Toward More Rational Environmental Enforcement

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Established on December 2, 1970, the U.S. Environmental Protection Agency (EPA) is now in its fifth decade. Today, the nation's environmental regulatory program consists not only of EPA, but also of various state and local environmental authorities who act often with a delegation of authority from EPA. Over its 42-year existence, the nation's physical environment certainly has improved, as has human awareness of the importance of environmental stewardship. For example, today, recycling is the social norm and in many jurisdictions, the law. Likewise, U.S. citizens are, on average, living longer and healthier lives.

Credit for these improvements appropriately may, in part, be given to EPA as well as a number of other federal and state agencies charged with protecting aspects of human health and the physical environment, including the Food and Drug Administration and the Occupational Safety and Health Administration. Credit for these advances, however, also must be provided to individual and business innovators and job creators. Pharmaceutical advancements to improve and extend the quality of life as well as similar advancements in cures, treatments, and awareness of breast and prostate cancers, point to remarkable human progress. Alternative fuel vehicles, renewable energy development, and green construction demonstrate collaborative environmental and development progress.

Since EPA's birth, many new environmental and health and safety laws have been passed and/or reauthorized. These laws have given rise to a series of related regulations designed to assist in administering the law's stated purpose(s). Courts too have been involved in this environmental evolution, expanding or contracting the authority of the Executive Branch and the scope of what may be permissibly regulated and by whom.

This article generally discusses environmental enforcement by EPA and others and suggests that there is some present disconnection between the original goals of EPA and similar state and local agencies—and the current approach to ensuring compliance. There is room for improvement in how environmental laws are enforced and a few suggestions follow.

Discussion may ensue as to whether the system is broken (I submit that it is at least damaged) and if so, how to fix it. The few observations contained in this article are merely the tipping point for additional dialogue. Improvements to our system can benefit the regulated business community while advancing the protection of the nation's physical environment and enhancing the health of its citizens.

Although many may disagree, one of EPA's stated purposes, namely "that all Americans are protected from significant risks to human health in the environment where they live, learn and work," largely appears to have been met. The agency's goals and purpose must continue to be adaptive, acknowledging new risks associated with new technologies and processes. For example, the relatively recent wave of hydraulic fracturing as a means of domestic energy production and job creation certainly presents a new range of challenges for those, like EPA, tasked with protecting human health and the environment.

Forty years after the oil crisis of the early 1970s, there is today great emphasis on energy independence. Similarly, there is a corresponding emphasis on green growth with financial incentives, certifications, and the like in place for businesses and developments requiring that their projects factor environmental impacts such as energy use and waste generation.

However, with the growth and expansion of environmental laws, the regulatory programs spawned by those laws have taken on an independent, often unproductive existence. Agencies like the EPA may conduct inspections as a means of ensuring compliance with environmental laws. These inspections, often unannounced, generally consist of interviewing available facility or site representatives, reviewing records and reports, and perhaps taking photographs or collecting and analyzing soil or water samples. Such inspections tend to be focused on a single environmental media regulatory program (e.g., air, water, waste). Thus, a facility may be subject to multiple inspections and corresponding business disruptions to allow for separate, unannounced inspections involving air, water, or waste issues.

Inspections are not, however, the only means for EPA and other delegating authorities to ensure compliance. Upset conditions like fires, floods, or explosions, as well as citizen complaints, may give rise to agency awareness of noncompliance and pursuit of enforcement activity. Additionally, businesses may conduct self-audits and report the results of those audits, which may demonstrate noncompliance and a plan to ensure future compliance. However, sometimes the current enforcement climate can work against self-reporting for fear of enhanced enforcement and negative publicity. In this scenario, many self-auditing businesses will prefer to cure the noncompliance and not report, rather than risk the enforcement wrath of an agency like EPA.

Most environmental laws contain enforcement mechanisms that allow agencies to collect civil monetary penalties for noncompliance, and in particularly egregious instances, pursue criminal penalties. Many agencies will prepare an annual report of enforcement activities and results, a sort of 10-K for the agency on how it did the prior year.

For example, EPA regularly touts its civil penalties in press releases and annual reports. For calendar year 2011, EPA notes that its enforcement activities resulted in $19 billion invested to improve environmental performance, $168 million assessed in penalties to deter pollution, and 89.5 years of incarceration for environmental criminals. EPA also notes that the more than $152 million in civil penalties assessed in fiscal year 2011 was the highest in the last five years. This emphasis on monetary penalties collected seems out of place with the agency's underlying goals. EPA is not the IRS.

With an economy that is as bad or worse than existed during EPA's first decade, many in the regulated community argue that EPA and other environmental enforcement agencies are currently overreaching. Some believe the regulatory scheme has grown overly complex and burdensome and that the multilayered approach involving federal, state, and local agencies often results in inconsistent and unnecessarily duplicative enforcement approaches. For example, although a company may be deemed in compliance by a local EPA-delegated authority, sometimes EPA will disagree and seek to override the delegated authority in pursuit of its own separate penalties,

thus subjecting a regulated business to a form of civil double jeopardy. Ironically, this divergence in federal and local regulatory programs can sometimes pit EPA and its state counterpart against each other, further complicating the compliance goals of the regulated business community. Some businesses question why they are in EPA's cross-hairs if they have done everything their local regulatory has asked.

Further, there is often a disconnect between EPA's goals on ensuring compliance and the methods it employs to achieve compliance. Some businesses observe a generally cooperative role with EPA and other agencies in which an inspection may reveal noncompliance. In some of those instances, the business and agency can work hand in hand to properly ensure that compliance is promptly achieved or regained and that the company will maintain compliance. However, in some of these instances, agencies will nonetheless seek to impose civil monetary penalties many months or years after the inspection occurred and after working with the entity to ensure compliance. In these situations, regulated entities question the real motivation of the agencies who continue to pursue civil penalties long after a demonstration of compliance.

In 2011, the 112th U.S. Congress passed three regulatory reform bills: H.R. 527, the Regulatory Flexibility Improvements Act; H.R. 3010, the Regulatory Accountability Act of 2011; and H.R. 10, Regulations from the Executive in Need of Scrutiny—the so-called REINS Act. Each of these proposed bills seeks to prevent or greatly limit federal agencies from implementing substantial regulatory initiatives without congressional approval. Supporters applaud the proposals as a necessary check on federal regulatory agencies, while opponents view these proposals as an encroachment on the authority of federal agencies that could result in compromises to human health, safety, and environmental protections. Although the expanse of these bills is far beyond environmental enforcement, the underpinnings of these proposals may nonetheless form the basis for a more rational approach to enforcement of environmental regulations.

Similarly, in January 2012, the U.S. Supreme Court heard oral argument in *Sackett v. EPA* regarding EPA's ability to issue compliance orders that are not subject to judicial review. Specifically, EPA currently can issue compliance orders that essentially preclude the party's ability to dispute EPA's claims. Although no decision has yet been issued, a ruling against EPA could provide an important limitation on this broad enforcement authority.

During these times in particular, it seems that a carrot enforcement approach is much preferred to the stick. That is, EPA and other environmental enforcement agencies, without compromise to their mission of protecting human health and the environment, should first work more closely and cooperatively with the regulated community toward ensuring compliance with regulations, and, only in the most egregious situations, pursue civil monetary penalties and/or criminal enforcement. There are multitudes of approaches to accomplish this goal. The following are a few suggestions.

Consider More Comprehensive Inspections

Although the business community almost certainly wants fewer, not more inspections, the current piecemeal scheme is inefficient to both business and the enforcement agencies. When a facility that emits pollutants into the environment as part of its operations is inspected by EPA or related local agency, all aspects of that facility's operations should be evaluated simultaneously or as close together in time as reasonably practical. If a facility's air emissions are compliant, but its water discharges are not, risks to public health and the environment exist. Those risks should be equally and hastily addressed by the inspecting agency. Doing so would allow the inspected facility to globally get its house in order, while similarly allowing the agency to move on to the next facility.

Create a Limitations Period

Agencies should adhere to a reasonable period for seeking penalties associated with historic, but corrected environmental violations. Assume ABC Widget is inspected on June 1, 2012. During that inspection, noncompliance is discovered. That noncompliance is corrected within 30 days such that by July 1, 2012, the facility is fully compliant and remains compliant for the next 12 months during which time it believes it is no longer a target for agency enforcement. Then, more than a year later in the fall of 2013, the agency revisits the prior noncompliance and seeks to exact monetary penalties for violations identified and fixed more than a year earlier. A limitations period would encourage swift action when appropriate and mitigate against the "gotcha" penalty years after a violation was discovered and corrected. Clearly, certain violations will continue to merit some enhanced response action even after the passage of time. For example those violations that are deliberate or that caused direct harm to the environment may merit further sanctions even after coming into compliance. However, not every violation is of this nature.

Monetary Penalties Are Not Always Required

Facilities that cooperate with the agency in response to a complaint or a violation discovered via inspection, should, in some instances, be afforded an opportunity to come into compliance without being subject to monetary penalty. Not every noncompliance event merits the severe punishment of monetary penalties or criminal enforcement.

Further, the administrative penalty policies—even acknowledging "ability to pay" factors—create the regular possibility of fines that will bankrupt a business deemed in violation and eliminate the valuable jobs and tax revenue it created.

Constructing and operating a facility without a required permit should not be treated the same as a failure to renew a properly issued permit to a compliant, operating facility. Failure to provide required training or certification to managers or employees should not be treated the same as a failure to recertify or renew that existing certification, particularly when there have been no personnel or regulatory changes and/or when the courses or training required may be offered on only a limited basis.

Working toward a more collaborative enforcement approach will encourage audits and self-reporting without compromise to human health or the environment. The current system of environmental enforcement in the United States should be improved to encourage an open dialogue between the regulators and regulated with greater prospects for environmentally responsible business growth.