REFORMS, (July 1999).

¹¹⁶ *Id.* at 3.

¹¹⁷ U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. EPA 530-F-01-001, RCRA CLEANUP REFORMS—REFORMS II: FOSTERING CREATIVE SOLUTIONS, 3 (Jan. 2001).

¹¹⁸ See Memorandum from Michael Shapiro, EPA Office of Solid Waste, to Regional Waste Management Division Directors (July 29, 1994) (regarding RCRIS Corrective Action Environmental Indicator Event Codes CA725 and CA750), available at [http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/D3A9E4D14A11AE5985256936006AC49C/\\$file/11956.pdf](http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/D3A9E4D14A11AE5985256936006AC49C/$file/11956.pdf); see Memorandum from Elizabeth Cotsworth, Acting Director, Office of Solid Waste, to RCRA Senior Policy Managers, Regions I–X (Feb. 2, 1999) [hereinafter “Cotsworth Memo”] (regarding Interim-Final Guidance for RCRA Corrective Action Environmental

If a facility receives a positive evaluation using the Current Human Exposures Under Control EI, then this “indicates that there are no ‘unacceptable’ human exposures to ‘contamination’ (i.e., contaminants in concentrations in excess of appropriate risk-based levels) that can be reasonably expected under current land- and groundwater-use conditions.”¹¹⁹ Similarly, if a facility receives a positive evaluation under the Migration of Contaminated Groundwater Under Control EI, then this “indicates that the migration of ‘contaminated’ groundwater has stabilized, and that monitoring will be conducted to confirm that contaminated groundwater remains within the original ‘area of contaminated groundwater’.”¹²⁰ EPA guidance makes it clear that the EIs represent only an immediate determination of facility conditions, and that they do not serve as replacements for final remedies to site contamination.¹²¹

With a smaller universe of facilities, and more immediate goals than the traditional RCRA corrective action process, EPA set off to prove that it could achieve significant environmental improvement at the most critical facilities in a reasonable time-frame.

B. RCRA Corrective Action Performance Under GPRA

The White House’s OMB classified EPA’s RCRA Corrective Action Program as “adequate” the last time it was evaluated with the PART in 2003.¹²² According to OMB, “[t]his rating describes a program that needs to set more ambitious goals, achieve better results, improve accountability or strengthen its management practices.”¹²³ Specifically, OMB noted that the RCRA corrective

Indicators), *available at* http://www.epa.gov/epaoswer/hazwaste/ca/eis/ei_guida.pdf.

¹¹⁹ Cotsworth Memo, *supra* note 118, at 1.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Office of Mgmt. and Budget, Executive Office of the President, Detailed Information on the Resource Conservation and Recovery Act Corrective Action Assessment [hereinafter “RCRA CA Detail”], <http://www.whitehouse.gov/omb/expectmore/detail/10001139.2003.html>.

¹²³ Office of Mgmt. and Budget, Executive Office of the President, About Us [hereinafter “OMB About Us”], <http://www.whitehouse.gov/omb/expectmore/about.html> (last visited Mar. 19, 2008).

action program “is making progress toward achieving both the human exposure and groundwater migration long-term goals.”¹²⁴

OMB’s 2003 PART analysis on the RCRA Corrective Action Program provides the qualitative evaluation that “[t]he program has made consistent progress,” but little in the way of hard numbers.¹²⁵ EPA’s 2005 PAR report indicates that the RCRA Corrective Action Program “achieved both of its long-term cumulative goals” for the two EIs.¹²⁶

There is, however, more information available beyond OMB’s PART assessment and EPA’s PAR report. EPA collects data from the RCRA Corrective Action Program in its RCRAInfo database.¹²⁷ EPA tracks progress at facilities regulated under the RCRA Corrective Action Program, including the 1,714 facilities on EPA’s GPRA Baseline, by recording milestones in RCRAInfo as they occur. This data can be obtained from the RCRAInfo database in order to evaluate the accomplishments of the RCRA Corrective Action Program over time.¹²⁸

The chart below contains two traditional RCRA corrective action accomplishments—the number of RCRA Facility Investigations approved by EPA, and the number of Corrective Measures implemented at facilities regulated under the RCRA program. The chart also contains the number of EIs performed at those facilities, reflecting the priorities of the RCRA Corrective Action Program influenced by GPRA. The data is limited to the 1,714 facilities on the GPRA Baseline, and is presented by fiscal year.¹²⁹

¹²⁴ RCRA CA Detail, *supra* note 122, at § 4.1.

¹²⁵ *Id.* § 4.2.

¹²⁶ EPA FY05 PAR, *supra* note 66, at 103.

¹²⁷ U.S. Env’tl. Prot. Agency, Resource Conservation and Recovery Act (RCRAInfo): Overview, <http://www.epa.gov/enviro/html/rcris> (last visited Mar. 19, 2008), *see also* RCRA CA Detail, *supra* note 122, at § 3.1.

¹²⁸ Special thanks to Betsy Lopez of EPA Region 2, Div. of Env’tl. Planning and Protection, RCRA Programs Branch for providing the data from the RCRAInfo database. Raw data available from author upon request.

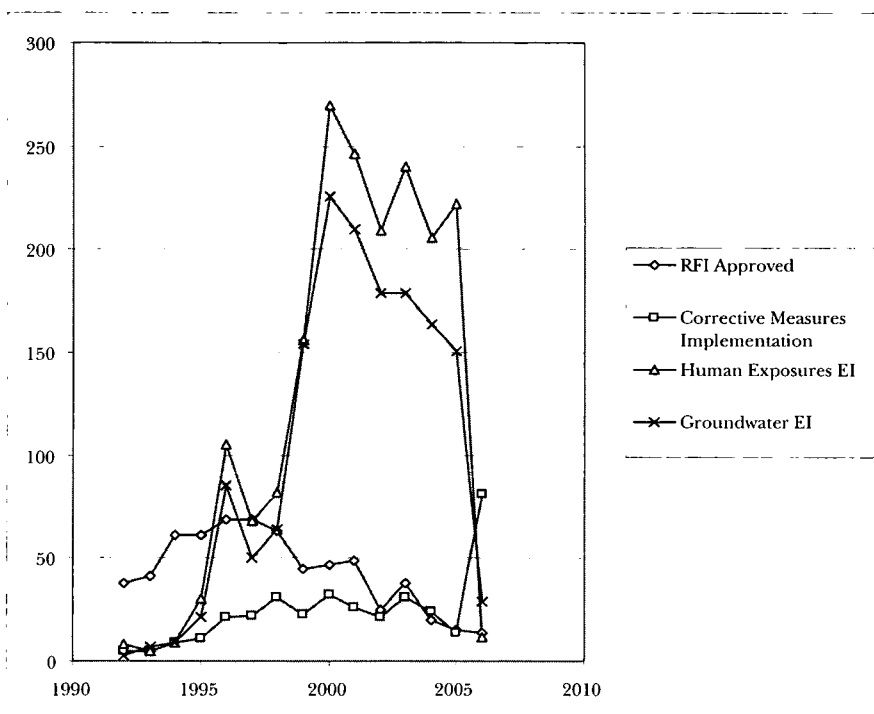
¹²⁹ The data includes duplicated events, e.g. some facilities received multiple RFI site investigations and/or multiple EI determinations. The data is current as of Nov. 17, 2006.

<u>Fiscal Year</u>	<u>RFI Approved</u>	<u>Corrective Measures Implementation</u>	<u>Human Exposures EI</u>	<u>Groundwater EI</u>
1992	38	5	8	3
1993	41	5	5	7
1994	61	9	9	9
1995	61	11	30	21
1996	69	21	105	85
1997	69	22	68	50
1998	63	31	82	64
1999	45	23	156	154
2000	47	32	270	226
2001	49	26	246	210
2002	25	21	209	179
2003	38	31	240	179
2004	20	24	206	164
2005	15	14	222	151
2006	14	81	12	29

The data above shows that EPA focused quite heavily on achieving the EIs for facilities on the GPRA Baseline from fiscal year 1996 onwards, especially in fiscal years 1999 through 2005. This is consistent with EPA's long-term strategic goal emphasizing the accomplishment of EIs in the RCRA Corrective Action Program, as articulated under Goal 5 of EPA's 2000–2005 strategic plan.¹³⁰ Specifically, EPA set a goal of controlling human exposures at 95 percent of the GPRA Baseline facilities, and controlling the migration of contaminated groundwater at 70 percent of the GPRA Baseline facilities by 2005.¹³¹ Notably, in the years where there is a marked increase in the number of EIs, there is a marked decrease in the number of RFIs (site investigations) approved. The graph below illustrates this decrease in RFIs.

¹³⁰ U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA-190-R-00-002, STRATEGIC PLAN, at 36 (September 2000), available at <http://www.epa.gov/cfo/plan/2000strategicplan.pdf>.

¹³¹ *Id.*



Empirically, it appears that EPA did more than simply accelerate the RCRA corrective action program into achieving more EIs, but arguably shifted its efforts from the older traditional RCRA Facility Investigations toward the more immediate, near-term EIs. There remain over 500 facilities on the GPRA Baseline of 1,714 facilities without RFIs.¹³² Any facility on the GPRA Baseline has been deemed a high priority by EPA, and therefore arguably warrants the robust site investigation of an RFI.

¹³² Any number of factors could have contributed to the slow-down in RFIs. Interactions between RCRA and other EPA programs can affect the length of the clean-up process. EPA may also have simply exhausted the supply of easily achievable RFIs by the late 90s. Political and economic pressures also impact the ability of the regulated community to satisfy EPA site investigation requirements. Whatever the cause, a substantial number of high priority facilities had not received RFIs as of 2006. See *supra* note 128 and associated data.

C. *EPA Is Now Returning to Final Remedies*

In its PART evaluation, OMB expressed some concern that EPA was not focusing sufficiently on achieving its long-term goal of implementing final remedies for facilities subject to RCRA corrective action. OMB noted that expanding the GPRA Baseline in order to achieve additional EIs “will not be sufficient enough to make this approach useful in challenging the program to improve.”¹³³ OMB also noted that EPA was in the process of developing new measures to correspond to final remedies.¹³⁴

In its 2003–2008 strategic plan, EPA reemphasized completing the RCRA corrective action process at its regulated facilities, by setting a goal of selecting final cleanup remedies at 30 percent of the facilities on the GPRA Baseline by 2008.¹³⁵ In fact, the number of Corrective Measures Implemented at facilities on the GPRA Baseline jumped to eighty-one in fiscal year 2006.¹³⁶ Further, the 2006–2011 strategic plan shows that EPA is expanding the Baseline to include “high, medium, and low ranked facilities,” instead of exclusively high ranked ones.¹³⁷ Even more ambitiously, EPA has identified a long-term goal of implementing and completing final remedies at 95 percent of all facilities requiring RCRA corrective action by the year 2020.¹³⁸

D. *GPRA Shifted the Focus of RCRA Corrective Action for Several Years*

EPA used the EIs to meet the GPRA mandate to better show progress toward meeting its overall goals of protecting human health and the environment. In the RCRA Corrective Action Program, EPA’s emphasis on EIs appears to have overtaken the goal of conducting full site investigations at regulated facilities, at least for several years. EPA’s recent efforts to return to final

¹³³ RCRA CA Detail, *supra* note 122, at § 2.4.

¹³⁴ *Id.* at § 2.3.

¹³⁵ EPA FY03–08 STRATEGIC PLAN, *supra* note 90, available at <http://www.epa.gov/cfo/plan/2003sp.pdf>.

¹³⁶ See *supra* note 128 and associated data.

¹³⁷ U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA-190-R-06-001, 2006–2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE 68 (September 2006), available at http://www.epa.gov/cfo/plan/2006/entire_report.pdf.

¹³⁸ *Id.* at 71.

remedies for regulated facilities is consistent with the overall purpose of the RCRA program, but there is a legitimate question as to whether EPA's focus on EIs instead of site investigations over the last several years created unnecessary delay.

On the other hand, the importance of EIs in the RCRA Corrective Action Program could represent a purposeful policy shift by EPA. EPA may have concluded that determining whether threats to human health and water supplies at the most contaminated facilities were fully contained trumped the overall goal of pushing all regulated facilities through the traditional corrective action process. If EIs eliminated the most dangerous threats up front in exchange for delaying the overall RCRA program, then EPA arguably made an appropriate shift in its priorities. In turn, GPRA could be credited for providing the impetus for that policy-shift.

V. HOW ARE OTHER AGENCIES REACTING TO GPRA?

Virtually all agencies are required to comply with GPRA, and the EPA Corrective Action Program is only a single example. Other federal agencies have met with varied success in their implementation of the GPRA requirements.

A. The United States Patent and Trademark Office

OMB's recent evaluation of the U.S. Patent and Trademark Office's ("PTO") Patents program received a rating of "adequate" in 2003.¹³⁹ The PTO has a strategic goal to "Optimize Patent Quality and Timeliness."¹⁴⁰ While the PTO believes it met 90 percent of its GPRA goals in fiscal year 2006, it acknowledges a growing backlog of patent applications that it is unable to review in a timely fashion.¹⁴¹ The source of the problem is the ever-increasing number of patent applications, increasing by 87

¹³⁹ Office of Mgmt. and Budget, Executive Office of the President, Detailed Information on the U.S. Patent and Trademark Office—Patents Assessment [hereinafter "Patent Detail"], *available at* <http://www.whitehouse.gov/omb/expectmore/detail/10000046.2003.html>.

¹⁴⁰ U.S. PATENT AND TRADEMARK OFFICE, DRAFT STRATEGIC PLAN - 2007-2012, at 15 (Dec. 19, 2006) [hereinafter PTO DRAFT STRATEGIC PLAN FY07-12], *available at* <http://www.uspto.gov/web/offices/com/strat2007/stratplan2007-20012ombv.doc>.

¹⁴¹ *Id.* at 3, 10.

percent between fiscal years 1997 and 2006.¹⁴² The PTO measure for the “average time in months from filing until the application is issued as a patent or abandoned by the applicant” is called average total pendency.¹⁴³ In 2001, the average total pendency was 24.7 months, but had risen to 31.1 months by 2006.¹⁴⁴ Even with aggressive hiring of additional patent examiners, the PTO predicts that the average total pendency between initial submittal of patent applications and final approval or abandonment will exceed three years by 2010.¹⁴⁵

Despite this growing backlog, the PTO routinely meets or outperforms its targets for average total pendency by raising the targets each year; 27.7 months in fiscal year 2003, 29.8 months in fiscal year 2004, 31.0 months in fiscal year 2005, and 31.3 months in fiscal year 2006.¹⁴⁶ While the PTO has been open about the growing pendency problem, the rising targets beg the question of their own validity. As the PTO faces a patent application backlog of record-setting proportions,¹⁴⁷ these regularly met performance targets are increasingly meaningless.¹⁴⁸

B. *The United States Mint*

OMB performed a PART assessment of the U.S. Mint in 2002 and deemed it “effective.”¹⁴⁹ “This is the highest rating a program can achieve. Programs rated effective set ambitious goals, achieve results, are well-managed and improve efficiency.”¹⁵⁰ The Department of the Treasury set a strategic goal in 2003 to

¹⁴² U.S. PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2006, at 20 (Nov. 6, 2006) [hereinafter PTO FY06 PAR], available at <http://www.uspto.gov/web/offices/com/annual/2006/2006annualreport.pdf>.

¹⁴³ *Id.*

¹⁴⁴ See Patent Detail, *supra* note 139.

¹⁴⁵ PTO DRAFT STRATEGIC PLAN FY07–12, *supra* note 140, at 11.

¹⁴⁶ PTO FY06 PAR, *supra* note 142, at 22.

¹⁴⁷ PTO DRAFT STRATEGIC PLAN FY07–12, *supra* note 140, at 4.

¹⁴⁸ PTO FY06 PAR, *supra* note 142, at 22.

¹⁴⁹ Office of Mgmt. and Budget, Executive Office of the President, Detailed Information on the U.S. Mint: Coin Production Assessment, available at <http://www.whitehouse.gov/omb/expectmore/detail/10000420.2002.html>.

¹⁵⁰ OMB About Us, *supra* note 123.

“Preserve the Integrity of Financial Systems,”¹⁵¹ with a supporting strategic objective to “Increase the Reliability of the U.S. Financial System.”¹⁵² The Department “ensures the U.S. financial system’s reliability and security through the production of the nation’s coins and currency.”¹⁵³

The U.S. Mint reported that the cost to produce 1,000 coins went from \$9.96 in Fiscal Year 2003 to \$7.55 in Fiscal Year 2006.¹⁵⁴ It also managed to reduce the amount of time necessary to produce new coins and deliver them to customers from 150 days to 72 days between fiscal years 2003 and 2006.¹⁵⁵ The U.S. Mint credited streamlining its processes and technological advances to achieve the reduced costs.¹⁵⁶ The Treasury has made significant improvements at the Mint, and utilized their 2006 PAR to communicate that improvement to Congress.

VI. CONCLUSION

GPRA deserves credit for the proliferation of data to make inquiries about agency performance possible. Without the readily accessible PAR reports from various agencies, it would be difficult to even conceive of the correct questions to ask, much less which answers would be satisfactory. Perhaps GPRA’s best success has been its service as a spotlight on agencies’ job performance. One of GPRA’s purposes was to “help Federal managers improve service delivery, by requiring that they plan for meeting program objectives and by providing them with information about program results.”¹⁵⁷ The sheer volume of reports dedicated to meeting

¹⁵¹ U.S. DEP’T OF THE TREASURY, STRATEGIC PLAN FOR THE FISCAL YEARS 2003–2008, at 19, *available at* <http://www.ustreas.gov/offices/management/budget/strategic-plan/2003-2008/strategic-plan2003-2008.pdf>.

¹⁵² *Id.* at 23.

¹⁵³ U.S. DEP’T OF THE TREASURY, FISCAL YEAR 2006 PERFORMANCE AND ACCOUNTABILITY REPORT, at 59 (Nov. 15, 2006), *available at* http://www.ustreas.gov/offices/management/dcfo/accountability-reports/2006-par/Full_Version.pdf.

¹⁵⁴ *Id.* at 60.

¹⁵⁵ *Id.* at 191.

¹⁵⁶ *Id.* at 60.

¹⁵⁷ 31 U.S.C. § 1115 note (2000) (Congressional Findings and Statement of Purposes).

GPRA requirements clearly shows a focus on setting program objectives and reporting results.

The White House generates the PART Assessments, and the agencies, led by the administration's political appointees, create the PAR reports. If the Executive Branch improves the quality of the work performed by agencies through the provision of comprehensive performance reports to the legislative branch, then GPRA is undoubtedly doing its job. Alternatively, if those agencies create their own measures of success and then meet the goals they set for themselves, is GPRA simply reduced to a paper exercise?

Ensuring that GPRA is implemented in a meaningful manner may not require new legislation, but rather the exercise of authority already granted to Congress. The terms of GPRA enable Congress to "establish, amend, suspend, or annul a performance goal."¹⁵⁸ Congressional oversight committees could use this ability to demand that agencies use performance measures that not only report success, but also represent goals that best serve the agencies' missions and accurately reflect the amount of progress the agencies have achieved. This would give agencies clear direction on Congress's expectations for implementing GPRA, and split the burden of GPRA's accountability requirements between the Congress demanding them and the agencies implementing them. During her testimony before the House Subcommittee on Government Management, Information, and Technology, Ellen Taylor of OMB Watch stated "[t]here must be an improved dialogue between Congress and Executive Branch agencies as partners in this process," in order to "ensure more meaningful and ambitious performance measures that improve as time passes."¹⁵⁹

¹⁵⁸ 31 U.S.C. § 1115 note (Congressional Oversight). For an overview of Congress' broad authority to conduct oversight of the Executive Branch, see Frederick M. Kaiser and Walter J. Oleszek, Cong. Research Serv., CONGRESSIONAL OVERSIGHT MANUAL, CRS REPORT FOR CONGRESS, ORDER CODE RL30240, at 1-17 (May 1, 2007). Any limits imposed by the separation of powers doctrine upon Congressional authority to control agency action are not explored here.

¹⁵⁹ 2000 *Results Hearing*, *supra* note 67, at 109 (prepared statement of Ellen Taylor). The reality of Congressional oversight may be something less. Rep. Albert Wynn (D-Maryland) stated that a hearing regarding EPA's fiscal year 2008 budget request before the Subcommittee on Environment and Hazardous Materials was the first held in the last six years, and that Congressional oversight of EPA should be

Ultimately, reviewing the efforts of a few agency programs to comply with GPRA requirements here provides a small window into the overall efficacy of GPRA. Drawing broad conclusions about the performance of the entire spectrum of the federal government from figures for those individual programs would be flawed. Rather, the limited evidence presented here suggests that it would be informative to conduct a broader analysis of the available government-wide data in order to determine if agency efforts to meet the requirements of GPRA have obscured the original purpose the agencies serve.¹⁶⁰

pursued more vigorously. *The Environmental Protection Agency Fiscal Year 2008 Budget Request: Hearing Before the Subcomm. on Env't and Hazardous Materials of the H. Comm. on Energy and Commerce*, 110 Cong. 1-2 (2007) (statement of Rep. Albert Wynn, Chairman, Subcomm. on Env't and Hazardous Materials).

¹⁶⁰ There is more than a little irony in suggesting a broad performance analysis of the results of GPRA in order to judge its efficacy.