

## **ENVIRONMENTAL ENFORCEMENT: IN SEARCH OF BOTH EFFECTIVENESS AND FAIRNESS**

by  
Alexander Volokh and Roger Marzulla

### **EXECUTIVE SUMMARY**

The current enforcement of environmental laws often violates basic principles of fairness, with perverse consequences for everyone.

- Businesses suffer from the high costs of attempting to comply with vague and ambiguous environmental regulations to avoid prosecution.
- Individuals suffer by being subject to civil and criminal penalties unjustly imposed, and out of proportion to the severity of their violations.
- Government suffers by failing to improve the environment, while spending vast sums of money on sometimes useless litigation efforts.
- We all suffer by having dirtier water, more polluted air and a less clean environment than we should have for the tremendous sums we spend.

Environmental enforcement encompasses the range of measures which government uses to punish non-compliance with environmental laws or regulations. When faced with a violation of environmental laws, enforcement agencies can often choose from a range of options—from administrative action to civil fines to criminal prosecution.

The question is not whether we need environmental enforcement—of course we do. As in any regulatory regime, the possibility of violations exists; wherever there is an intent to harm people or intentionally violate the law, a mechanism for enforcement (and, sometimes, criminal enforcement) must exist. But how do we judge whether a particular enforcement regime, whether for environmental or other laws, is *effective and appropriate*? Some of the criteria we should use in answering this question are:

- Is it procedurally fair?
- Is there some reasonable relationship between the “crime” and the “punishment”?
- Does it effectively prioritize enforcement efforts, concentrating the most resources on punishing the worst actors and protecting us from the worst risks?
- Do enforcement agencies have appropriate incentives?
- Does the regulated community have appropriate incentives?

These issues exist in some degree for all enforcement efforts, and there's little about environmental law that differs inherently from the issues raised by other substantive areas of the law. Yet environmental enforcement has seldom been held up to the same scrutiny as other government enforcement programs.

The problems of environmental enforcement fall into two main categories:

- The current environmental enforcement system often fails to improve the environment—because of unclear regulations, and because environmental enforcers inappropriately concentrate on technical compliance with regulations and not on improving environmental quality.
- Current environmental enforcement policy often violates fundamental principles of fairness and justice— by using criminal punishments where they're not appropriate, by abandoning traditional concepts of intent and responsibility, and by eroding constitutional protections.

The numbers of cases filed, penalties collected, and years of imprisonment obtained are largely irrelevant to measuring the success of the environmental enforcement program. One would think, from the fact that these figures climb year by year, that American businesses are becoming increasingly lawless and disdainful of environmental protection. Yet the opposite is actually true. Year by year, American businesses improve their environmental record and spend more on environmental protection than in any previous year. What these statistics prove is that the environmental enforcement program is pushing the margins of judicial deference, regulatory interpretation, and strict liability, to achieve essentially meaningless results of greater penalties and more convictions. Environmental enforcement is responding to the first principle of any government bureaucracy: bigger budgets and more employees. New measures of success must be found.

There is no one way to achieve effective and fair environmental enforcement; reality is complicated. The principles to keep in mind, though, are relatively simple. To be effective, an enforcement regime must:

- be clear in what it mandates and prohibits;
- be predictable in how it punishes violations of the regulations, and rely where possible on cooperative, problem-solving approaches; and,
- seek environmental improvement, not numerical enforcement targets.

And to be fair, an enforcement regime must:

- reserve criminal penalties for the morally blameworthy, and punish others with civil or administrative penalties;
- restore specific criminal intent as a necessary condition of a criminal prosecution, and only punish those who are truly responsible for the criminal acts; and,
- respect the Bill of Rights.

Reforms based on these principles would make environmental enforcement more predictable for businesses and more cost-effective for governments. Environmentalists would benefit from these reforms, because a misguided enforcement regime that leads to unjustified punishments is, after all, bad press. The environment need not suffer as a result, and would, in fact, probably improve as the government starts to send a clearer and more consistent deterrent message. Most importantly, these reforms would make environmental enforcement more fair for all concerned.

## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	CURRENT TRENDS IN ENVIRONMENTAL PROSECUTION	2
III.	THE ENVIRONMENTAL ENFORCEMENT SYSTEM OFTEN FAILS TO IMPROVE THE ENVIRONMENT	4
	A. Unclear Laws, Permits, and Regulations	4
	B. Unclear Enforcement Methods	8
	C. The Enforcement Mindset	11
	D. Why We Should Care?	13
IV.	THE ENVIRONMENTAL ENFORCEMENT SYSTEM OFTEN VIOLATES PRINCIPLES OF FAIRNESS AND JUSTICE	15
	A. Criminal Law: Who Needs It?	15
	B. Intent and Responsibility	16
	C. Environmental Law and the Bill of Rights	18
	1. <i>The Fourth Amendment: Unreasonable Searches</i>	18
	2. <i>The Fifth Amendment: Self-Incrimination</i>	20
	3. <i>The Fifth Amendment: Double Jeopardy</i>	22
	4. <i>The Tenth Amendment: Federalism and Duplicate Regulation</i>	23
	5. <i>The Eighth Amendment: Excessive Fines, Cruel &amp; Unusual Punishment</i>	24
V.	SOME STEPS IN THE RIGHT DIRECTION	27
VI.	CONCLUSION	31
	ABOUT THE AUTHORS	32

**A MORE DETAILED TREATMENT OF THE ISSUES RAISED IN THIS PAPER IS AVAILABLE FROM THE REASON FOUNDATION UPON REQUEST.**

*“The Law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw,  
And I, my Lords, embody the Law.”*

—W.S. Gilbert, *Iolanthe* (1882)

## I. INTRODUCTION

The current enforcement of environmental laws often violates basic principles of fairness, with perverse consequences for everyone.

- Businesses suffer from the high costs of attempting to comply with vague and ambiguous environmental regulations to avoid prosecution.
- Individuals suffer by being subject to civil and criminal penalties unjustly imposed, and out of proportion to the severity of their violations.
- Government suffers by failing to improve the environment, while spending vast sums of money on sometimes useless litigation efforts.
- We all suffer by having dirtier water, more polluted air and a less clean environment than we should have for the tremendous sums we spend.

Environmental enforcement encompasses the range of measures which government uses to punish non-compliance with environmental laws or regulations. When faced with a violation of environmental laws, enforcement agencies can often choose from a range of options—from administrative action to civil fines to criminal prosecution.

The question is not whether we need environmental enforcement—of course we do. As in any regulatory regime, the possibility of violations exists; wherever there is an intent to harm people or intentionally violate the law, a mechanism for enforcement (and, sometimes, criminal enforcement) must exist. But how do we judge whether a particular enforcement regime, whether for environmental or other laws, is *effective* and *appropriate*? Some of the criteria we should use in answering this question are:

- Is it procedurally fair?
- Is there some reasonable relationship between the “crime” and the “punishment”?
- Does it effectively prioritize enforcement efforts, concentrating the most resources on punishing the worst actors and protecting us from the worst risks?
- Do enforcement agencies have appropriate incentives?
- Does the regulated community have appropriate incentives?

These issues exist in some degree for all enforcement efforts, and there's little about environmental law that differs inherently from the issues raised by other substantive areas of the law. Yet environmental enforcement has seldom been held up to the same scrutiny as other government enforcement programs.

The problems of environmental enforcement fall into two main categories:

- The current environmental enforcement system often fails to improve the environment—because of unclear regulations, and because environmental enforcers inappropriately concentrate on technical compliance with regulations and not on improving environmental quality.
- Current environmental enforcement policy often violates fundamental principles of fairness and justice—by using criminal punishments where they're not appropriate, by abandoning traditional concepts of intent and responsibility, and by eroding constitutional protections.

State legislatures and the U.S. Environmental Protection Agency (EPA) have begun to take some steps in the right direction. This paper will conclude with an overview of such steps.

## II. CURRENT TRENDS IN ENVIRONMENTAL PROSECUTION

While environmental enforcement includes administrative, civil, and criminal prosecution, environmental crimes have been perhaps the most controversial aspect of the enforcement regime. The EPA and the Department of Justice prosecute a great many environmental violations criminally, and the numbers have grown rapidly through 1995. Because environmental criminal sentences are quite variable, and not as common as sentences for more conventional crimes, it's difficult to talk meaningfully about average sentences. But some recent, high-profile environmental sentences have exceeded average sentences for many different categories of offenses. In recent years, for instance, first-time offenders Ocie and Carey Mills were sentenced to 21 months in prison for the federal crime of dumping dirt on their wetlands without a permit. For comparison, here are some average sentences for offenses committed by criminals with extensive prior criminal history: 20 months for larceny, 10 months for embezzlement, 13 months for fraud, 17 months for car theft, 16 months for forgery or counterfeiting, 17 months for bribery, and 22 months for escape.

**Table 1: Trends in Environmental Criminal Prosecution**

FY	Indictments	Pleas & Convictions
1983	40	40
1984	43	32
1985	40	37
1986	94	67
1987	127	86
1988	124	63
1989	101	107
1990	134	85
1991	127	96
1992	187	104
1993	186	168
1994	178	124
1995	100	66
<b>Total</b>	<b>1,481</b>	<b>1,074</b>

Source: U.S. Dept. of Justice, Environment and Natural Resources Div., Policy, Legislation and Special Litigation Section, *Environmental Criminal Statistics FY83 Through FY94* (April 7, 1995).

**Table 2: Trends in Environmental Fines and Sentences**

FY	Criminal Fines	Total Prison Terms			Total Confinement		
		Year	Month	Day	Year	Month	Day
1983	341,100	11			5		
1984	384,290	5	3		1	7	
1985	565,850	5	5		2	11	
1986	1,917,602	124	2	2	31	4	12
1987	3,046,060	32	4	7	14	9	22
1988	7,091,876	39	3	1	8	3	7
1989	12,750,330	53	1		37	2	
1990	29,977,508	71	11	3	47	13	1
1991	18,508,732	24	8		22	8	
1992	169,359,344	37	6	1	34	1	1
1993	18,992,968	62	8		55	4	5
1994	27,714,286	69	7	1	69	7	1
1995	5,932,057	24	4		24	4	
<b>Total</b>	<b>\$296,582,003</b>	<b>561</b>	<b>2</b>	<b>16</b>	<b>359</b>	<b>1</b>	<b>19</b>

Source: U.S. Dept. of Justice, Environment & Natural Resources Div., Policy, Legislation and Special Litigation Section, *Environmental Criminal Statistics FY83 Through FY94* (April 7, 1995).

Tables 1 and 2 provide a statistical summary of the criminal cases brought under the environmental statutes by the EPA and the sentences imposed. These statistics demonstrate that environmental criminal enforcement has been

dramatically on the rise for the last decade. And these are only the criminal numbers. Each year, companies also pay hundreds of millions of dollars in civil fines, penalties, and legal costs. On November 30, 1994, for instance, EPA Administrator Carol Browner announced that in fiscal year 1994 alone, the EPA extracted \$165.2 million in monetary penalties, \$747.5 million in injunctive and supplemental relief, and \$1.6 billion in Superfund cleanups and cost recovery.<sup>1</sup>

---

<sup>1</sup> Roger Marzulla, "The EPA's environmental protection racket," *The Washington Times*, January 9, 1995, p. A21.

### III. THE ENVIRONMENTAL ENFORCEMENT SYSTEM OFTEN FAILS TO IMPROVE THE ENVIRONMENT

#### A. Unclear Laws, Permits, and Regulations

*“If there isn't a law, there will be.”*

— Harold Faber, *The New York Times Magazine* (1968)

Unclear laws and regulations defeat the very purpose of environmental regulation. The success of the environmental regulatory scheme depends on how well people follow the regulations' mandates and prohibitions. But if no one knows what he is supposed to do or not do, the regulations will not achieve the intended result. The more complex the regulatory regime, the less clear the laws and regulations, the more difficult it is for the most well-intentioned individual to comply because he cannot ascertain what is expected.

EPA Administrator Carol Browner has noted that the existing environmental regulatory scheme is “a complex and unwieldy system of laws and regulations and increasing conflict and gridlock.”<sup>2</sup> The Supreme Court has commented on the complexity of the Clean Water<sup>3</sup> and Clean Air<sup>4</sup> Acts. The statutes themselves can be hundreds of pages long, and combine detailed congressional micromanagement with extensive delegation to the EPA. The regulations that implement the statutes take thousands of pages in the Code of Federal Regulations. The laws and regulations are supplemented by policy pronouncements in the *Federal Register*, judicial opinions, guidance documents, letters of agency interpretation, verbal advice given over hotlines by employees of EPA contractors, and litigation positions taken in civil and criminal enforcement actions.<sup>5</sup>

Two-thirds of corporate lawyers surveyed in 1993 by the *National Law Journal* admitted that their companies had violated some environmental statute during the previous year, largely because of uncertainty and complexity. Seventy percent believed that full compliance with all federal and state environmental laws was impossible.<sup>6</sup>

---

<sup>2</sup> “New EPA ‘Common Sense’ Approach Cautiously Welcomed By Industries,” *Air Water Pollution Report*, July 25, 1994, p. 30.

<sup>3</sup> See, for example, *Chemical Manufacturers Association v. Natural Resources Defense Council*, 470 U.S. 116, p. 125 (1985).

<sup>4</sup> See, for example, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, p. 848 (1984).

<sup>5</sup> James V. DeLong, “The criminalization of just about everything,” *The American Enterprise*, March/April 1994, p. 29.

<sup>6</sup> Marianne Lavelle, “Environmental Vise: Law, Compliance,” *National Law Journal*, August 30, 1993, p. S8.



How complicated are the regulations based on the laws? As one federal judge recently stated regarding the hazardous waste regulations of the Resource Conservation and Recovery Act (RCRA): “The people who wrote this ought to go to jail. They ought not to be indicted, that’s not enough.”<sup>7</sup> When Congress enacted RCRA, it was vague on the notion of “solid waste,” and referred to “garbage,” “refuse,” and “other discarded material” without defining the terms.<sup>8</sup> The task of defining and refining terms was left to the EPA.

---

<sup>7</sup> Judge Adrian Duplantier, quoted in a press release from Marine Shale Processors Inc., itself quoted in “Judge critical of both parties in Marine Shale case,” *Pesticide & Toxic Chemical News*, September 7, 1994, p. 20.

<sup>8</sup> David J. Bodney and Steven M. Hoffman, “Rethinking the Law: A Balanced Approach to Recycling,” *Arizona Attorney*, October 1993, p. 13.

By EPA's admission, the resulting regulations are "complicated"<sup>9</sup> and "convoluted."<sup>10</sup> For instance, even though some EPA regulations define hazardous waste as a type of solid waste, other regulations define solid waste as a subset of hazardous waste.<sup>11</sup> The regulations are so confusing that up to a third of the inquiries on EPA's RCRA Hotline involve the definitions of "solid" and "hazardous" waste.<sup>12</sup>

"After reading and rereading the regulations several times," a federal district judge concluded that "the regulations are in fact dense, turgid, and a bit circuitous."<sup>13</sup> Don R. Clay, former Assistant Administrator for the EPA Office of Solid Waste and Emergency Response, has called RCRA "a regulatory cuckoo land of definition," in which a substance that wasn't hazardous yesterday "is hazardous tomorrow, because we've changed the rules."<sup>14</sup> According to Clay, only about five people in the agency actually know what a hazardous waste is.<sup>15</sup>

Consider the example given by leading environmental criminal attorney Judson Starr: "If [a] solvent is poured first on the machinery and then wiped with a clean rag, the rag is a hazardous waste. However, if the solvent is poured first on the rag and then is used to wipe the machinery clean, the rag is not a hazardous waste. Go figure."<sup>16</sup>

---

<sup>9</sup> Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614 (Jan. 4, 1985), p. 617.

<sup>10</sup> *Rethinking the Definition of Solid Waste* (EPA Forum Agenda, April 28, 1993), p. 8.

<sup>11</sup> 40 C.F.R. § 261.2(a)(2)(i) (1988). "The term 'hazardous waste'... includes any *solid, liquid, semi-solid, or contained gaseous* waste materials...." James E. McCarthy and Mark E. Anthony Reisch, *Hazardous Waste Fact Book*, Congressional Research Service, January 30, 1987, p. CRS-1 (emphasis added).

<sup>12</sup> *Rethinking*, p. 13.

<sup>13</sup> Quoted in *United States v. White*, 766 F. Supp. 873, p. 880 (E.D. Wash. 1991).

<sup>14</sup> *United States v. White*, p. 882.

<sup>15</sup> Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, Cato Institute, Policy Analysis #223, April 20, 1995, n. 31.

<sup>16</sup> Judson W. Starr, Joseph G. Block, and John F. Cooney, "Prosecuting Pollution," in "Special Report: Protecting the Heavens and the Earth," *Legal Times*, May 31, 1993, pp. 8-10, quoted in Lynch, *Polluting Our Principles*, pp. 8-9.

This isn't just a question of semantics; when an entire regulatory scheme applies to some people and not to others, figuring out who's who becomes vitally important. This is, indeed, part of the problem with RCRA—the existing regulations are an “all or nothing” proposition. A recycler is either in or out of RCRA Subtitle C regulation, depending on whether the substance he handles can be excluded from the definition of “hazardous solid waste.”<sup>17</sup>

Often even more complicated than the laws and regulations themselves are the permits issued under the regulations. National Pollution Discharge Elimination System (NPDES) permits—the permits that are required under the Clean Water Act—prescribe what pollutants, and how much of them, a company can discharge and often run one hundred pages or more. These effluent limitations can be expressed in many ways, such as a limitation of the quantity or the mass of the pollutant. NPDES permits can contain a maximum allowable discharge of a pollutant on a given day and also the maximum allowable daily discharge for a 30-day period. Permits can contain limitations in terms of mass, concentration, or toxicity. They can have daily maximum or monthly average flow requirements. They can contain specific monitoring requirements, like sampling or testing protocols.

---

<sup>17</sup> Bodney and Hoffman, “Rethinking the Law,” p. 13.

Many permit “violations” merely involve the failure to follow every element of a complex monitoring protocol. Under the NPDES, permitted individuals can be required to perform composite sampling—collecting a variety of grab samples and following certain procedures to create a composite sample of the grab samples. If the permittee doesn’t follow the sampling protocols exactly, the entire sample is invalid. This means that there could be a permit violation even though the actual samples may be within permit limits. Erroneous test data could make the permittee change his discharge and accidentally be out of compliance the next month. These problems are compounded by two- to four-week delays in getting test results back.<sup>18</sup>

Another result of unclear laws and regulations is “regulation by litigation.” When no one can understand the regulations, they often end up in court, where judges, on a slow, inconsistent, case-by-case basis, decide what the law means. “Regulation by litigation” tends to lead to a new cycle of unclear laws, as the courts reward sloppy lawmaking by often resolving ambiguities in the government’s favor.

In *U.S. v. Standard Oil*<sup>19</sup> (1966), for example, the Supreme Court found the statutory term “refuse matter” to include commercially valuable gasoline.<sup>20</sup> In *U.S. v. Phelps Dodge Corporation*<sup>21</sup> (1975), a federal district judge ruled that the terms “navigable waters” and “waters of the United States” in the Clean Water Act could encompass “normally dry arroyos through which water *may* flow.”<sup>22</sup> And it took the Supreme Court more than 20 years to finally decide the meaning of “harm” as used in the Endangered Species Act, in *Babbitt v. Sweet Home*<sup>23</sup> (1995).

## B. Unclear Enforcement Methods

---

<sup>18</sup> *Thomas W. Mariani and Michael H. Weitzenhoff v. U.S.*, petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit, brief of the Corporate Environmental Enforcement Council, the Electronic Industries Association, the National Association of Manufacturers, and the Pharmaceutical Research and Manufacturers of America as *amici curiae* in support of petitioners (“CEEC *amicus* brief in *Weitzenhoff*”), pp. 6–7.

<sup>19</sup> 384 U.S. 224, p. 226 (1966).

<sup>20</sup> The *Standard Oil* case was central to the expanded reach of the navigable waters legislation. Before that case, the applicable statute was understood to deal only with maintaining the navigability of waterways. *Standard Oil* established that the statutes applied not only to navigability, but to pollution that may be unrelated to navigation.

<sup>21</sup> 391 F.Supp. 1181 (1975).

<sup>22</sup> Lynch, *Polluting Our Principles*, p. 9.

<sup>23</sup> 115 S. Ct. 2407 (1995).

If environmental law is to protect the environment, it must do two things. First, it must educate the public by laying out what behavior is required and what behavior forbidden. Second, it must deter the public from acting irresponsibly by setting forth appropriate penalties—greater penalties for more severe offenses, and smaller penalties for less severe offenses.

The environmental enforcement regime provides the government with many tools to ensure regulatory compliance. Violations of environmental laws can be enforced either administratively, civilly, or criminally, and which method is used often depends on the prosecutor. Environmental agencies also have the discretion to recognize when someone is in technical violation of a law but isn't in fact doing any environmental harm, or when a “violator” is innocent and shouldn't be punished. Sometimes they work cooperatively with “violators” to reach a mutually beneficial solution; sometimes they don't.

Some amount of discretion is appropriate; we don't want to force the same treatment on different offenses. Some offenses are grave enough to warrant criminal penalties, and others can appropriately be dealt with through administrative fines. But it's hard for people to tell ahead of time what actions will lead to what punishment. In the world at large, we know that parking violations and murder are both bad, but the system of penalties (which, in turn, is based on notions of societal harm and moral notions of blame) tells us that a murder conviction is serious, while a parking ticket is venial. Vague punishments raise due process questions, as there isn't adequate notice to potential offenders. But unpredictability of prosecution also hurts environmental compliance. Under current practice, whether a violation is treated administratively, civilly or criminally typically doesn't depend on how severe the violation is.<sup>24</sup>

As we have seen, ambiguous or conflicting regulations defeat the very purpose for which they were adopted—compliance. The imposition of severe civil or criminal penalties for violation of such ambiguous regulations compounds the problem by breeding disrespect for a program which no one can even understand. Much of the resentment of government regulations today arises from the unclear way in which they are drafted, compounded by the unfair way in which they are enforced.

Federal agencies publish more than 65,000 pages of rules and interpretive statements in the *Federal Register* each year, and issue countless pages of regulatory guidance. Much of this “guidance” actually attempts to change the meaning of the regulations, or to add new requirements not contained in the published rule. These thousands upon thousands of pages of regulations and interpretations often are inaccessible to most Americans, creating a welter of “private regulations” of which citizens are completely unaware. These memoranda, letters, and notes, prepared by thousands of separate government employees, are sometimes inconsistent with each other—as well as with the regulation. Indeed, the more ambiguous the regulation, the greater the proliferation of interpretations and guidance, leaving the citizen to pick through them to ascertain—at his peril—what those regulations require of him. The results, in many instances, include ruinous penalties and the shattering of lives of ordinary, law-abiding Americans who tried to do the right thing.

The imposition of fines and penalties upon those who are unable to comply with ambiguous and mind-numbing regulations undermines the legitimacy of the very program it is intended to advance. Prosecutions based on such defective regulatory requirements encourage regulators to “make it up as they go along” by clarifying unclear regulations through litigation. Like the proverbial “speed trap town” which hides a speed limit sign behind a tree to catch a passing motorist, unclear and inconsistently interpreted regulations actually discourage citizens from complying by making it virtually impossible for them to do so.

Federal agencies have made some progress in helping people understand complex regulations, by reinventing and reviewing regulatory schemes. But agencies have systematically revised existing regulations in only a few isolated instances, leaving the regulated community open to continued enforcement of ambiguous regulations or conflicting

---

<sup>24</sup> Kevin A. Gaynor, Jodi C. Remer, and Thomas R. Bartman, “Environmental Criminal Prosecutions: Simple Fixes for a Flawed System,” *Villanova Environmental Law Journal* 3 (1992): 1–31, quoted in Lynch, *Polluting Our Principles*, p. 10.

agency interpretations in the vast majority of circumstances. At present, Americans remain at risk of ruinous penalties for failure to comply with regulatory requirements that they did not and could not have known about.

For instance:

- A major chemical company in Texas was being threatened with a lawsuit that could impose millions of dollars in penalties under the Clean Air Act. The suit stems from the company's compliance with a 1984 interpretation of a regulation issued by the state's Air Control Board and communicated to the EPA at that time. Ten years later, the EPA said it disagreed with the state's interpretation, and wanted to be paid up to \$25,000 per day in fines, going all the way back to 1984.<sup>25</sup>

On the other hand, agencies can be cooperative as well as confrontational:

- A Midwestern Fortune 100 company was expanding some of its operations at a site where it had been located for a hundred years. During that expansion, the company learned that the 15-acre site was considered a wetland, and so its expansion plans, which were already under way, were about to criminally violate the Clean Water Act. It was infeasible for the company to expand elsewhere, since the choice of location was crucial to the operation.

The government could have sought criminal penalties, but it worked together with the company instead. The company couldn't create another wetland of equal size, because unlike many developers who want to build on a wetland, the company wasn't in the business of land management. Moreover, since a newly created wetland will lose its wetland status unless it's actively managed, merely creating another wetland wouldn't have solved the problem. Most of the options suggested by the Army Corps of Engineers were prohibitively expensive, considering that the site, though it fit the technical definition of a wetland, had been a manufacturing site for a century and hadn't served a wetlands function in a long time.

---

<sup>25</sup> Roger Marzulla, "The EPA's environmental protection racket."

The company found a wetlands restoration project underway nearby that was using state, local, and private funds. It offered to pay for the cost of restoring a 15-acre portion of that wetland. At first, the Army Corps of Engineers objected to the idea of the company giving money to someone in exchange for developing a wetland. But after a series of meetings, because the company had worked actively with the government and negotiated in good faith, the government allowed the company to pay for the remediation of a portion of the project. This example demonstrates the possibilities, even within the confines of existing law, of moving away from punitive and confrontational approaches.<sup>26</sup>

Criminal laws should punish the *really* blameworthy, administrative fines should punish technical violations, and civil penalties should punish everything in between. Cooperative, problem solving approaches may be the best solution in many cases, when “violators” are acting in good faith. But environmental laws are broad; the unspoken premise is, “Maybe innocent people will end up violating the law—but we’ll rely on the prosecutor’s judgment.” Sometimes, this policy may work. But it means that the prosecutor is the one who makes the distinctions between guilty and innocent as he goes along. As one prosecutor put it, “When the little hairs on the back of your neck stand up, it’s a felony. When it just makes you tingle, it’s a misdemeanor. If it does nothing to you at all, it’s a civil problem.”<sup>27</sup>

When legislatures make their statutes so broad that everyone is potentially a criminal, they invite abuse by overzealous prosecutors. Enforcement is likely to be inconsistent and arbitrary, and the deterrent message of the law is likely to be garbled; these problems are compounded by the vagueness and complexity of the law. Fundamentally, when the severity of the punishment is unknown and not necessarily related to the gravity of the offense, the law as a way of modifying behavior is undermined.

### C. The Enforcement Mindset

*“He who the sword of heaven will bear  
Should be as holy as severe.”*

— William Shakespeare, *Measure for Measure* (1605)

When considering whether environmental enforcement advances environmental compliance, we should ask whether the regulators have the proper incentive to prosecute the right cases or assess the right penalties. In reality, enforcers often do not. Environmental enforcement agencies are frequently motivated by what can best be described as “bean-counting”—strictly enforcing paperwork mistakes and technical violations with no environmental harm, in an attempt to increase environmental prosecution.

Environmental harm and intentional noncompliance, not “bean counting,” ought to be deciding factors in whether or not to prosecute a case. After all, we’re trying to achieve environmental quality, not prosecutions; enforcement is only a means to an end. If environmental agencies or prosecutors are subjected to undue political pressure to

---

<sup>26</sup> This example shouldn’t be construed as implying that reform of the Clean Water Act (and wetlands regulations) isn’t warranted. Wetlands regulations raise important property rights issues that need to be addressed. However, in the absence of reforms, at a minimum these more flexible applications of regulations are preferable to purely punitive approaches.

<sup>27</sup> Quoted in Leslie Spencer, “Designated Inmates,” *Forbes*, October 26, 1992, p. 100, and Lynch, *Polluting Our Principles*, p. 10.

prosecute more, or if they have a financial stake in the amount of enforcement they perform, enforcement will rise—but with little or no benefit to the environment.

Congress has repeatedly demonstrated its willingness to intervene in environmental prosecutions. Various congressional committees, headed by Congressmen John Dingell, Charles Schumer, and Howard Wolpe, condemned the Bush Administration's alleged softness on environmental crime. In 1992, then Vice President-elect Al Gore endorsed a study done for Rep. Schumer's committee that selected six cases, out of hundreds, that it said should have been pushed harder. Government prosecutors were required to testify under oath as to why they chose not to seek greater penalties and at least one—a highly experienced former “mob” prosecutor from New York—lost his job as a result.

Yet this political pressure defeats the goal of even-handed prosecutorial discretion. Regulators are rarely chided for overregulating. Such pressure can make prosecutors think twice before bargaining cases down, even when they think this is the correct response. And there is the danger that this attitude can lead to an indiscriminate attitude of retribution.

Moreover, many state and local agencies—for instance, the South Coast Air Quality Management District (AQMD) in the Los Angeles area—collect their revenues partly from the penalties they impose. Since they collect penalties every time someone violates a regulation, they have a financial stake in the continuation of the problem. This system also makes it hard for them to recognize good news when they see it. When violations decline, so does the agency budget. The AQMD has been known to call for increasing penalties to compensate for its budget shortfalls, even though those budget shortfalls were partly due to its own success in curbing violations. This is a curious situation for a regulatory agency—essentially having to penalize pollution *more* when we have *less* of it.<sup>28</sup>

The perverse incentives that lead to these results do more than just single out individual violators for unjust punishment. They give environmental agencies a “more is better” mindset, in which enforcement becomes an end in itself. The EPA exults when the “output” of its criminal program—the amount of cases brought, criminal and civil fines levied, fees collected, and prison terms imposed—increases, and issues concerned memos when it decreases. As Robert Adler and Charles Lord of the Natural Resources Defense Council put it, EPA personnel should “take their enforcement responsibilities seriously and view enforcement as more than a ‘bean-counting’ exercise.”<sup>29</sup> An environmental agency under this sort of quota-like system, like the proverbial traffic cop with his quota of tickets to write, will tend to prosecute not the most serious cases, but those that are the easiest to find. The regulated community and environmental compliance as a whole suffer as a result.

The moral of the story is that we shouldn't count tickets or beans, or measure the success of environmental enforcement programs by anything other than environmental quality. A regime that enforces without regard to environmental quality may improve the environment, but only by accident.

---

<sup>28</sup> Myrna Oliver, “AQMD hikes its budget, raises fees to pay for it,” *Los Angeles Times*, June 3, 1989, Metro, part 2, p. 1.

<sup>29</sup> Robert W. Adler and Charles Lord, “Environmental Crimes: Raising the Stakes,” *George Washington Law Review* 59 (1991): 781, p. 811.



## D. Why We Should Care?

Is the environmental enforcement community furthering environmental compliance? The question boils down to whether the regulated community has the right incentives—which, in turn, depends on whether the regulators are punishing the right things, in the right amounts, and under the right incentives.

Laws matter. Environmental laws do more than just tell people what's acceptable and what isn't. What *types* of laws we have—what the rewards are for good behavior, what relationship the regulators have with the regulated, how clearly defined the regulations are—are crucial in determining companies' responses and, ultimately, the state of the environment. If we get the laws wrong, justice may suffer in some abstract sense, but the environment can also suffer. Here's an example of how that can happen.

- Benjamin Cone discovered red-cockaded woodpeckers—which are listed as an endangered species—on his land, and found himself unable to harvest any timber within half a mile of any woodpecker colony. Since the woodpecker was discovered, the Fish and Wildlife Service began controlling over a fifth of Cone's land. The value of Cone's land was sharply reduced, and yet Cone still has to pay taxes on the land's previous value. The irony is that Cone may have helped attract the woodpeckers and other animals to the land in the first place by selectively harvesting trees and creating an open, park-like forest.

The Endangered Species Act imposes criminal penalties for killing members of an endangered species. Cone's forestry practices, which were the model of responsible management and arguably environmentally beneficial according to the intent of the Endangered Species Act, would have been considered a crime. As a result, Cone changed his practices. He began to clearcut 300 to 500 acres *every year* on that part of the land that he still controls, to prevent woodpeckers from nesting there. Many other landowners are also actively managing their property to avoid creating habitats that might attract endangered species. “I cannot afford to let those woodpeckers take over the rest of the property,” Cone told an investigator.<sup>30</sup>

In other words, endangered species are suffering because of a misplaced public-sector emphasis on punitive measures. The fundamental axiom of environmental policy is that if we want to improve the environment, we want to discourage bad environmental behavior and encourage good behavior. In short: “First, do no (net) harm.” A legal structure with perverse incentives—one that encourages people to abandon stewardship efforts—is an outcome to avoid. Here's another example:

- Coors Brewing Company did a comprehensive, voluntary investigation of its air emissions. Before Coors's audit, the government thought that beer brewers were minor emitters of volatile organic compounds (VOCs). But the audit revealed that the government had been mistaken and had underestimated brewers' emissions by a factor of about 17. Coors provided this information to the Colorado Department of Health,

---

<sup>30</sup> Richard L. Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series, Issue Number PS-3, April 1995, pp. 4–6. See also Stroup, “Making Endangered Species Friends Instead of Enemies,” *The American Enterprise*, September/October 1995, p. 81. Even the FWS may have recognized the perversity of this and initiated negotiations with Ben Cone. At press time, Cone was no longer clearcutting on his property.

which then fined Coors \$1.05 million for its 189 violations of state air pollution laws and regulations—even though neither the company nor the state had any idea these violations were occurring before the audit.<sup>31</sup>

Environmental enforcement actions must advance principles of environmental protection. We all want clean air and pure water; we want a system that will achieve maximum benefits for the cost paid; we want an incentive system that will encourage actions that protect the environment. Sanctions (at least civil penalties and injunctions) are a necessary means to penalize “bad actors.” But it makes no sense for an environmental agency, by enforcing unclear regulations without looking at the big picture of environmental quality, to discourage the behavior that is necessary to identify and correct environmental problems. As Steven J. Madonna, New Jersey's State Environmental Prosecutor, explains:

---

<sup>31</sup> This story has been put together from the following sources: “Colorado Dept. of Health Fines Coors for Air Pollution Violations,” *Clean Air Network Online Today*, July 23, 1993; “Coors says fine could deter corporate environmental audits,” *BNA National Environment Daily*, July 28, 1993; “Coors settles with state over violations discovered during company's self-audit,” *BNA State Environment Daily*, February 23, 1994; Coors Brewing Company, *1993 Environmental Health and Safety Progress Report*.

*You can create an aura of intimidation so overpowering that everyone shudders at your name. That's great if you're planning the Garden of Eden, without human beings there. What are you creating if you have an atmosphere that is not conducive to responsible business and a place for their employees to live and work?... You're not chasing elephants with fly swatters, and you're not shooting flies with elephant guns.<sup>32</sup>*

## IV. THE ENVIRONMENTAL ENFORCEMENT SYSTEM OFTEN VIOLATES PRINCIPLES OF FAIRNESS AND JUSTICE

### A. Criminal Law: Who Needs It?

*“Justice should remove the bandage from her eyes long enough to distinguish between the vicious and the unfortunate.”*

—Robert G. Ingersoll, *Prose-Poems and Selections* (1884)

An environmental enforcement regime should be both *effective* (i.e., it succeeds in protecting the environment) and *appropriate* (i.e., it is fair). We have shown how ambiguity and misplaced enforcement priorities can lead to ineffectiveness. The following section will discuss how the current enforcement system can also violate principles of fairness and justice.

Let us return to the distinction between civil and criminal law. Many environmental offenses can be prosecuted either civilly or criminally, at the prosecutor's discretion, even though the two sorts of law operate differently and seek to achieve different results. The key difference between criminal and civil law is society's moral condemnation. We condemn murder in a way that we don't condemn traffic accidents. According to John Coffee, professor of law at Columbia University, what most distinguishes criminal law from civil law (and particularly from tort law) is:

*its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far more than tort law, criminal law is a system for public communication of values. As a result, the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant. Thus, while tort law seeks to balance private benefits and public costs, criminal law does not..., possibly because balancing would undercut the moral rhetoric of the criminal law. Characteristically, tort law prices, while criminal law prohibits.<sup>33</sup>*

Generally, someone can violate the civil law and get away with a fine, whereas someone who breaks the criminal law, even if he spends no time in jail, still has the stigma of a criminal conviction. The criminal law prohibits, mainly *because* it's the criminal law. The stern moral condemnation, not the penalty, *is* the prohibition.

This view of the criminal law has a number of consequences:

<sup>32</sup> Kucewicz, “Grime & Punishment,” p. 55.

<sup>33</sup> John C. Coffee Jr., “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law,” *Boston University Law Review* 71 (1991): 193, p. 193–194 (first italics are ours, second italics are the author's).

- The stigma associated with criminal law diminishes as the criminal law is applied to behavior that people don't think of as criminal. When people don't think their activities deserve disdain, and yet they see that these activities are crimes, they will have less respect for the criminal law.
- We shouldn't use the criminal law when the underlying behavior has some social usefulness. Murder—intentional, non-self-defensive killing—has no social usefulness. Neither does, say, armed robbery. Neither does reckless behavior—when you know you're subjecting people to a substantial risk, but you do it anyway. A blanket prohibition against these is a good idea.
- What about negligence? The negligent defendant often acts negligently *while* performing actions which, in themselves, are socially useful. Accidents happen. In theory, one can avoid negligence simply by acting non-negligently. But acting non-negligently takes resources, and it's difficult to be non-negligent all the time. There is such a thing as “too much prevention,” especially when the underlying behavior has some social usefulness. This means that the criminal law is inappropriate for accidents.

## B. Intent and Responsibility

*“When innocence trembles, it condemns the judge.”*

—Publius Syrus, *Moral Sayings* (1st cent. B.C.)

Most importantly, we shouldn't impose criminal penalties unless the defendant was truly blameworthy—that is, if he knowingly harms people, knowingly endangers them by exposing them to a substantial and unjustifiable risk (recklessness), or intentionally violates a law. The following examples show how this principle is violated in environmental law:

- In 1974, the White Fuel Corporation was prosecuted under the Refuse Act when oil seeped from a storage tank on the company's shoreline property into Boston Harbor. White Fuel was prevented from presenting “evidence that it had not known of the underground deposit, had not appreciated its hazards, and had acted diligently when the deposit became known.”<sup>34</sup>
- In *U.S. v. Weitzenhoff*<sup>35</sup> (1993), sewage treatment plant operators were prosecuted under the Clean Water Act for “knowing discharge of pollutants exceeding permit limits.” But that crime involves far less than one might think. Under the “general intent” standard, the government was required to prove only that the defendants knew they were discharging wastewater—not that they were violating their almost incomprehensible wastewater discharge permit. Since Weitzenhoff's job as a Honolulu Sewage Treatment Plant worker was precisely to discharge wastewater, the government had to prove only that he knew he was performing his job. The court refused to allow Weitzenhoff to be acquitted if the jury found that, although he knew he was performing his job by discharging wastewater, he actually thought he was doing so in accordance with the permit—not in violation of it.

While criminal law normally requires that the defendant possess an intent to commit a crime, this requirement has been abandoned in environmental crime cases in favor of the principle of “general intent.” Under this interpretation

<sup>34</sup> *U.S. v. White Fuel Corp.*, 498 F.2d 619, 621 (1974).

<sup>35</sup> *U.S. v. Weitzenhoff*, 747 F.2d 1102, 1103-4 (1984).

of environmental statutes, a defendant may go to jail even though he did not know that his act violated an environmental regulation, or even if he believed that his actions were authorized by that regulation. For instance, a hunter who believes that he is shooting at a deer is guilty of a criminal Endangered Species Act violation if his bullet injures or harms a protected animal, since he had the “general intent” of discharging the gun.

Such “strict liability” criminal prosecutions increase the number of convictions, but do little, if anything, for environmental protection. Accidents happen, and, in fields outside environmental law, are not prosecuted as criminal offenses. Killing a pedestrian in a cross-walk, for example, may be manslaughter if the car is driven recklessly, but it may also be negligence (not a crime), or even a tragic accident for which no one is legally responsible. If the “general intent” standard were applied to traffic accidents, the government would be required only to prove that the driver intended to drive the car in order to convict him of a crime. Prosecutions for accidental or unintended environmental violations (especially technical violations) do not advance the goal of environmental protection.

Fairness also requires that criminal punishment fall only on those who were actually responsible for the crimes. Traditionally, this was always the case, but in environmental law, it no longer is.

- Diceon Electronics pled “no contest” to three waste-storage violations, but Roland G. Matthews, president of the firm, claimed that he himself was innocent. He had no technical training, was four managerial levels removed from the violations, and worked in a headquarters 100 miles away. The court said that Matthews' lack of personal control was “of no consequence” and that he could be convicted unless he had “undertaken all objectively possible means to discover, prevent, and remedy any and all violations of such laws.”<sup>36</sup>

Today, corporate managers can be held responsible, or “vicariously liable,” for the misdeeds of their employees, under the “responsible corporate officer doctrine.” This extends further than simply punishing corporate officers who foster a culture that rewards employee negligence. Today, the mere fact that a manager holds a position of responsibility implies that he has knowledge of his employee's acts—and the definition of “knowledge” can be an imaginative one.

- Accudyne, a company that had a contract with the government, was sued by the Atlantic States Legal Foundation for having made a “false claim” to the government. Every government contract contains a standard clause that the contractor must comply with all applicable laws and regulations, including environmental regulations. Accudyne had violated some environmental laws, but its violations were in the past, so they could no longer be sued under those laws. But under the False Claims Act, if a contractor makes a false claim to the government, anyone can sue and collect treble damages. ASLF claimed that because Accudyne reported all of its discharges to the government, it “knew” all of its discharges, so it knew that it hadn't complied with environmental laws when it filed for payment of the contract. Although this was not a criminal case, making false claims *can* be prosecuted as a criminal offense and, under the “general intent” and “responsible corporate officer” doctrines, could result in a criminal conviction on precisely the same evidence. (Accudyne settled with ASLF for \$12 million, of which \$2.64 million went to the plaintiffs as “bounty.”)<sup>37</sup>

The reasoning in *Accudyne* may sound reasonable, but it only gets us so far. Consider a company with 400 operations and 3,000 discharge reports. The people responsible for reporting the company's discharges may not even

---

<sup>36</sup> William W. Bedsworth, “The Verdict,” *Sierra*, May/June 1993, pp. 84–85.

<sup>37</sup> *U.S. ex rel. Fallon v. Accudyne*, Civil Action No. 93-C-801-S.

know, when they report the information, that they're violating their permit. It's not an intentional violation, but it's been reported on a document. And a company's managers are presumed to know everything its employees know.

Can UPS know each time one of its drivers exceeds 65 mph on the freeway? In an ideal world, maybe it would. But we live elsewhere. The doctrine of vicarious liability assumes that company executives know things they can't possibly know. It makes heads of companies vulnerable to rogue employees, who maliciously act to undermine the company. And in a world where intent isn't required for a crime, it makes executives criminally liable for their employees' accidents, even when appropriate company policies exist to avoid accidents. If employers collude with their employees to violate the law, or if employers consciously foster a corporate culture that tolerates environmental violations, punishing them is appropriate. Otherwise, though, employees should bear the consequences of their own actions.

### C. Environmental Law and the Bill of Rights

*“The worthy administrators of justice are like a cat set to take care of a cheese, lest it should be gnawed by the mice. One bite of the cat does more damage to the cheese than twenty mice can do.”*

—Voltaire, “Allegory,” *Philosophical Dictionary* (1764)

We will conclude this section with a brief overview of the status of a few procedural rights. Certain procedural rights that are guaranteed by the Bill of Rights, and respected in most criminal cases—the requirement of search warrants, the privilege against self-incrimination, the guarantee against double jeopardy, and the rule against excessive fines or cruel and unusual punishment—have been watered down in environmental law. The full history of these developments is a long one, would take us well outside of environmental law, and is adequately dealt with elsewhere.<sup>38</sup> However, we will examine the effect of environmental enforcement on these fundamental constitutional rights.

#### 1. *The Fourth Amendment: Unreasonable Searches*

The Supreme Court established in *Davis v. U.S.*<sup>39</sup> (1946) and *Donovan v. Dewey*<sup>40</sup> (1981) that the government has greater latitude to inspect commercial property without a warrant than residential property. All the government needs to do is get an “administrative search warrant”—which can be issued “solely on a showing that reasonable legislative

---

<sup>38</sup> See Lynch, *Polluting Our Principles*.

<sup>39</sup> 328 U.S. 582 (1946).

<sup>40</sup> 452 U.S. 594 (1981).

or administrative standards for conducting an inspection are satisfied with respect to the particular place to be searched. There need be no probable cause that a violation has occurred or is occurring.”<sup>41</sup> In the 1970s, the Supreme Court held that “closely regulated” industries were exempt from even these rules. Inspectors can inspect the premises of “closely regulated” industries without a warrant, and there have been no limits on what the government can label as closely regulated. The Resource Conservation and Recovery Act,<sup>42</sup> the Clean Air Act,<sup>43</sup> and the Toxic Substances Control Act,<sup>44</sup> among other laws, authorize warrantless inspections.

Warrantless searches are permitted in order to make the jobs of law enforcement officers easier. However, this alone isn't enough to allow warrantless searches; there are other interests at stake besides the law enforcement interest. But one can argue that violations of environmental laws are different than other violations. There's often a time lag between an environmental violation and resulting health effects; effects can often be impossible to trace back to the original offender; since effects can be hard to detect, there's often no way of even knowing that an environmental violation has occurred without doing an inspection. Drunk driving is detectable by its effects, but one cannot tell, just by looking at a smokestack, whether someone's exceeding a permit level.

---

<sup>41</sup> John Wesley Hall Jr., *Search and Seizure*, 2nd ed. (New York: Clark Boardman Callaghan, 1991), vol. 2, p. 376.

<sup>42</sup> 42 U.S.C. § 6928(d).

<sup>43</sup> Harris, Marshall, and Cavanaugh, *Environmental Crimes*, p. 2–17.

<sup>44</sup> Eva M. Fromm, “Commanding Respect: Criminal Sanctions for Environmental Crimes,” *St. Mary's Law Journal* 21 (1990): 839-840.

But even by this charitable assessment of the need for warrantless inspections, not all government inspection powers are justified. As a result of the erosion of Fourth Amendment protections in environmental cases, the EPA can use an administrative inspection to look for evidence of environmental crimes, and then use that evidence to get a real search warrant later. The Environmental Crimes Unit of the FBI has worked with local health officials to gather evidence for criminal prosecutions when local officials do their routine inspections.<sup>45</sup> Since the power to inspect, when not properly restrained, can become the power to harass, this phenomenon should give us pause. It's one thing to have a lower probable cause standard for civil violations, but it's quite another thing to be able to use any inspection as a fishing expedition to find any other violation. Unless the evidence of environmental crimes is somehow related to the reason for the inspection, the EPA shouldn't be allowed to piggyback on the unrelated inspections of other agencies.

Another cause for concern is the different treatment of places of business and open fields. The Supreme Court has held that intrusion on open fields is not an unreasonable search according to the Fourth Amendment. In fact, though, the privacy interest of individuals is violated whenever someone trespasses on their property. This applies whether they're in their homes, in their businesses, or on their fields. The "open fields" doctrine should be abandoned; the conditions under which the government should be able to trespass on open fields should be the same conditions as those that allow inspections in general.

All concerns about overbroad inspection powers, though, stem from the basic structure of current environmental regulation. In most cases, environmental regulations mandate a particular sort of technology, and not a particular environmental standard. This sort of regulation is particularly pernicious, in that it hinders innovation and forgets the primary purpose of environmental regulation, which is to protect human health and the environment (and not to use particular smokestack scrubbers). The emphasis on inspections and warrantless searches is an attempt to evade the more important task of figuring out what actually happens to the environment. As long as regulation is based on technology and not environmental standards, enforcement concerns related to inspections and warrantless searches must continue, because while it's possible to externally monitor environmental quality, it can be difficult or impossible to find out what machines a company is using without regular inspections.

The solution is to address the root cause of inspections, which is the regulations that make them inevitable. Through its "Environmental Results Program" (see the discussion of this program later in the paper), Massachusetts has recently adopted an environmental standards program, which even eliminates the need for a company to get a new permit when it changes the technology it uses, as long as it can certify that it will continue meeting the same objective environmental standard.

## *2. The Fifth Amendment: Self-Incrimination*

Most of the EPA's compliance data come from "self-reporting requirements." For instance, the Toxic Substances Control Act requires the owner of any PCB equipment to report any spill of 10 or more pounds of material

---

<sup>45</sup> Spencer, "Designated Inmates," p. 100.



containing PCBs at concentrations of 50 ppm or greater.<sup>46</sup> This system has been referred to as the “TSCA self-confession program.”<sup>47</sup> And the federal sentencing guidelines put a big premium on self-disclosure.<sup>48</sup>

---

<sup>46</sup> See 40 C.F.R. §§ 761.120-761.135.

<sup>47</sup> Environmental Protection Agency, *Enforcement in the 1990s Project: Recommendations of the Analytical Workgroups* (October 1991), p. 5-1.

<sup>48</sup> Harris, Marshall, and Cavanaugh, *Environmental Crimes*, p. 9-20.

The erosion of the privilege against self-incrimination began in *Hale v. Henkel*<sup>49</sup> (1906), where the Supreme Court held that corporate officers couldn't invoke the privilege against self-incrimination on behalf of a corporation. Later, in *New York Central and Hudson River Railroad v. U.S.*<sup>50</sup> (1909), the Court held that corporations could be charged with crimes. The Supreme Court has also held that corporate employees can't invoke the privilege against self-incrimination to protect themselves—as opposed to the corporation itself—from a criminal prosecution.<sup>51</sup> So if a corporation is accused of an environmental crime—and under the “responsible corporate officer doctrine,” this means that a corporate executive would be punished for it—that executive can't invoke Fifth Amendment protection.

The result is that TSCA lets the EPA subpoena any report, paper, or document that it likes.<sup>52</sup> The EPA can even subpoena “answers to questions.” Recently, the EPA attempted to subpoena the records of American companies doing business in Mexico, on the theory that since pollution from those plants could spill over into the United States, these companies were “importing” pollutants into the country. In another case, a Missouri corporation was indicted because it didn't report an oil spill in the Mississippi River, even though a low-level employee, who didn't tell anyone about it, was the only witness. A \$20,000 fine was upheld on appeal.<sup>53</sup>

Is this a problem? Ideally, the answer, as with inspections, is to directly monitor environmental quality in the outside world. But, as with inspections, this is not always possible—and where it is, it isn't always possible to trace the pollution to the polluter. Self-reporting requirements are often the only way of finding out whether pollution is happening. Remove the power of inspection and the mandate to self-report, and only the most egregious, obvious violations can be punished. Remove the government's power to prosecute on the basis of such reports, and any company will be able to pollute, report its pollution, and get off scot-free. Unless there are other ways of getting the information, self-reporting—in the abstract—remains an appropriate enforcement tool.

But here again, what appear to be Fifth Amendment problems may actually stem from more fundamental concerns. We still live in a world where accidents can result in criminal prosecutions and where corporate executives can be punished even if they weren't responsible for the actual crime. For self-reporting to be a truly acceptable form of enforcement, *intent* and *responsibility* need to be reestablished as requirements for criminal punishment. The possibility of being criminally punished for admissions of accidents creates an enormous incentive to lie, cover problems up, or simply not find out about them in the first place. This is why laws protecting environmental audits, which we have discussed earlier in the paper and which we will come to again, are particularly important.

### 3. *The Fifth Amendment: Double Jeopardy*

---

<sup>49</sup> 201 U.S. 43 (1906).

<sup>50</sup> 212 U.S. 481 (1909).

<sup>51</sup> See, for example, *Braswell v. U.S.*, 487 U.S. 99 (1988).

<sup>52</sup> 15 U.S.C. § 2610(c).

<sup>53</sup> *Apex Oil Co. v. U.S.*, 530 F.2d 1291 (1976). See also *U.S. v. Texas Pipe Line Co.*, 528 F.Supp. 728 (1978).

The guarantee against double jeopardy protects people from being punished twice for the same offense. But this doesn't stop the same actions from being crimes under federal law and state law, since federal and state governments are different. Environmental violations are often investigated by joint federal-state task forces. In *U.S. v. Louisville Edible Products Inc.*<sup>54</sup> (1991), the federal government brought charges against a Kentucky corporation under the Clean Air Act. Since the federal charges were based on actions for which the company had already been fined by a local environmental enforcement agency, the company argued that it was protected by the double jeopardy clause of the Fifth Amendment. It lost. And, of course, any government can also bring both civil and criminal actions against defendants. The threat of such prosecution is an effective plea-bargaining instrument.

Successive state and federal prosecutions can be appropriate because otherwise, California could undermine a federal law it disagreed with by declaring the same conduct to be criminal and punishable by a fine of \$2. Then everyone in California who committed this “crime” could immediately plead guilty in a state court, pay the \$2, and be free of further legal actions. In short, successive state and federal (and successive civil and criminal) prosecutions don't violate the Fifth Amendment, but they're still multiple prosecutions, and their justification in any case, as the next section outlines, should be closely scrutinized.

#### 4. *The Tenth Amendment: Federalism and Duplicate Regulation*

The Tenth Amendment divides power between the federal government on the one hand and the states (or the people respectively) on the other. The Supreme Court has described the purpose of this fractioning of government power: “the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>55</sup>

Why, then, are different governments making regulations regarding the same activity in the first place? A good rule of thumb, when dealing with the environment, is that local governments should deal with problems that are truly local, state governments should deal with problems that are truly statewide, and the federal government should only deal with problems that are truly national in scope. A hazardous waste site in Alabama, for instance, is an issue that doesn't affect people outside of Alabama. So it should be regulated by a local agency. Under current law, however, the EPA is also involved in local waste management, through RCRA and Superfund, though the justification for its role is unclear. Indeed, as a federal district court has recently held in the *Olin* case,<sup>56</sup> the federal government has no business regulating a purely intra-state waste site. If a polluter runs afoul of the local agency and the EPA simultaneously, we should spend less effort trying to merge the two punishments and more effort wondering why both have to apply.

There may be cases where both the federal and the state governments have some business regulating the activity—for instance, in the case of air pollution in small states, which affects both the people in the immediate vicinity and other states downwind. In this *limited* case—which *only* applies if the state and federal governments are protecting *different* people or things—we have to solve the problem of creating an appropriate regulatory and enforcement mechanism. In the case of air pollution, federal regulation may be appropriate, in the interests of practicality and uniformity. On the other hand, federal preemption may not always be the best solution. And imposing both punishments may be unfair, since if either punishment was appropriate, both of them together can't be. The proper way of handling duplicate regulation, in the rare cases when these may be appropriate, depends on the situation.

---

<sup>54</sup> 926 F.2d 584 (1991).

<sup>55</sup> *New York v. U.S.*, 505 U.S. 144, 167 (1992).

<sup>56</sup> slip. op., *U.S. v. Olin Corp.*, 95-0526-BH-5 (S.D. Ala., May 20, 1996).

But if a local government is willing and able to handle a case that's truly a local responsibility, it should be able to. In general, two levels of government shouldn't *both* intervene unless there really is a different set of protected objects. For example, a hazardous waste site in the middle of a San Antonio community should be the problem of people who live in San Antonio; the Texas and federal governments shouldn't both get involved. On the other hand, if an oil spill contaminates a municipal park and also a federal facility, then that's not one problem but two, and dual prosecutions could be appropriate. Once we've established this limitation on dual prosecutions, the set of legitimate dual prosecutions may become quite small.

### 5. *The Eighth Amendment: Excessive Fines, Cruel & Unusual Punishment*

In 1984, Congress enacted the Comprehensive Crime Control Act, which established the U.S. Sentencing Commission as “an independent commission in the judicial branch.”<sup>57</sup> The commission was created to set up federal sentencing guidelines to narrow the disparity in sentences imposed on similar offenders for comparable conduct,<sup>58</sup> while still leaving judges with flexibility to impose individualized sentences according to the facts of the case.<sup>59</sup> Seven of its guidelines deal specifically with the environment.<sup>60</sup>

Each environmental guideline establishes a “base offense level” for a particular offense, and adjusts this in light of whether the victim was known to be particularly vulnerable;<sup>61</sup> whether the defendant played an organizing role or was a minimal participant; whether the defendant abused a position of trust or used a special skill that significantly facilitated the offense;<sup>62</sup> whether the defendant has clearly demonstrated an acceptance of responsibility;<sup>63</sup> and other

---

<sup>57</sup> 28 U.S.C. § 991(a).

<sup>58</sup> Sharp and Shen, “The (Mis)application of Sentencing Guidelines,” p. 189.

<sup>59</sup> 18 U.S.C. § 3553(b).

<sup>60</sup> U.S. Sentencing Commission, Guidelines Manual, §§ 2Q1.1-2Q2.1 (November 1989).

<sup>61</sup> § 3A.1.

<sup>62</sup> § 3B.1.

<sup>63</sup> § 3E.1.

“specific offense characteristics.”<sup>64</sup> The resulting offense level is plotted against the defendant's criminal history on a “Sentencing Table,” which gives a range from which the judge can select the final sentence.

One of the main problems with the environmental sentencing guidelines is that in many cases, they come up with sentences that are greater than the maximum allowed by the actual laws. This forces a court to sentence the offender to the maximum penalty prescribed by the relevant statute.<sup>65</sup> The sentencing guidelines almost always impose a prison term, even for first-time offenders.<sup>66</sup> When Congress came up with the range of sentences that appears in the law, they were trying to assign different sentences to differently serious crimes; tying judges to the maximum is irrational because it denies judges the flexibility that the sentencing guidelines were meant to preserve.

---

<sup>64</sup> Sharp and Shen, “The (Mis)application of Sentencing Guidelines,” p. 190.

<sup>65</sup> Stanley Arkin, “Crime Against the Environment,” *New York Law Journal*, August 9, 1990, p. 23, cited in Coffee, “Does ‘Unlawful’ Mean ‘Criminal?’”, p. 217.

<sup>66</sup> Sharp and Shen, “The (Mis)application of Sentencing Guidelines,” p. 190.

The guidelines' base offense levels don't treat intentional and accidental violations differently. Nor do the guidelines distinguish between misdemeanors and felonies, imposing the same sentence for both crimes. This means that a sentence calculated under the guidelines may be appropriate if the crime is a felony, but may be way out of line if it's a misdemeanor. For instance, under the guidelines, a private pesticide applicator who violates FIFRA would get two to eight months of prison.<sup>67</sup> Even the *shortest* guideline sentence is twice the statutory maximum of 30 days. With the Clean Water Act, sentences tend to be just within the statutory maximum range for felonies, and over the maximum for misdemeanors—whether or not the defendant had a criminal history.<sup>68</sup>

The guidelines also double-count violations. John Pozsgai, a self-employed truck mechanic, got the longest prison sentence in U.S. history ever imposed for an environmental offense—27 months under § 2Q1.3, for putting topsoil on some acres of his property which the government claimed was a wetland.<sup>69</sup> Under the guidelines' "points system," Pozsgai received<sup>70</sup> 6 points for the base offense of discharging a pollutant without a permit in violation of 33 U.S.C. § 1311, 6 points for discharging the pollutant,<sup>71</sup> and 4 points for not having the permit.<sup>72</sup> This adds up to an offense level of 16, which, for a first-time offender, means a prison sentence of 21 to 27 months.<sup>73</sup>

Pozsgai's story has been a controversial one, and most of the facts in it are disputed. But even assuming that he did everything he was accused of doing, his punishment was excessive, largely because the guidelines double-counted his violations. As discussed earlier in this paper, a 27-month sentence is greater than the average first-offense

---

<sup>67</sup> § 2Q1.2.

<sup>68</sup> Sharp and Shen, "The (Mis)application of Sentencing Guidelines," p. 190.

<sup>69</sup> The details of Pozsgai's case are controversial, and opposing sides in the story give opposite stories. But these details aren't important here; I'm only using the case as an example of the sentencing guidelines in action.

<sup>70</sup> Much of the following discussion on sentencing guidelines is from a letter from Paul D. Kamenar to Judge William W. Wilkins, Jr., chairman of the U.S. Sentencing Commission, re Modification of Part 2Q of the Guidelines, dated January 15, 1991.

<sup>71</sup> Under § 2Q1.3(b)(1)(A).

<sup>72</sup> Under § 2Q1.3(b)(4).

<sup>73</sup> A note for purposes of comparison. Before the sentencing guidelines went into effect, people who were imprisoned were eligible for parole after serving a third of their sentence; parole was usually granted. Under the sentencing guidelines, there is no parole. This means that Pozsgai's 27-month sentence is the equivalent of an 81-month sentence before the guidelines.

sentence for burglary/breaking and entering, and other average sentences for offenses committed by criminals with extensive prior criminal history, including larceny, embezzlement, fraud, car theft, forgery or counterfeiting, bribery, and escape.<sup>74</sup>

To avoid these problems, environmental sentencing guidelines should be in line with the sentences laid out in the statute; ideally, the range given by the guidelines should be identical to the range in the statute. The guidelines' contribution should be to help determine where in the range to set the sentence. As far as the statute allows, the actual sentence chosen should be in line with sentences for other crimes that seem equally harmful. The guidelines should distinguish between intentional and unintentional violations. They should also avoid double-counting, whether by counting the same offense twice or by having harsher penalties for repetitive violations which the statute already punishes.

## V. SOME STEPS IN THE RIGHT DIRECTION

Recently, the EPA has begun to work with industry to develop alternative methods of complying with environmental law. Working together with industry, EPA sheds its command and control posture and allows industry and state and local government to devise achievable compliance strategies. The two main programs used to achieve this are the Common Sense Initiative and Project XL. The Common Sense Initiative seeks to develop comprehensive pollution prevention strategies for six specific industries: automobile assembly, electronics and computers, iron and steel, metal painting and finishing, and petroleum refining and printing. Though broader in scope, Project XL also seeks to find alternative compliance methods. The driving force behind Project XL, however, is that industry or a particular facility develops its own alternative environmental compliance strategies. These pilot programs are models for a future cooperative relationship between industry and government.

The federal government has also enacted or is thinking of enacting other enforcement-related reforms:

---

<sup>74</sup> Note that the environmental crimes here are federal, while the other crimes in the paragraph are state crimes.

- The Small Business Regulatory Enforcement Fairness Act,<sup>75</sup> signed in March 1996, addresses some of the problems discussed in this paper as they relate to small business.

The act requires agencies to provide informal guidance to small businesses and to prepare “small entity compliance guides,” written in plain language.

The act also establishes a Small Business and Agriculture Regulatory Enforcement Ombudsman and Regional Small Business Regulatory Fairness Boards to represent the interests of small businesses. It also requires agencies to establish penalty-reduction programs for small businesses for certain types of violations—provided that the business made a good faith effort to comply with the law and wasn't already subject to multiple enforcement actions by the agency, and provided that the violations are promptly fixed, don't involve willful or criminal conduct, and don't pose health, safety, or environmental threats.

Other portions of the act provide for attorney's fee awards to defendants in cases of unjust prosecution by agencies, and require agencies to estimate the impact of proposed regulations on small businesses.

The Small Business Regulatory Enforcement Fairness Act is a bit of a blunt instrument for a delicate task. The solution to confusing laws, for instance, may not be plain-English guides but, rather, simpler laws. The act seeks to lighten the regulatory burden, without really asking whether, in any particular case, lightening the burden, or reducing penalties, is appropriate. More fundamentally, by its exclusive emphasis on small businesses, the law seems to treat the health of small businesses as the final goal; if fairness in enforcement were the actual goal, these provisions would have been extended to all businesses. Still, the act, overall, contains some valuable provisions and is a small step in the right direction.

- The Comprehensive Regulatory Reform Act of 1995 (S. 343), considered by the Senate in Summer 1995, also addresses many of the concerns discussed in this paper. Section 709 of the act deals primarily with “affirmative defenses” in which businesses would not be subject to penalties when an agency fails to give fair warning as to prohibited conduct, especially when the regulated entity specifically relies on guidance from the regulatory agency. It also precludes an agency from deferring to its own unpublished interpretations of regulations during enforcement actions. Effectively, this codifies judicial decisions such as *General Electric*,<sup>76</sup> which held that agency interpretations can only be applied prospectively. Though S. 343 was defeated, the amendment containing section 709 passed 80-0 and received such bipartisan support as that from Sen. Joe Biden (D-MA), who said, “I think the [regulated entity] should, as this amendment suggests, be exempt from civil and criminal penalties... if they violate a rule after having been told by the rulemaker that it is O.K. to go ahead and do this.”<sup>77</sup>
- At press time, the House of Representatives was working on legislation similar to S. 343. The Regulatory Fair Warning Act, H.R. 3077, has many of the same provisions as the Senate version, but is still in the draft stages in committee. It, too, protects entities from unfair actions taken by regulatory agencies, and gives

---

<sup>75</sup> Pub. L. No. 104-121.

<sup>76</sup> *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).

<sup>77</sup> 141 Cong. Rec. S9982-84 (daily ed. July 14, 1995).



some relief to the regulated community. Like S. 343, it deals not only with environmental law, but with the full panoply of federal regulations.

Many states have also adopted other environmental enforcement measures that avoid some of the pitfalls outlined in this paper. The following are representative examples:

- Many states have given qualified protection to environmental audits, to avoid the sort of problem that Coors Brewing Co. had to deal with, as described earlier in this paper. Environmental audit privilege laws are designed to avoid the problem of companies conducting voluntary audits, finding and fixing problems they never knew existed (and wouldn't have known about but for the audit), and then being fined by an environmental agency.

In Texas, for instance, audit reports are inadmissible as evidence and are not subject to discovery in administrative, civil, or criminal actions; witnesses cannot be compelled to testify about the content of an audit report; and government agents cannot demand audit reports during facility inspections. The privilege is waived if the court determines that the privilege was sought for a fraudulent purpose, or if the violations uncovered in the audit were not promptly fixed. The privilege also does not apply to information that a company has to collect under federal or state law, information obtained by the regulatory agency itself, or information obtained from a source not involved in the preparation of the audit report. Individuals who voluntarily disclose previously unknown violations uncovered in an audit are immune from administrative, civil, or criminal penalties, as long as the disclosure is made promptly, the problem is fixed within a reasonable time, the individual cooperates with the agency, and the violation caused no harm to third parties. This immunity does not apply if the individual who disclosed the violation also had intentionally committed it and under other circumstances.<sup>78</sup>

Seventeen states—Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, South Dakota, Texas, Utah, Virginia, and Wyoming—have audit privilege laws, and bills are pending in most other states. Supporters maintain that these laws, if carefully drafted, will encourage companies to learn about previously unknown environmental violations—and that as long as the privilege only applies if the violations are promptly reported and corrected, companies will be more likely to comply voluntarily with environmental regulations. Critics of such legislation counter that audit laws can protect willful violators of the law from the consequences of their actions; some critics are concerned about the very principle of letting any firm that exceeds its permits escape fines and penalties, and oppose audit privilege laws on those grounds. The EPA, concerned about the effect of audit privilege laws on its power to punish noncompliant firms, objects to some of these laws, but has supported modest audit protection provisions.

- Massachusetts is moving toward a “self-certification” program for certain permitted businesses. Under the “Environmental Results Program,” companies need to commit to a certain standard of environmental performance, and report or “certify” annually their compliance with these standards. The Massachusetts Department of Environmental Protection (DEP), in return, will increase compliance information, do more inspections and audits, and step up enforcement against violators. Companies that self-certify will not have to obtain thousands of low-risk permits.

By the end of 1996, the DEP expects 70 percent of all companies that now require state permits to shift to performance-based, facility-wide self-certification, eliminating many low-risk permits. The number of facilities involved could be greater if the U.S. EPA allows the DEP to treat federal permits in the same way. Some enforcement will be suspended for state permits that are, essentially, replaced by the compliance self-certifications.<sup>79</sup>

---

<sup>78</sup> Texas House Bill 2473, 74th Legislature (1995).

<sup>79</sup> Massachusetts Department of Environmental Protection, “The Environmental Results Program: The Promise of Performance,”



- The California EPA has set up a permit consolidation system. When a permit applicant needs permits from more than one environmental agency, Cal/EPA can designate one of the agencies to coordinate all the required permit decisions. A single consolidated permit is issued incorporating the individual permits. All decisions are made according to a set, negotiated time line; when deadlines are violated without good cause, the applicant can appeal to Cal/EPA. The consolidated permit agency works with the other participating permit agencies to resolve any disputes and keep the process on time.<sup>80</sup>
- Through its “Clean Break” program, the Illinois EPA is giving small businesses amnesty from fines if they work with state officials to comply with environmental laws. The program allows businesses with 200 or fewer employees to anonymously learn from the Illinois EPA what steps are needed to comply with environmental regulations. Amnesty is excluded for violations that “pose a substantial and imminent danger to public health or the environment,” violations previously known to the Illinois EPA or discovered through routine inspections or citizens' complaints, felony violations, or any deliberate acts.<sup>81</sup>

## VI. CONCLUSION

*“The science of legislation is like that of medicine in one respect: that it is far more easy to point out what will do harm than what will do good.”*

— Charles Caleb Colton, *Lacon* (1825)

The numbers of cases filed, penalties collected, and years of imprisonment obtained are largely irrelevant to measuring the success of the environmental enforcement program. One would think, from the fact that these figures climb year-by-year, that American business is becoming increasingly more lawless and disdainful of environmental protection. Yet the opposite is actually true. Year by year, American businesses improve their environmental record and spend more on environmental protection than in any previous year. What these statistics prove is that the environmental enforcement program is pushing the margins of judicial deference, regulatory interpretation, and strict liability, to achieve essentially meaningless results of greater penalties and more convictions. Environmental enforcement is responding to the first principle of any government bureaucracy: bigger budgets and more employees. New measures of success must be found.

There is no one way to achieve effective and fair environmental enforcement; reality is complicated. The principles to keep in mind, though, are relatively simple. To be effective, an enforcement regime must:

- be clear in what it mandates and prohibits;
- be predictable in how it punishes violations of the regulations, and rely where possible on cooperative, problem-solving approaches; and,
- seek environmental improvement, not numerical enforcement targets.

And to be fair, an enforcement regime must:

---

<sup>80</sup> California Environmental Protection Agency, “Environmental Permit Certainty: (1) Decision Time Limits & (2) Consolidated Permits,” Fact Sheet, September 1995.

<sup>81</sup> “Illinois State Agency Unveils Small Business Amnesty Program,” *BNA State Environment Daily*, April 26, 1995; “Small Businesses Encouraged to Make ‘Clean Break’ with Polluting Practices,” *Illinois Environmental Law Letter*, May 1994, vol. 4, issue 2; “Polluters Offered Amnesty from Fines,” *Chicago Tribune*, November 11, 1995, p. 5.

- reserve criminal penalties for the morally blameworthy, and punish others with civil or administrative penalties;
- restore specific criminal intent as a necessary condition of a criminal prosecution, and only punish those who are truly responsible for the criminal acts; and,
- respect the Bill of Rights.

Reforms based on these principles would make environmental enforcement more predictable for businesses and more cost-effective for governments. Environmentalists would benefit from these reforms, because a misguided enforcement regime that leads to unjustified punishments is, after all, bad press. The environment need not suffer as a result, and would, in fact, probably improve as the government starts to send a clearer and more consistent deterrent message. Most importantly, these reforms would make environmental enforcement more fair for all concerned.

## ABOUT THE AUTHORS

Alexander Volokh is assistant policy analyst at the Reason Foundation. He is the author of the Reason Foundation's policy series, *Recycling and Deregulation: Opportunities for Market Development*. Volokh's expertise includes environmental risk assessment, solid waste management, environmental law, natural resources, commercial speech, and medical drug and device regulation. Before joining the Reason Foundation, Mr. Volokh worked in the Competitive Enterprise Institute's Free Market Legal Program.

Roger J. Marzulla, P.C. heads the environmental section of the Washington office of Akin, Gump, Strauss, Hauer & Feld, L.L.P. A nationally recognized authority on environmental law, Mr. Marzulla specializes in environmental enforcement litigation, regulatory compliance, environmental crime, natural resources law, and environmental policy and legislation. Before joining Akin, Gump, Mr. Marzulla served as an Assistant Attorney General in charge of Environmental and Natural Resources division of the U.S. Justice Department.