

Effective Environmental Compliance and Governance:

Perspectives from the Natural Resources Defense Council



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About this Briefing Report

This briefing report is the finalization of an earlier draft report produced in May 2010. The May 2010 report was written as part of Honorable Minister Jairam Ramesh and the Ministry of Environment and Forests' (MoEF or Ministry) invitation to the Natural Resources Defense Council (NRDC) to participate in MoEF's workshop regarding environmental compliance and governance. The May 2010 report was reviewed by experts in India, and the final report has been modified based on conversations at the MoEF workshop and discussions with civil society organizations.

The report discusses principles for effective compliance and enforcement based on the U.S. experience with environmental protection, illustrating both the successes and challenges. This report does not aim to provide specific recommendations on the Ministry's proposal to create the National Environmental Protection Authority (NEPA), but rather, provides insight into the U.S. experience.

Authorship

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About NRDC

The Natural Resources Defense Council (NRDC) is an international nonprofit environmental organization with more than 1.3 million members and online activists. Since 1970, our lawyers, scientists, and other environmental specialists have worked to protect the world's natural resources, public health, and the environment. NRDC has offices in New York City, Washington, D.C., Los Angeles, San Francisco, Chicago, Montana, and Beijing. Visit us at www.nrdc.org.

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Executive Summary

“EPA has always been at its best when it viewed its role as not just custodial but as cutting edge, as formulating leadership, as prescribing the answers to problems, as directing to the Congress what needs attention, as communicating to the country what the big issues are and how they should be addressed.”

– William K. Reilly, EPA Administrator, 1993-95

Strong principles for compliance and enforcement are crucial to a government agency’s ability to protect the environment and public. These principles shape the agency’s overall mission and affect its specific decisions at the project level. The principles also emphasize the government agency’s leadership role in creating a culture of environmental compliance for industry, state and local governments, and the public. Based on NRDC’s experience in compliance and enforcement of environmental laws in the United States and elsewhere, the following eight principles were identified as critical principles for effective environmental governance:

1. Clarity and Coordination Between Federal and State Agencies

The United States Environmental Protection Agency (EPA) and state governments work together in a regime described as “cooperative federalism.” The environmental governance structures in the U.S. are not always ideally coordinated, but they can still provide a useful comparison. In the U.S., federal laws and their implementing regulations establish minimum, uniform standards and requirements for environmental compliance. EPA can delegate regulatory authority to states once a state demonstrates its ability to effectively implement federal programs. *States may also require more stringent standards, but they may not weaken the federal standards.* This cooperative federalism establishes a uniform set of requirements that are protective of health and the environment while avoiding a race to lower standards to attract business, but at the same time states can exceed these standards to meet local conditions. In addition, EPA has the authority to review and provide oversight over the performance of state agencies in meeting requirements of federal laws. EPA can step in when states do not meet federal requirements and, in rare cases, EPA may threaten de-delegation or sanction states. For example, a state that fails to meet its obligations under the federal Clean Air Act can lose federal highway funds, a large source of revenue for state highway projects. Local agencies also play an important role in working with EPA and states to implement environmental standards.

2. Retaining Highly Qualified Professionals and Dedicated Agency Resources

Highly qualified professionals and dedicated agency resources are vital elements of successful environmental governance. Successful implementation of regulations relies on adequate and qualified staff, proper equipment, and adequate funding to facilitate both. EPA receives funding from the federal government, and spends a significant percent of its allotted resources on developing and maintaining a qualified workforce. In order to compete with the private sector for qualified professionals, the agency must offer a clear vision and mission, attractive benefits,

opportunities for advancement and training, and job stability. EPA and state enforcement bodies such as California's Environmental Protection Agency reflect this emphasis, hiring staff with expertise in these areas. *Staff must be able to display aptitude with cutting-edge science, detailed legal and regulatory language and arguments, and complex statistical, economic, financial, or market-related mechanisms.* This is crucial both in establishing the agency's credibility, authority, and in engaging with a regulated community that may seek to use the law, science, statistics, or economics to challenge agency decisions. In addition, hiring experienced staff in design and maintenance of data systems is key to effective monitoring systems to verify compliance. A highly qualified and experienced core staff with specialization and strong credentials will ensure better standard-setting, enforcement, and compliance.

3. Monitoring by Regulated Entities: Self-Monitoring and Self-Reporting

Under most U.S. environmental laws, permit programs play a critical role in applying regulatory standards to specific pollution sources, including specifying pollution limits and monitoring and reporting requirements. All permits must require self-monitoring and self-reporting sufficient to determine whether there is compliance with the permit requirements.. This self-monitoring and self-reporting requirement is central to compliance and enforcement, because it requires permit applicants to track their pollution and identify and disclose their own violations. *These self-monitoring requirements promote a culture of compliance, allowing regulated entities to modify their operations to come into compliance. The regulated entities can often even reduce costs by capitalizing on opportunities for improved efficiencies revealed by their own monitoring data. In addition, the U.S. Congress required this system because self-monitoring facilitates effective enforcement: "One purpose of these new requirements is to avoid the necessity of lengthy fact finding [and] investigations . . . at the time of enforcement."* (S. Rep. No. 414, reprinted in 1972 U.S.C.C.A.N. 3668, 3730. U.S.) Because of this congressional directive, EPA requires regulated industries to monitor their operations for environmental parameters, to keep records of their operations for relevant environmental parameters, and to report this data to EPA. Having the regulated industry pay for the monitoring and the record-keeping is consistent with the "polluter-pays principle." Further, these self-reports, bolstered by laws against falsification and serious penalties for falsification of material, often provide the basis for enforcement actions not only by EPA but also by citizens and state agencies.

4. Incentive and Outreach Compliance Programs

While penalties, fines, and other enforcement actions are essential to effective deterrence of violations, they must be combined with outreach programs to educate the regulated community about the law and the options for meeting the requirements. These outreach programs are important to assist industry in complying with the law, especially small and medium enterprises that may have limited resources. The outreach compliance programs *ensure that polluters understand what is required of them, encourage greater compliance, and leave violators with no excuse for their failure to comply.* In addition, incentive programs to help resource-poor enterprises can provide another avenue for achieving compliance goals.

5. Agency Enforcement Tools: Administrative, Civil and Criminal Authority

In the U.S., both federal and state agencies have the ability to tailor enforcement tools to the seriousness of the violation. This flexibility allows agencies to conduct informal inquiries for minor violations to prompt compliance, instead of relying on time-consuming court remedies. Agencies can also impose administrative fines and penalties with appeals available to administrative adjudicatory bodies. For more substantial violations, agencies can seek civil and/or criminal penalties in the courts. *The availability of administrative, civil, and criminal authority utilizes resources more effectively, increases the deterrent value of enforcement, and is more cost-effective.* The availability of both administrative and judicial avenues of enforcement reduces pressures on the courts, freeing them up to address the most egregious violations. Meanwhile, administrative authority allows agencies to proceed quickly with enforcement without delays from waiting for judicial decisions, all while using fewer resources. Swift and consistent enforcement goes a long way towards increasing the deterrent value of enforcement actions and predictability for regulated entities. The availability of both civil and criminal penalties similarly reduces the burden on the courts and streamlines enforcement by adjusting the burden of proof according to the severity of the remedy sought.

6. Agency Accountability

Accountability of agency actions is critical to the effectiveness of any agency. In the U.S., agency accountability is achieved through both internal and external oversight. *Internal agency review processes have been more effective than external review processes; nonetheless increased accountability is needed on both levels.* EPA has an independent Office of the Inspector General, with separate funding, which regularly audits agency performance. In addition to internal review processes, the U.S. Government Accountability Office (GAO)—the investigative arm of Congress charged with examining matters relating to the receipt and payment of public funds—routinely assesses the performance of agencies and the implementation of particular laws. EPA performs a similar role in its review of state programs implementing federal laws. EPA can reject state plans and make the states redo their plans or step into the shoes of regional agencies, should the regional agencies fail to meet their obligations as required by environmental laws. Another example is EPA's approval of federally-funded regional or state projects. EPA has authority to independently review federal projects approved by states or other agencies. Based on its review, EPA ranks these projects. While EPA does not veto the projects outright, its ranking plays an important role in determining whether the project will receive funding. The oversight mechanisms discussed in principle 1 (federal and state coordination) and the mechanisms for public participation and judicial review discussed in principles 7 and 8 also act as mechanisms to ensure accountability.

7. Transparent and Meaningful Public Participation

A meaningful opportunity for the public to participate in the process is central to the operation of laws in a democratic society – including compliance with environmental laws. The public has a vested interest in the effective implementation of environmental laws because the local

community and public at large are directly affected by the pollution that environmental laws seek to prevent. *The public and environmental organizations play a critical role in bolstering and improving the work of enforcement agencies, in legitimizing their work, and in helping identify and enforce against violations of the laws. In a world of limited resources, the public can be an invaluable resource for the agency.* Public participation takes a number of forms in the U.S. Both state and federal laws provide for public hearings and comment periods and require the agency to respond to public comments, while giving citizens the right to challenge agency decisions in court. Other laws require agencies to collect and report on basic pollution data, which informs public participation, and to make other records available to the public upon request. All of these mechanisms play a role in ensuring meaningful public participation and in helping ensure the effective functioning of agencies enforcing environmental laws.

8. Citizen Suits

While EPA holds the primary responsibility for bringing violators of environmental laws into compliance, often the agency's resources are insufficient to address all violations. When writing environmental laws, the U.S. legislature foresaw this problem and granted citizens the ability to supplement EPA's enforcement efforts. Citizen suits give ordinary people the right to sue both polluters that do not comply with environmental laws, as well as government agencies that fail to implement the law. Public interest organizations have brought the bulk of citizen suits in the history of environmental enforcement in the U.S. – often in coalitions with affected individuals or local community groups. *Citizen suits provide many of the same advantages of extensive public participation – including improved decision making, greater enforcement, awareness-building, and increased public approval.*

This report aims to illustrate the experience of American environmental compliance and enforcement through a detailed description of both the successes and challenges. The report is organized by principle, as listed above. Each section is prefaced by a summary, and concluded by a set of “Key Points,” which highlight important takeaways from the U.S. experience in the implementation of each respective principle. In addition, the appendix includes examples of legislative language, designed to incorporate the named principle. *Finally, while each of these principles is equally crucial towards creating a foundation for effective environmental governance, it is important to remember that these principles have proven to be most helpful when implemented together.*

Principle 1: Clarity and Coordination Between Federal and State Agencies

Clarity and coordination between federal and state agencies is one of the critical components of successful environmental regulation in the United States. EPA and state agencies work together in a regime described as “cooperative federalism.” Air and water pollution control administered under the Clean Air Act and Clean Water Act provide apt examples of this system. Cooperative federalism is designed to provide a minimum and uniform set of national standards while allowing for adjustments for local circumstances as long as the national standards are met.

Principle

Clarity and coordination between federal and state entities is a critical component of successful environmental regulation in the United States. For a meaningful analysis of this principle, it is necessary to define the terms as used in the principle:

“Clarity”: Well articulated responsibilities, expectations and authorities, clearly delineated roles.

“Coordination”: Communication between the entities fostering effective environmental protection.

“Federal Entities” in the U.S. Context: EPA and its regional offices.

“State Entities” in the U.S. Context: State agencies, variously named, which are responsible for environmental protection – including but not limited to, air pollution control, water pollution control, and hazardous substance cleanup.

The Creation of EPA

EPA was created in 1970, pursuant to an executive order issued by President Nixon.¹ Citing the lack of “effective and concerted action” in dealing with pollution, and the need for a “single interrelated system” for environmental protection, the order consolidated a number of existing federal agencies from a variety of government departments, which had previously been responsible for narrow aspects of environmental protection.² The order did more than simply reorganize the federal bureaucracy. It created an agency that would “establish and enforce environmental standards consistent with national environmental goals.”³ This was a significant departure from the previous emphasis on environmental protection as a function of local and state governments.

¹ See Jack Lewis, *The Birth of EPA*, EPA Journal, (Nov. 1985), <http://www.epa.gov/history/topics/epa/15c.htm>.

² 84 Stat. 2086 (1970), amended by 97 Stat. 485, 486 (1983); 42 U.S.C.A. § 4321 (West 2010).

³ Executive Office of the President, *Ash Council Memo*, (1970), <http://www.epa.gov/history/org/origins/ash.htm>.

Cooperative Federalism

The creation of EPA facilitated the emergence of a new model for environmental protection in the U.S., described as “cooperative federalism.”⁴ Under this structure, both the federal government and state governments play critical but different roles in environmental protection. States continue to have primacy and flexibility in their traditional realms of implementation and enforcement of environmental standards.⁵ The federal government sets a floor for environmental standards, oversees implementation by the states, retains ultimate enforcement authority, and provides national leadership and consistency.⁶ Thus, this cooperative federalism structure may also be described as *minimum national requirements*.

This cooperation is achieved through a system of “delegated” and “non-delegated” authority. “*Delegated authority*” refers to those implementation and enforcement responsibilities that are transferred to state or local agencies, while “*non delegated authority*” is retained by the federal government.⁷ In this system, states are encouraged to cooperate with the federal scheme through the inducement of delegated authority and federal funding for qualifying programs; meanwhile the federal government can intervene or sanction states that fail to effectively implement federal programs.⁸ The structure of cooperative federalism can thus be distilled into five essential defining factors: 1) provisions for state implementation, 2) setting clear standards, 3) respect for state autonomy, 4) oversight and enforcement mechanisms, and 5) strong incentives to join the program and strong disincentives to violate it.⁹ These factors are exemplified in the structure of two fundamental U.S. statutes: the Clean Air Act and the Clean Water Act.

The Clean Air Act and Clean Water Act are the cornerstones of air and water pollution control in the United States. The Clean Air Act defines EPA’s responsibilities for protecting and improving the nation’s air quality, while the Clean Water Act provides for the protection and improvement of the nation’s water quality. While both statutes existed before 1970, they were significantly amended after the creation of EPA to reflect a new structure which vested in the federal government vastly expanded administrative and enforcement authority. *Both statutes now reflect the principles of minimum national requirements in their respective division of authority between federal and state agencies.*

⁴ Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532 (1995).

⁵ See PowerPoint: Steve Wolfson, U.S. EPA Office of General Counsel, *Some Key Legal Tools for Coordination/Oversight for Air Quality Management: Permitting Under Title 5 of the Clean Air Act*

⁶ *Id.* at 2.

⁷ See U.S. Env’tl. Prot. Agency, *Region 9 – Air Standards Delegations*, (last updated Dec. 10, 2010), <http://yosemite.epa.gov/r9/r9nsps.nsf/findpage/basic#delegation>.

⁸ See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 189-190 (2005).

⁹ See Babich, 54 MD. L. REV. at 1534; see also Fischman, 14. N.Y.U. ENVTL. L.J. at 189.

It is important to note that three quarters of the federal environmental programs that can be delegated to state agencies pursuant to their governing statutes are run by the states.¹⁰ *Consistent with this federal-state work ratio, state agencies now pursue 90 percent of the enforcement actions and collect 95 percent of the data used by EPA.*¹¹ While EPA's national standards and programs serve an important role in defining the minimum standards for state environmental laws, EPA must work closely with the states to ensure that the laws are properly enforced and to ensure compliance with the laws. *The agency is structured with headquarters in Washington, D.C., supplemented by regional offices that help the agency stay abreast of the real-world implementation of the laws in different parts of the country and to work effectively with the state agencies implementing the laws.*

The Clean Air Act

The 1963 version of the Clean Air Act assigned the primary burden of air pollution control to state and local governments. *However, by 1970 it was clear that state and local governments could not respond adequately to meet national environmental goals (as articulated in the National Environmental Protection Act of 1969), and that federal authority needed to be increased.*¹² With this overarching purpose in mind, Congress passed the 1970 amendments to the Clean Air Act, as a "more effective program to improve the quality of the Nation's air."¹³ The amended Clean Air Act dramatically expanded the ability of the federal government to hold states and state agencies accountable, enforce national standards, and implement adequate air pollution control measures wherever states fell short. The newly created EPA was given the authority to implement the provisions of the amended Clean Air Act, where previously, implementation was carried out by a variety of federal departments and state agencies.¹⁴

Under the Clean Air Act, EPA is responsible for five critical aspects of air pollution control: 1) setting national air quality goals; 2) setting national ambient air quality standards for sulfur dioxide (SO₂), nitrogen dioxide (NO₂), Particulate Matter (PM), carbon monoxide (CO), ozone (O₃) and lead (Pb); 3) creating rigorous emissions standards for new major sources or major modifications at existing sources in areas not in compliance with ambient air quality standards; 4) setting standards for emissions of hazardous air pollutants¹⁵; and 5) setting emissions standards as part of the Prevention of Significant Deterioration (PSD) program for new major sources or major modifications at existing sources for pollutants where the area the source is located is in compliance with ambient air quality standards¹⁶. *EPA can delegate authority to administer the Clean Air Act if the state makes a showing that it will implement environmental*

¹⁰ See Env'tl. Council of the States, *Annual Report and Almanac*, 16, (Apr. 2005), http://www.ecos.org/files/1457_file_2005_Annual_Report_and_Almanac.pdf.

¹¹ Barry Rabe, *Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation*, 37 PUBLIUS 413 (2007).

¹² 116 Cong. Rec. 32900, 32901 (1970).

¹³ *Id.*

¹⁴ See 42 U.S.C. § 7401.

¹⁵ See PowerPoint: Steve Wolfson, U.S. EPA Office of General Counsel, *Some Key Legal Tools for Coordination/Oversight for Air Quality Management: Permitting Under Title 5 of the Clean Air Act*.

¹⁶ See 42 U.S.C. §§ 7470-7492.

regulations and have the ability to implement the federal programs. States, with delegated authority, develop “State Implementation Plans” (SIPs), which propose a strategy for implementing, maintaining, and enforcing the national air quality standards and goals.¹⁷ These implementation plans are reviewed by EPA before being approved. The statute makes it clear that the national air quality goals and standards are a ‘floor’, and that state standards must be *at least as stringent* as the nationally prescribed standards. It states, in relevant part,

“Nothing in this title shall be construed as preventing a State...from adopting...ambient air quality standards and implementation plans, including emission requirements, to implement an air quality program which will (A) attain and maintain a higher level of air quality than is specified in any national ambient air quality standard promulgated pursuant to this Act, or (B) attain and maintain the level of air quality specified in any national ambient air quality standard within a shorter period of time than required by this Act, or from adopting within the time provided in section 114 or section 115 of this Act, or revising after such time, emission standards more stringent than those established by the Secretary.”¹⁸

If a state fails to submit or adequately implement a state plan, EPA can take steps to have the state correct the state plan and ultimately can revoke the state’s delegated authority. However, in practice, EPA rarely threatens de-delegation. When a state does not or is unable to develop an adequate State Implementation Plan (SIP), EPA must step in with a Federal Implementation Plan to achieve attainment of air quality standards.¹⁹ The Clean Air Act also allows EPA to sanction states that fail to comply with the Act requirements. EPA can require that new or modified emission sources be offset and can ultimately threaten to withhold federal funding for critical highway projects in the nonattainment areas of the state if the offset requirement does not induce the necessary adjustments.²⁰ Because of the severity of the sanction, however, it is seldom imposed.²¹ This suggests the need for intermediate levels of sanctions. The statute states, in relevant part:

(b) Sanctions

The sanctions available to the Administrator as provided in subsection (a) of this section are as follows:

(1) Highway sanctions

(A) *The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under title 23 other than projects or*

¹⁷ See PowerPoint: Steve Wolfson, U.S. EPA Office of General Counsel, *Some Key Legal Tools for Coordination/Oversight for Air Quality Management: Permitting Under Title 5 of the Clean Air Act*.

¹⁸ 42 U.S.C. § 7413.

¹⁹ 42 U.S.C. § 7410(c).

²⁰ 42 U.S.C. § 7509; See also James E. McCarthy, *CRS Report: 97-959 - Highway Fund Sanctions for Clean Air Act Violations*, (Oct. 22, 1997), <http://ncseonline.org/nle/crsreports/transportation/trans-9.cfm>.

²¹ See David Schoenbrod, et al., *Air Pollution: Building on the Successes*, 17 N.Y.U. ENVTL. L.J. 284, 313 (2008).

grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents. *Such prohibition shall become effective upon the selection by the Administrator of this sanction*²²

In 1990, amendments to the Clean Air Act introduced a new permit program. Under Title V of the newly amended Clean Air Act, states are given the authority to issue a single operating permit, which consolidates all applicable emissions limitations and other air quality requirements, to qualifying large emitters.²³ These permit programs, however, must meet federal requirements. These requirements include federal emissions limitations and standards, monitoring requirements, record-keeping and reporting requirements, provisions allowing federal regulators to inspect emitters' facilities, and provisions requiring periodic certification of compliance by a senior company official. The amendments simplified the process of monitoring and enforcement for emitters, and once again, re-emphasized the cooperative federalism structure.

The Clean Water Act

Much like the Clean Air Act, the Clean Water Act was amended in 1972 and now reflects a cooperative federalism structure in its administration and enforcement mechanisms. Under the Clean Water Act, states must develop and establish water quality standards.²⁴ These standards are reviewed and approved by EPA. If a particular water body meets the established water quality standard, then anti-degradation policies and ambient monitoring must be employed to ensure that this body is maintained at these standards.²⁵ While the responsibility for monitoring is generally vested in the states, EPA may step in if a state does not adequately monitor whether its water bodies are attaining water quality standards.²⁶

If a particular water body does not meet water quality standards, then the state must develop a strategy to meet them. The most common strategy employed is called Total Maximum Daily Load (TMDL), which defines the maximum level of pollutants allowed in a particular water body before the water quality standard is violated. Once again, the TMDL must be submitted to EPA for approval.²⁷

Similar to the Title V Permit program under the Clean Air Act, the Clean Water Act set up a program known as the National Pollutant Discharge Elimination System (NPDES), which gave

²² 42 U.S.C. § 7509 (emphasis added).

²³ See PowerPoint: Steve Wolfson, U.S. EPA Office of General Counsel, *Some Key Legal Tools for Coordination/Oversight for Air Quality Management: Permitting Under Title 5 of the Clean Air Act*; 42 U.S.C. § 7661.

²⁴ U.S. Env'tl. Prot. Agency, *Introduction to the Clean Water Act*, at Section 2, (last updated Sept. 12, 2008), <http://www.epa.gov/watertrain/cwa/>.

²⁵ *Id.* at Section 17-20.

²⁶ See 33 U.S.C. § 1313(c)(4).

²⁷ See 33 U.S.C. § 1313(d).

states with authorized programs the authority to issue permits to point sources of water pollution.²⁸ The NPDES permit program compiles a variety of water pollution control requirements in a single permit, allowing for greater ease of administration and monitoring. There are four basic requirements included in an NPDES permit: 1) effluent limits based on appropriate technology based standards and water quality based standards; 2) monitoring and reporting requirements, which are used to characterize waste streams, evaluate wastewater treatment efficiency, and determine compliance with permit conditions; and 3) special conditions to supplement effluent limits, including best management practices²⁹; and 4) compliance schedules, ambient stream surveys, and toxicity reduction evaluations.³⁰ Implementation of the NPDES program is delegated to the states if the state demonstrates that it will establish a program with requirements at least as stringent as federal requirements. If a state is unable to do this, then EPA assumes the authority for permitting in that state.

The Role of Environmental Advocacy Groups

Although environmental statutes such as the Clean Air Act and Clean Water Act have set up a clear system of cooperative federalism, in reality both state and federal agencies must often be prodded to fulfill their respective responsibilities. NRDC and other environmental advocacy groups play a critical role in encouraging state implementation and federal enforcement. NRDC works to make state agencies increase compliance and monitoring, while making EPA set reasonable standards and hold state agencies accountable. In 2008, for example, NRDC along with other environmental advocacy groups filed a lawsuit against EPA for failing to rule on California's State Implementation Plan, which was violating the Clean Air Act.³¹ NRDC's tools go beyond lawsuits, and include amicus briefs in court, recommendations to agencies, comments on rulemakings and policies, letters to Congressional committees and members calling for congressional action, Congressional testimony, and press and public outreach. In February 2008, for example, in anticipation of a federal law regulating greenhouse gas emissions, NRDC authored a letter to Congressmen Dingell and Boucher, urging them to maintain the system of cooperative federalism in the new legislation.³²

²⁸ See 40 C.F.R. § 122.

²⁹ "Best Management Practices ('BMPs') means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." 40 C.F.R. § 122.2.

³⁰ U.S. Env'tl. Prot. Agency, *Introduction to the Clean Water Act*, at Section 42, (last updated Sept. 12, 2008), <http://www.epa.gov/watertrain/cwa/>; 40 C.F.R. § 124.

³¹ Natural Resources Defense Council, Press Release - Lawsuit Challenges EPA Failure to Ensure Clean-Up of Nation's Filthiest Air, (Jan. 14, 2008), <http://www.nrdc.org/media/2008/080114.asp>.

³² Letter from Frances Beinecke, President, Natural Resources Defense Council, to Hon. John D. Dingell, Chairman, and Hon. Rick Boucher, Chairman, Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, U.S. House of Representatives (Feb. 25, 2008), http://docs.nrdc.org/globalWarming/files/glo_08022501a.pdf.

Challenges for the Cooperative Federalism Structure

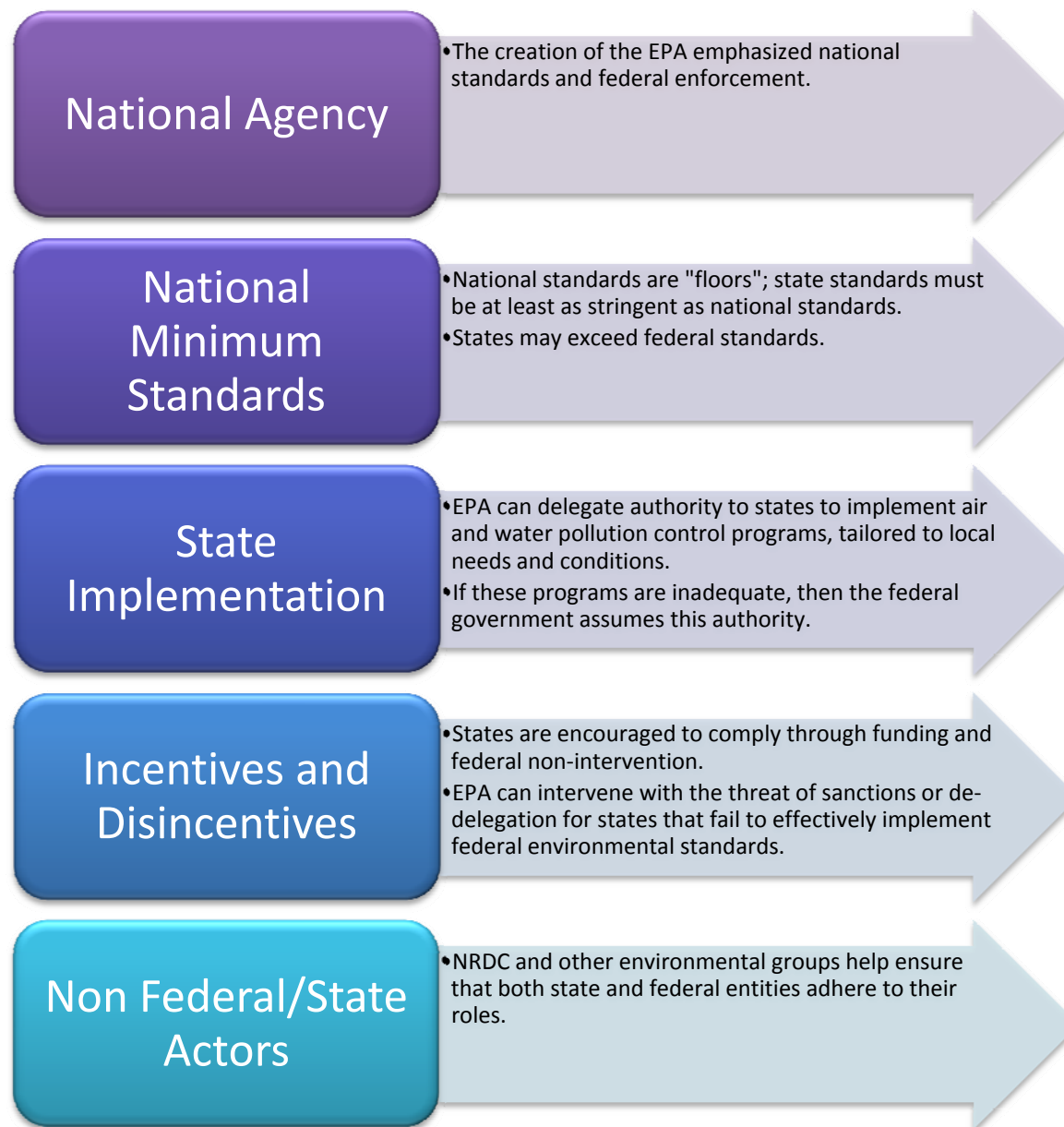
In the spheres of air and water pollution control, the system of cooperative federalism has been largely successful. While the judicial system and the efforts of environmental groups are needed to help define the boundaries of state and federal responsibility, the Supreme Court has regularly reiterated the authority of the federal government in setting and enforcing standards, and the role of the state in implementing programs to meet these standards.³³

Scholars have, however, pointed out some shortcomings of the cooperative federalism structure and suggested the importance of the right incentives to achieve the desired national objectives. For instance, scholars have pointed to the Clean Air Act's sanction structure as a potential reason for continued failures to meet air quality goals. Scholars argue that the Clean Air Act imposes strong penalties for failing to develop a plan to meet the air quality standards but not for actually failing to meet the standards, thus leading to over-optimistic plans that do not achieve air quality objectives.³⁴ The availability of intermediate levels of sanctions, aside from drastic sanctions such as the loss of highway funding, might also increase EPA's willingness to take state programs to task for shortcomings.

³³ See *Alaska Dep't of Env'tl. Conservation v. Env'tl. Prot. Agency*, 540 U.S. 461 (2004) (holding that EPA has the final authority in determining the best available control technology, and in prohibiting the issuance of a Prevention of Significant Deterioration permit).

³⁴ Schoenbrod, *Air Pollution: Building on the Successes*, 17 N.Y.U. ENVTL. L.J. at 313 (2008).

KEY POINTS: Clarity and Coordination Between Federal and State Agencies



Principle 2: Retaining Highly Qualified Professionals and Dedicated Agency Resources

A highly qualified, professional staff at environmental agencies and dedicated agency resources are critical elements of successful environmental governance in the United States. Successful implementation of legislation and supporting regulations relies on adequate and qualified staff, technically adequate and productivity-enhancing equipment, and sufficient funding to ensure both. EPA receives funding from the federal government, and it spends a significant percent of its allotted resources on developing and maintaining a qualified workforce. EPA also receives federal funds that are “passed through” to state and local agencies to ensure that state and local programs have sufficient resources. *Like any other government agency, EPA must compete with the private sector in attracting qualified professionals to agency jobs, and retaining these professionals. In order to do this, the agency must offer a clear vision and mission, attractive benefits, opportunities for advancement and training, and job stability.* EPA also regularly assesses its workforce, a practice which allows the agency to monitor its success in retaining qualified professionals and adequate resources, while identifying areas for improvement. In addition to career staff, EPA and state governments have allocated resources to hire consultants and contract workers, which can compensate for limited permanent staff. Sufficient operating budgets are also needed for dedicated travel budgets for site inspections and the purchasing of monitoring and other necessary equipment.

The Principle

Retaining highly qualified professionals and the commitment of sufficient resources is a critical element of successful environmental governance in the United States. For the purposes of this principle, terms are defined as follows:

“Qualified”: Employees trained in a specific role that they will carry out, and with adequate background to perform this role with a high level of skill.

“Retention”: Maintaining a low rate of employee turnover to allow for sustainability, retain knowledge and expertise within the agency, and keep costs low.

“Agency Resources”: Adequate and professional staff, equipment, and funding, allowing for effective execution of agency efforts.

The Availability of Resources to EPA and State Environmental Protection Agencies

Federal Funding and EPA

The federal government recognizes the critical importance of committing significant resources to EPA. Thus, EPA receives most of its funding from the federal government. The budget for EPA is initially submitted to the Office of Management and Budget (OMB) in the White House, usually two years prior to the budget year. This budget must be approved by the OMB as well as by Congress before funds can be appropriated to the agency. For the year 2011, the total agency

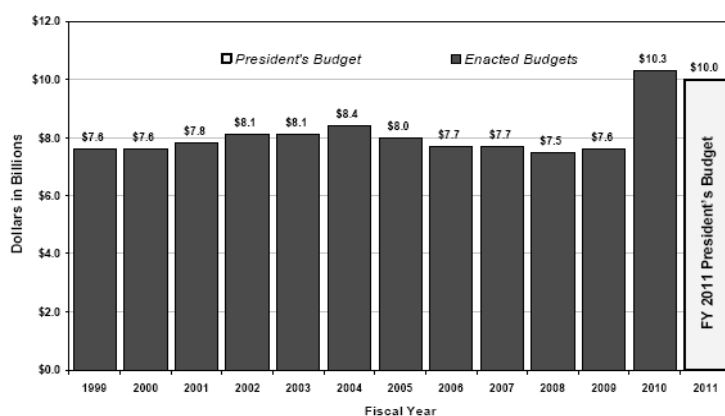
budget is approximately \$10 billion.³⁵ For the purposes of comparison, the U.S. Department of Education has a budget of approximately \$49.7 billion, the U.S. Department of Agriculture has a budget of approximately \$25.8 billion, and the U.S. Department of Labor has a budget of approximately \$14 billion.³⁶

When EPA submits its budget, it must provide a breakdown of where the appropriations will be spent in what is called a “congressional justification.” When broken down by overarching goal, EPA spends approximately \$4.6 billion (45 percent) on clean water, \$1.8 billion (17.5 percent) on land restoration and preservation, \$1.7 billion (17 percent) on healthy communities and ecosystem preservation, \$1.2 billion (12 percent) on clean air, and \$824 million (8 percent) on compliance and environmental stewardship.³⁷ In addition to a breakdown by goal, the budget includes a vastly more detailed breakdown of resource appropriation by program area.

State environmental protection agencies receive funding for their programs from a combination of state sources as well as EPA. The provision of federal funds for state programs and the coordination between federal and state entities is discussed under principle 1: clarity and coordination between federal and state entities.

EPA's Enacted Budget FY 1999 to 2011

(Dollars in Billions)



Important Players in the Funding Process

The process of securing committed resources for EPA is aided and guided by a number of essential players. At the federal level, as mentioned above, the EPA budget must be approved by Congress. However, instead of a hearing in front of a full Congress, the EPA budget is heard and considered by specialized committees in both the Senate and House of

Representatives. These committees

are formed by members in both houses of Congress who ideally have expertise, interests, and experience in the area of environmental protection. In the Senate, the Committee on Environment and Public Works reviews the EPA budget before the Senate Sub-committee on the Interior, Environment and Related Agencies within the Senate Appropriations Committee hears the budget. In the House of Representatives, the House Committee on Natural Resources

³⁵ U.S. Env'tl. Prot. Agency, *FY 2011 EPA Budget in Brief*, at 9, (last updated Dec. 9, 2010)

<http://www.epa.gov/budget/>.

³⁶ The White House, *The Budget of the United States Government*, Fiscal Year 2011, at pp. 52, 71 & 99,

<http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/budget.pdf>.

³⁷ U.S. Env'tl. Prot. Agency, *FY 2011 EPA Budget in Brief*, at 9, (last updated Dec. 9, 2010)

<http://www.epa.gov/budget/>.

considers the budget before the House Appropriations Committee hears it. Each of these committees provides a forum for the EPA budget to be discussed, for expert views to be presented, and for necessary changes to the budget to be incorporated.³⁸ *While these committees with subject-area expertise often have a better understanding of the issues than the undifferentiated Congress, the political perspectives of their members often influences whether the committees are a help or an obstacle to ensuring that EPA regularly receives adequate resources to achieve its mission. The regular testimony by EPA officials in front of these committees can help build a relationship between EPA and members of each committee – encouraging further dialogue to enhance expertise, and strategies to acquire additional necessary resources – to ease what can be a difficult process.*

Other groups also play important roles in securing resources to support environmental compliance and enforcement. The NRDC and other environmental advocacy groups often play a critical role in supporting funding for particular environmental programs and projects and advocating for increased resources for the implementation of environmental laws and for environmental agencies. In 2008, for example, NRDC submitted a set of recommendations to California’s Governor Schwarzenegger, putting its support squarely behind two bills that would increase funding for air pollution control and global warming initiatives.³⁹

Workforce Development: Attracting a Qualified and Professional Workforce to EPA

In order to develop and retain a qualified and professional workforce, EPA employs established policies for hiring, projects a compelling and clear mission statement to prospective employees, offers and recommends a variety of training programs to its employees, and provides significant benefits and opportunities for its employees. EPA is guided by the Title 5 provisions of the U.S. Code, which provides an umbrella framework for government agency employment, compensation, and other benefits.⁴⁰

Hiring Decisions and Compensation

5 U.S.C. § 5105 establishes a “general schedule” of employee positions within government agencies.⁴¹ The obligation of detailing duties, responsibilities, and qualification requirements for each position is shared between the U.S. Office of Personnel Management and the agencies (including EPA). The statute states, in relevant part;

§ 5105. Standards for classification of positions

(a) The Office of Personnel Management, after consulting the agencies, shall *prepare standards for placing positions in their proper classes and grades.* The Office may make such inquiries or investigations of the duties, responsibilities,

³⁸ Judy Schneider, *The Committee System in the U.S. Congress*, CRS Report for Congress, (May 2, 2003), at 4, http://www.ait.org.tw/infousa/enus/government/branches/docs/committee_system.pdf.

³⁹ NRDC Urges Governor to Sign Bills to Reduce Global Warming and Ports Pollution, *available at* <http://www.nrdc.org/media/2008/080923c.asp>

⁴⁰ 5 U.S.C. See Appendix B: Statutory Language

⁴¹ 5 U.S.C. § 5105.

and qualification requirements of positions as it considers necessary for this purpose. The agencies, on request of the Office, shall furnish information for and cooperate in the preparation of the standards. In the standards, which shall be published in such form as the Office may determine, the Office shall--

- (1) define the various classes of positions in terms of duties, responsibilities, and qualification requirements;
 - (2) establish the official class titles; and
 - (3) set forth the grades in which the classes have been placed by the Office.
- (b) The Office, after consulting the agencies to the extent considered necessary, shall revise, supplement, or abolish existing standards[...]
- (c) The official class titles established under subsection (a)(2) of this section shall be used for personnel, budget, and fiscal purposes.⁴²

This schedule, which creates categories of employees from GS-1 to GS-15, has two basic purposes: 1) It allows agencies to group employees based on duties, responsibilities and qualification requirements, and 2) It allows for a standardized pay schedule.⁴³ While a GS-1 employee may be paid approximately \$22,000 a year, a GS-15 employee can expect an annual salary of approximately \$120,000.⁴⁴ In addition, executives at EPA, defined as per qualification requirements established under 5 U.S.C. § 5312-16, are subject to a separate pay schedule.⁴⁵ The executive pay schedule includes levels from I – V, where level I executives include the Secretaries and Administrators of federal agencies, and subsequent levels include executives lower in the hierarchy in each federal agency.⁴⁶

The General Schedule provides the advantage of standardization, and greater certainty that each employee's skill set is tailored to their position. Prospective employees can also easily determine what kind of job and compensation they might expect from a job at EPA.

As a result of these and other factors, EPA has maintained a highly qualified workforce: according to projections in the EPA Workforce Assessment Project, 99 percent of the workforce has a high school diploma, while 75 percent have graduated from college, and 39 percent of the workforce has a postgraduate degree.⁴⁷ More than half of EPA's 17,000 strong staff are engineers, scientists, and policy analysts.⁴⁸ A large number of employees are also legal, public affairs, financial, information management and computer specialists.

⁴² *Id.*

⁴³ 5 U.S.C. § 5332.

⁴⁴ 2010 General Schedule Locality Pay Table, U.S. Office of Personnel Management, <http://www.opm.gov/oca/10tables/indexGS.asp>.

⁴⁵ 5 U.S.C. § 5311.

⁴⁶ 5 U.S.C. § 5312.

⁴⁷ U.S. Env'tl. Prot. Agency Office of Administration and Resources Management, *Workforce Assessment Project*, at 82, (1999), www.epa.gov/epahrist/workforce/wap.pdf.

⁴⁸ U.S. Env'tl. Prot. Agency, *About EPA: Who We Are and How We Are Organized*, <http://www.epa.gov/epahome/aboutepa.htm>.

EPA Mission

While the General Schedule allows EPA to hire highly qualified employees, according to one senior EPA executive, the primary attraction of the agency is its well articulated mission and its clearly defined strategies for achieving that mission. This mission, stated succinctly, is to “protect human health and the environment” and is communicated to prospective employees through recruiting events, EPA published materials, and the EPA website. This draws individuals committed to environmental protection to the agency.

The opportunity to work at EPA is one that many employees are proud of, as the agency’s objectives command respect. This translates to high levels of job satisfaction across EPA, noted by both the Office of Attorney Recruitment and Management (OARM) Workforce Assessment Project and the National Advisory Council for Environmental Policy and Technology (NACEPT) review of the Workforce Assessment Plan (WAP).⁴⁹ These intangible benefits are significant tools in EPA’s workforce development and retention strategy.

Training Programs

In addition to hiring policies that facilitate a highly-qualified workforce, EPA offers training programs and other opportunities for continuing education that ensure that its employees not only remain competent in their respective areas, but also have the chance to broaden their skill sets. This is what one senior employee at EPA refers to as “the recommended threshold [of ability] (skill set required for their position) supplemented by the opportunity threshold (new skills acquired).”⁵⁰

The Danger of Agency Capture

Agency capture refers to a process whereby a regulated sector exerts control over the agency that is meant to regulate it. The captive agency theory was first described by Professor Marver Bernstein, who noticed that regulatory agencies have a tendency to “move so far in the direction of accommodating the interest of the entities they are charged with regulating that ultimately these agencies may be fairly considered a ‘captive’ of those regulated firms.” This often occurs due to a combination of strategic lobbying and weak legislation. According to Professor Joel Mintz, an influential legal scholar, EPA has so far successfully avoided complete capture. He identifies several reasons for this success, including 1) the support of organized, politically active environmental “watchdog” groups, 2) **“a highly motivated, dedicated mission-oriented, professional staff”**, and 3) inspired and competent leadership.

Joel A. Mintz, *Has Industry Captured EPA?*, 17 Fordham Envtl. Law Rev.1, 29 (2005) (emphasis added).

For positions requiring high technical ability, EPA often requires certification pertinent to that particular position. These positions often come with a “continuing education” requirement set by the agency, and the certification programs allow employees to fulfill these requirements. The programs, often administered by independent agencies, may be paid for by EPA, and ensure that employees continue to meet the “recommended threshold” of competency for their particular position. In order to expand the capacities of employees past their “opportunity threshold,” EPA

⁴⁹ *Id* at 58.

also often offers in house training and cross agency training, whereby employees are trained in new areas of environmental protection. This is one way of accommodating both deep expertise and the ability to move across areas of expertise, that one former EPA executive identified as a key component, both of the agency's success, and of its ability to retain the staff it hires.⁵¹ Training sessions are encouraged – employees may take time off work in order to attend these trainings.

In addition, the benefits package awarded to EPA employees often includes incentives for getting advanced degrees, which may include covering part of the financial cost of the advanced degree, or simply permitting time off work to pursue the degree. These training programs serve not only to build a more qualified workforce, but also to attract more professionals to employment at the agency.

Job Stability

According to one senior employee at EPA, one of the most critical benefits offered by EPA is the promise of job stability, as employees are afforded civil service protection rather than at-will status. At-will employees can lose their jobs at any time for any reason other than those barred by law, such as discrimination. Civil service protections ensure that employees cannot be fired without good cause, afford rights of appeal for firing decisions, and provide a greater degree of stability than the at-will employment prevalent in the private sector.⁵² From the perspective of EPA, a stable workforce allows the agency to retain expertise and skills within the agency, and thus decrease hiring costs. Thus, job stability within the agency is critical for both employer and employee.

However, it is acknowledged that this benefit could present the danger of decreased work performance due to complacency. EPA attempts to meet this threat by regular performance reviews, workforce assessments, and inducements for increased work performance.

Staff Benefits

A critical element towards retaining qualified professionals is the benefits package offered to these employees. The benefits offered by EPA, much like (or better) than those offered to employers in the private and/or corporate sector, typically include:

- Annual leave and sick leave
- Federal retirement plan based on earnings and length of service
- Health, life and long term care insurance
- 10 paid holidays per year

⁵¹ Interview with Felicia Marcus, NRDC Western Director and former Regional Administrator of the EPA under the Clinton Administration (Oct. 15, 2010).

⁵² See DOI University, National Business Center, U.S. Department of the Interior, *The Federal Civil Service*, <http://www.doi.gov/hrm/pmanager/st6.html> (revised 11/10/98) (describing availability of appeals).

- Increasingly frequent provision of childcare services, fitness centers, stress labs, and an employee assistance program for personal problems.
- In some cases, employees are offered student loan reimbursement programs
- Reimbursement for commuting costs
- Training programs as discussed earlier.

As a result of these and other policies, EPA maintains an employee turnover rate of between 5 and 7 percent, and 41 percent of the workforce (in 2004) has spent 16 or more years working at the agency.⁵³ In comparison, the average U.S. employee turnover rate is approximately 24 percent, while the turnover rate in private industry is closer to 27 percent.⁵⁴

Mechanisms for Workforce Review

In order to ensure that the agency is, in fact, hiring and retaining a qualified workforce and adequate resources, EPA has set up a number of internal sub-agencies and organizations to review its workforce on an intermittent basis. The Office of Administration and Resource Management (OARM) is one such agency, which in 2004 published a Workforce Assessment Plan (WAP) and a Strategy for Human Capital at EPA. Both of these reports were assessed by yet another agency: the National Advisory Council for Environmental Policy and Technology (NACEPT).

These reports revealed a number of successes and failures in EPA's management of its workforce. Among these findings was the overwhelming agreement that EPA provides a positive working environment, the consistent ability of EPA to hire technically skilled employees, and the well developed analytical and program development skills of the workforce.⁵⁵ However, the WAP also noted that EPA workforce lacked adequate leadership ability and communication skills.⁵⁶ The WAP provided strategies for filling these "competency gaps," including recruitment tools, employee development programs, and new performance standards.⁵⁷ The NACEPT review of the WAP added recommendations including the integration of human resources planning into the Agency's overall strategic planning process, soft measures such as employee surveys to track employee perceptions, and the collection and archiving of more quantitative information.⁵⁸

These assessment mechanisms allow EPA to adapt its workforce to the changing needs of effective environmental protection, and therefore maintain a qualified workforce.

⁵³ U.S. Env'tl. Prot. Agency Office of Administration and Resources Management, Workforce Assessment Project, at 81, (1999), www.epa.gov/epahrist/workforce/wap.pdf.

⁵⁴ Latest BLS Employee Turnover Rates for Year Ending August, (based on data from the U.S. Bureau of Labor Statistics), Nobscot Corporation Retention Management and Metrics, (2006) <http://www.nobscot.com/survey/index.cfm>.

⁵⁵ *Id.* at 44.

⁵⁶ *Id.* at 48.

⁵⁷ *Id.* at 63.

⁵⁸ Evaluation of EPA's Workforce Assessment and Strategy for Human Capital, National Advisory Commission for Environmental Policy and Technology (NACEPT) at 21.

KEY POINTS: Retaining Highly Qualified Professionals and Dedicated Agency Resources



Principle 3: Monitoring by Regulated Entities: Self-Monitoring and Self-Reporting

Effective monitoring is central to compliance with environmental laws in any jurisdiction. Without compliance monitoring even the best environmental laws on the books would fail to protect human health and ecosystems. Self-monitoring and self-reporting by the regulated entity is the chief mechanism used in the U.S. for determining environmental compliance. Reliable and continuous monitoring data is critical to both determining compliance with environmental laws and enforcing environmental laws. *Self-monitoring and reporting programs can produce reliable pollution monitoring data and clear compliance metrics. This publicly available self-monitoring information encourages a culture of compliance from good actors and identifies bad actors for subsequent enforcement actions.*

In the United States, most environmental laws set forth environmental standards, emissions/effluent standards, and technology standards. These standards are then incorporated into a permit document for a specific facility or entity. The permit, as mandated by law, must include a self-monitoring and reporting requirement. *This is in recognition of the fact that enforcement actions alone cannot ensure compliance, given the sheer imbalance between the number of regulated entities and the relatively modest resources of the regulatory agency.* To counter this imbalance, it is important to create a culture that encourages compliance by the regulated entities themselves. Self-monitoring and reporting generate information that allows regulated entities to come into compliance without enforcement actions. At the same time, self-monitoring and reporting shifts the costs of assuring compliance to the regulated entities. By shifting monitoring and reporting costs to regulated entities, agencies can prioritize limited resources to aggressively control the worst actors while encouraging a culture of compliance for good actors. Additional tools available to agencies, such as inspections, targeted information-gathering, investigations, and citizen tips and complaints also aid in determining whether an entity is complying with environmental laws, and are discussed in detail in separate sections of this briefing report.

Defining Self-Monitoring, Self-Reporting, and Self-Recordkeeping

Self-monitoring, self-reporting, and self-recordkeeping are the main methods by which regulated entities track their own compliance and provide their recorded results for government review.⁵⁹

Self-monitoring requires regulated entities to measure emissions, discharges, or performance that provides information on the pollutant discharges or operation of control technologies.⁶⁰ For example, sewage treatment plants must monitor both their effluent discharge and ambient water quality to determine whether they are meeting water quality standards. Sources may also be

⁵⁹ International Network for Environmental Compliance and Enforcement, *Principles of Environmental Compliance and Enforcement Handbook*, (Apr. 2009).

⁶⁰ See, e.g., 33 U.S.C. § 1318 (Clean Water Act statutory requirements for records, reports, inspections, including: “maintenance; monitoring equipment; entry; access to information” and “availability to public.”); 42 U.S.C. § 7414 (Clean Air Act statutory requirements for recordkeeping, inspections, monitoring, and entry, including requirements to install monitoring equipment and provide monitoring reports).

required to monitor the operating parameters (such as line voltage and electrical current used) that show how well the equipment is operating.

Self-reporting requires regulated entities to provide regulators with information about their monitoring and operating programs on a periodic basis. Methods for such reporting vary. Some permitting systems require permitted entities to fill in a form and provide answers to a series of questions, such as, “Are you in compliance with your permit requirements?” or “What is the annual budget spent on environmental compliance?” Others require the provision of detailed compliance plans, including descriptions of what measures will be taken in a situation of noncompliance. The regulated facilities are also usually required to submit the self-monitoring data they collect. *The regulated entity must certify that the information in the report is true and correct under penalty of law.* These reports give the regulating agencies an overall picture of the entities’ monitoring and compliance status, as well as serving as a source of information for agency enforcement against noncompliance.

Example of Self-Monitoring and Self-Reporting Programs: Clean Water Act

Through its explicit statutory language and specific permitting requirements, the Clean Water Act established a model program for generating reliable monitoring data that has been replicated in the Clean Air Act as well. The Clean Water Act created the NPDES permitting program.⁶¹ Under this system, the discharge of any pollutant to any water of the United States is prohibited, unless the entity has a NPDES permit. A NPDES permit requires that any point source emitting a pollutant into the waters of the United States obtain a permit that specifies certain conditions that the point source operator must maintain.

Every NPDES permit issued under the Clean Water Act has a self-monitoring and self-reporting requirement. In fact, Clean Water Act Section 308 explicitly authorizes the regulating agency to require self-monitoring and self-reporting from the regulated community. Specifically, the Clean Water Act requires that owners of point sources:

1. Establish and maintain such records, as required by the agency,
2. Make such reports publicly available,
3. Install, use, and maintain specified monitoring equipment or methods (including where appropriate, biological monitoring methods),
4. Sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as prescribed by the agency), and
5. Provide such other information as may reasonably be required.⁶²

These statutorily mandated self-monitoring and self-reporting requirements in the Clean Water Act give broad authority to regulating agencies to seek, collect, and review compliance

⁶¹ 33 U.S.C. § 1342 (2006).

⁶² See 33 U.S.C. § 1342 (2006).

information directly from regulated entities. The statutory requirements are only a minimum. Both EPA and states are empowered to require more specific or stringent information.⁶³

In terms of the monitoring and testing procedure, the regulated agency requires a list of procedures that must be used.⁶⁴ *For instance, these procedures include the specific test method for monitoring pollutants, such as bacteria, or the specific types of fish that may be used for toxicity testing.* The samples and measurements taken by each facility must be reported to the regulating agency and must be maintained by the facility for a period of at least three years.⁶⁵ The information contained in these reports serves multiple purposes. First, the reporting requirements create a culture of compliance by making that facility aware of its emissions and responsible for not meeting water quality standards. Second, it provides the agency an opportunity to review the entities' compliance record and also allows other entities in the area to identify the pollution hotspots. Third, the reporting information can also serve as a basis for an enforcement action by citizen groups or regulatory agencies, even sufficing as grounds for a *prima facie* case of violation during summary judgment.⁶⁶

The regulating agency also has broad authority to enforce against entities who fail to submit reports and/or meet monitoring requirements. *Hefty civil and criminal penalties may be levied against anyone who provides false information to a regulatory agency or tampers with monitoring equipment.*⁶⁷ In many instances the threat of a fine is sufficient to draw out compliance. This broad authority to enforce against those who fail to submit reports or meet monitoring requirements is critical to ensure that lapses in monitoring and reporting may be curbed without the need to discover an emission violation.

Once the reports are submitted, the regulatory agency is obligated to review the reports. Under Clean Water Act Section 308(a)(4)(B), the regulating agency can explicitly authorize agency inspectors to enter and inspect facilities as well as to request records for review.⁶⁸ Until the early 1990s, the information provided by the reporting requirements of the NPDES permits provided the basis for as much as 90 percent of the enforcement activity under the Clean Water Act. Since that time, improved compliance by regulated entities has allowed enforcement agencies to shift their resources away from policing facilities to meet the self-monitoring requirements, encouraging compliance in areas where self-monitoring is not yet required or is not feasible.⁶⁹

⁶³ 33 U.S.C. § 1342(b) (2006) (The administration of the NPDES program has generally been delegated to state agencies provided that the state water program be no less stringent than the federally administered program).

⁶⁴ Part 136 of Title 40 of the C.F.R.

⁶⁵ 40 C.F.R. §122.41.

⁶⁶ See *PIRG v. Yates Ind.*, 757 F. Supp. 438, 447 (D.N.J. 1991).

⁶⁷ 33 U.S.C. §§ 1319(b)-(c) (2006).

⁶⁸ For an example of an NPDES enforcement action, see *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997). For criticism of the supervision of both EPA and state agencies with respect to NPDES permits for Concentrated Animal Feed Operations, see Terence J. Center, *Courts and EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 ENVTL. L. 1215 (2008).

⁶⁹ *Id.*

Building on the successes of the Clean Water Act reporting requirements, **the Clean Air Act** was amended in 1990 to include stronger authority for EPA to implement self-monitoring and reporting programs for air pollution. The Clean Air Act self-monitoring and reporting requirements focus on stationary, i.e. non-vehicular, sources. In contrast, EPA and the states are responsible for ambient air quality testing. As in the Clean Water Act, the overarching purpose of the self-monitoring and reporting provisions in the Clean Air Act is to create a culture of compliance. The EPA also requires the stationary source to provide data and information to demonstrate compliance with specific regulatory requirements. The provision of such “performance information” enables corrective action to be taken, if necessary. Depending on permit terms or conditions (e.g. emission limits, work practice requirements, equipment design, operating requirements, monitoring equipment, emissions sampling, etc.), regulations prescribe either periodic or continuous monitoring to evaluate performance.

In addition to the Clean Water Act and Clean Air Act requirements, several other environmental laws have self-monitoring and self-reporting programs:

- *Emergency Planning and Community Right-to-Know Act* - EPCRA was passed in 1986,⁷⁰ partly in response to the Bhopal disaster.⁷¹ EPCRA requires operators of regulated facilities to file a Toxic Release Inventory (TRI) report with EPA detailing any accidental or routine releases of specified chemicals that surpass the reporting thresholds.
- *Comprehensive Environmental Response, Compensation, and Liability Act* - CERCLA,⁷² also known as the Superfund Act, requires that non-permitted releases of hazardous chemicals greater than the designated “reportable quantity” be reported to the National Response Center (NRC) created by the Clean Water Act.⁷³
- *The Toxic Substances Control Act* – TSCA is a broad tool that authorizes EPA to fill the information gathering gaps left by other statutes. Unfortunately, the statute has been largely unsuccessful.⁷⁴ TSCA authorizes EPA to establish recordkeeping and reporting requirements for manufacturers, producers, and distributors of “chemical substances.” Significantly, in addition to the recordkeeping requirements, TSCA also authorizes EPA to shift the burden of scientific testing for the health and safety effects of chemicals to manufacturers.⁷⁵

Benefits

The self-monitoring and self-reporting requirements in all the statutes described have multiple benefits. One significant benefit of such requirements is that self-monitoring and self-reporting

⁷⁰ 42 U.S.C. §§ 11001-11050 (2006).

⁷¹ Env'tl. Prot. Agency, *What is the Toxics Release Inventory (TRI) Program*, <http://www.epa.gov/tri/triprogram/whatis.htm>.

⁷² 42 U.S.C. §§ 9601-9675 (2006).

⁷³ 42 U.S.C. § 9603(a) (2006).

⁷⁴ See Reitze, Jr. & Schell, at 96.

⁷⁵ 15 U.S.C. § 2607 (2006).

requirements create a culture of compliance. *Because of transparency in the public reporting requirements, and the array of enforcement responses available, regulating agencies, regulated facilities, and companies are motivated to comply with environmental laws.* In fact, while aggressive agency enforcement and citizen suits can sometimes have game-changing impacts, good behavior prompted by self-monitoring and self-reporting programs has been widely acknowledged as a cause of the sustained success of pollution control programs. In addition, self-monitoring and self-reporting requirements shift at least some of the costs of ensuring compliance to regulated entities, manifesting the “polluter pays” principle. The self-monitoring data also provides a basis for the regulating agency to take action either through informal requests for information or formal enforcement.

Educating the Regulated Entities Towards Compliance

Self-monitoring and self-reporting requirements are useful mechanisms to educate the regulated entities about compliance requirements. *While the regulated entity certainly should understand its permit requirements, the self-monitoring requirements enable companies to examine their emissions trends in the context of the specific pollution standards and to trouble-shoot problem areas.* The self-monitoring requirements also require that reliable and affordable monitoring equipment be used by the regulated entity, especially since self-monitoring relies on the ability of the facility to provide accurate data. Furthermore, the self-monitoring data results allow the facility to examine and adjust its overall operations, be it from modifying specific pollutant discharges or from altering monetary expenditures, to attain permit compliance. The industries can evaluate their own performance and can modify operations to actually save costs and products while complying with the law.

Transparency and Information-Gathering

The information gathered by regulating agencies, both state and federal, under the reporting requirements of such programs serve numerous valuable purposes. The reporting requirements of the Clean Water Act, EPCRA, CERCLA, and the Clean Air Act provide EPA with a tremendous amount of information on the type and volume of pollutants emitted by regulated facilities as well as the pollution control technologies they have employed. The agency can use this information to understand site-specific, industry, and regional trends. The program allows the agency to respond to emerging pollution in the ecosystem, identify bad actors, and promote cost-effective solutions.

The agency also evaluates the data during the rulemaking process to ensure that new regulations are based on the most complete and up-to-date data available. This both reduces the cost to the agency and, where automated monitoring systems are employed, may make the collection of accurate long-term data easier. For example, monitoring systems such as continuous emissions monitoring systems, required for certain facilities under the Clean Air Act, help evaluate trends over time for new rulemakings.⁷⁶

⁷⁶ Reitze, 65.

Shifting the Cost of Regulation to Polluters

Self-monitoring and reporting programs are powerful tools that allow agencies to make the best use of their limited resources. One of the significant benefits of self-monitoring and self-reporting programs is the overall cost-effectiveness of the program. By requiring the facility or company to be responsible for monitoring its emissions and activities, the agency shifts the costs of monitoring and data-gathering to the facility or company. This cost-shifting promotes efficiency because it engages the facility and ensures that the monitoring and reporting are tailored to each regulated facility. *It also drives innovation by the regulated community in pollution control technologies, monitoring equipment, and company staff training.*

This cost-effective arrangement also allows the agency to prioritize its resources to focus on the more critical task of ensuring compliance with the substantive mandates of environmental laws. *From an economic perspective, the cost-shifting component of the self-monitoring and self-reporting requirements is equitable in that it works to minimize some of the externalities related to environmental pollution.* Often, facilities and companies are able to unjustly shift their costs of pollution to the local community by failing to treat and reduce pollutants in the local waterways and air basins. The self-monitoring and self-reporting programs work to internalize these externalities. It is a manifestation of the polluter-pays principle that underlies much U.S. environmental law.

Shortcomings

Effective Use of Agency Resources

Although self-monitoring and enforcement programs may help agencies to shift resources away from routine monitoring and towards enforcement, there is some danger that cooperative mechanisms for regulation might be overemphasized. Although EPA's enforcement strategy from its founding through the 1990s might be characterized as focusing on deterrence—relying primarily on the initiation of formal legal proceedings to punish wrongdoers⁷⁷—EPA has since begun to rely more on fostering compliance among regulated entities through more informal mechanisms, supported by the data made available through self-monitoring and enforcement programs. Scholarly commentary on whether or not EPA self-compliance programs have achieved these aims has been somewhat mixed.⁷⁸

The suitability of each enforcement strategy depends on the characterization of regulated entities. *For example, if businesses are openly violating environmental laws, then regulators should rely*

⁷⁷ See, e.g., Joel A. Mintz, Enforcement at EPA: High Stakes and Hard Choices 102 (1996).

⁷⁸ Compare Eric W. Orts, *Reflexive Environmental Law*, 89 NW. L. REV. 1227 (1995) (suggesting that EPA's efforts to encourage cooperation have been beneficial overall) with Sidney A. Shapiro & Randy Rabinowitz, *Punishment v. Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713 (1997) (suggesting that a mix of punishment and cooperation is ideal and that cooperation produces superior results only in narrow circumstances) and Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and in Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97 (2000) (same).

on an aggressive, comprehensive formal inspection regime.⁷⁹ Alternatively, when businesses fail to comply with regulations deemed outmoded or unreasonable, a regulatory agency might flexibly adapt and apply regulations to ensure that environmental goals are met while accounting for legitimate business needs.⁸⁰ Finally, businesses may violate regulations simply due to organizational or informational deficiencies; in this case a regulatory body might serve as consultants to help overcome institutional weaknesses.⁸¹ Since no characterization is likely to apply to all organizations, environmental regulators should be prepared to employ a flexible mix of formal legal deterrence and informal cooperation and information sharing.⁸² Therefore, while self-monitoring and reporting programs are a key element of effective environmental regulation, they cannot function without a legitimizing strong traditional enforcement regime.

Fraud Detection

One of the concerns with self-monitoring and self-reporting systems is fraud. The fact that regulated entities prepare these reports, combined with limited agency resources, may allow bad actors to get away with submitting fraudulent reports or tampering with monitoring equipment. One means of preventing fraud is active and regular enforcement by agencies to verify and confirm self-monitoring and self-reporting documents. The threat of enforcement can be sufficient to encourage honest reporting. Each of the self-monitoring and reporting provisions discussed above provides separate enforcement authority for policing violations of the underlying substantive environmental regulations and the monitoring and reporting requirements.⁸³ Even inadvertent violations of the monitoring and reporting requirements may trigger civil penalties from EPA—though the penalty is set according to a flexible system allowing the agency to take account of the specific nature of the violation. *Statutes authorizing the development of monitoring and self-reporting requirements also provide for an increased criminal punishment for the knowing provision of fraudulent data.* The authority to prosecute violations of monitoring and reporting requirements is enforced through the authority of EPA and state agency inspectors to enter regulated facilities and conduct their own independent monitoring and review of the facility's records.

Self-monitoring programs can complicate the relationship between government regulators and regulated industries. One recent study has suggested that while these programs can be effective in assuring compliance, it is critical that government agencies continue to play a role by initiating frequent investigations and crafting targeted incentive programs.⁸⁴ Regulated entities and

⁷⁹ Mintz, at 103-104 (citing Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Though, this solution does pose some practical problems. First, it may be the case that two similar polluters are treated differently based on a subjective assessment of the reason for violation. Second it may be difficult for regulators to determine which characterization best captures a business's behavior. *See id.* at 104.

⁸³ Reitze, 65

⁸⁴ *See* Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J.L. ECON. & ORG. 45, 62 (2008).

facilities were more likely to report violations after an agency took enforcement action.⁸⁵ *Thus, the effectiveness of self-monitoring programs is contingent on agencies ensuring that enforcement and inspection programs continue on an on-going basis.* Consequently, cost-savings for government regulators may be less substantial than hoped. Self-monitoring and reporting programs coupled with enforcement actions create a dynamic relationship between government agencies and regulated entities.

Compliance Costs for Regulated Entities

Although there are many benefits to shifting the costs of monitoring, reporting, and recordkeeping to the regulated facilities themselves, there is some concern that the reporting and monitoring mandates may prove too costly and inhibit effective growth of industry. The increased costs may also increase the temptation for regulated facilities to attempt to circumvent monitoring requirements or submit fraudulent reports. Compliance in the context of environmental regulation is made more difficult by the complexity of environmental laws and regulations; it may be difficult for a given organization to determine which regulations apply to its conduct and how to comply with them.⁸⁶ EPA routinely makes technological and organizational best practices—compiled through the reporting requirements of other programs—available to help regulated entities better comply with environmental regulations. In addition, EPA supplies technical and organizational support to make it easier for regulated entities to monitor their own compliance and to self-report violations. For example, EPA is actively encouraging the use of electronic reporting mechanisms, maintained by EPA, to make reporting of violations less expensive and easier to integrate into EPA's databases.⁸⁷ Moreover, EPA has attempted to reduce compliance costs by providing clear guides to complex environmental regulations. For example, a detailed overview of the CERCLA/EPCRA reporting requirements is available on their website to help facilities satisfy the reporting requirements of the acts.⁸⁸ However, these costs must be weighed against the benefits, such as productive natural resources, reduced number of illnesses and deaths, cleanup efforts, and vibrant tourist economies.

Incentives for Self-Monitoring and Self-Reporting

EPA administers a number of programs designed to provide incentives for companies to participate in honest self-monitoring and reporting. For example, EPA's Auditing Policy⁸⁹ provides incentives for businesses to self-audit by drastically reducing penalties for self-reported violations of environmental regulations. These incentives range from significant reductions in monetary penalties for violations, to agreements not to prosecute, and to waivers of routine

⁸⁵ *Id.*

⁸⁶ See Mintz, at 106.

⁸⁷ See Env'tl. Prot. Agency, *Electronic Self-Disclosure under EPA Audit Policy*, <http://www.epa.gov/oecaerth/incentives/auditing/edisclosure.html>.

⁸⁸ See Env'tl. Prot. Agency, *Reportable Quantities—Superfund*, <http://www.epa.gov/superfund/policy/release/rq>.

⁸⁹ Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618-19,627 (Apr. 11, 2000).

auditing requirements for those who comply with EPA's self-reporting policies.⁹⁰ At the same time, EPA works with the National Enforcement and Investigations Center (NEIC) to detect and prosecute cases of fraudulent data reporting.

Case Study: Toxic Waters, *New York Times*

<http://www.nytimes.com/2009/09/13/us/13water.html>

Using information from self-monitoring and self-reporting documents, the *New York Times* compiled violations of the Clean Water Act throughout the United States. In a series of investigative reports, the *New York Times* survey found that in many states, "more than 50 percent of regulated facilities violated the Clean Water Act, but enforcement actions against polluters were infrequent."

The *New York Times* analyzed public records, government documents, and reports submitted by polluters themselves. The report documented hundreds of thousands of cases of polluters regularly violating the Clean Water Act. The Times compiled a database of more than 200,000 facilities regulated by EPA and state authorities under the Clean Water Act. An interactive map the *Times* published online allows readers to find polluting facilities and enforcement actions in their communities.



The award-winning investigation revealed the stunning state of non-compliance across the United States that includes over half a million violations for the 1972 Clean Water Act. In addition to raising public awareness of this critical issue, the *New York Times* Report has increased political will to stop water pollution. The newly appointed EPA Administrator under the Obama Administration emphasized that strengthening water protections is a top priority. Equally important, reports like these based on public records and self-monitoring information, create support for increased agency resources for inspectors and enforcement actions.

⁹⁰ *Id.* at 19,620.

KEY POINTS: Monitoring by Regulated Entities: Self-Monitoring and Self-Reporting

**Actions by
Regulated
Entities**

- Permits under most environmental statutes require self-monitoring, reporting, and record-keeping by regulated entities.
- Self-monitoring requires that regulated entities measure emissions, discharges, and other indices of environmental pollution.
- Self-reporting requires entities to provide regulators with information about their monitoring programs on a regular basis.
- Self-recordkeeping requires that entities maintain their own records on certain regulated activities.

Benefits

- Promotes a culture of compliance within the regulated community.
- Forces regulators to educate and increase awareness in the regulated community about compliance.
- Improves transparency.
- Encourages sustainability of compliance.
- Shifts costs of compliance from regulators on to regulated community.

Shortcomings

- Some costs for regulated entities.
- Often shifts agency resources and overemphasizes the reliance on self-monitoring and reporting.
- The system is susceptible to fraud and thus requires regular auditing.

EPA's STATIONARY SOURCE EMISSIONS MONITORING

http://cfpub.epa.gov/oarweb/mkb/Basic_Information.cfm

In general, stationary source emissions monitoring is composed of four elements, including: 1) indicator(s) of performance, 2) measurement techniques, 3) monitoring frequency, and 4) averaging time. These elements are explained as follows:

Indicator(s) of performance - the parameter(s) measured or observed for demonstrating: (a) proper operation of the air pollution control measures, or (b) compliance with the applicable emissions limitation or standard. Indicators of performance may include direct emissions measurements, surrogate emissions measurements (including opacity), operational parametric measurements that correspond to process or control device (and capture system) efficiencies or emission rates, and recorded findings of inspection of work practice activities, material tracking, or design characteristics. An indicator range may be expressed as a single maximum or minimum value, a function of process variables (for example, within a range of pressure drops), a particular operational or work practice status (for example, a damper position, completion of a waste recovery task, materials tracking), or an interdependency between two or more than two variables.

Measurement techniques - the means by which information from or about the indicators of performance is gathered and recorded. The components of a measurement technique include the detector type, location and installation specifications, inspection procedures, and quality assurance and quality control measures. Examples of measurement techniques include continuous emission monitoring systems (CEMS), continuous opacity monitoring systems (COMS), continuous parametric monitoring systems (CPMS), and manual inspections that include making records of process conditions or work practices.

Monitoring frequency - the number of times monitoring data are obtained and recorded over a specified time interval. Examples of monitoring frequencies include at least four points equally spaced for each hour for CEMS or CPMS, at least every 10 seconds for COMS, or at least once per operating day (or week, month, etc.) for CPMS, work practice, or design inspections.

Averaging time - the period over which data are averaged and used to verify proper operation of the pollution control approach or compliance with the emissions limitation or standard. Examples of averaging time include a 3-hour average in units of the emissions limitation, a 30-day rolling average emissions value, a daily average of control device operational parametric range, and an instantaneous alarm.

Principle 4: Incentive and Outreach Compliance Programs

An effective environmental enforcement system is designed to have both “carrots” – incentives for compliance – and “sticks” – penalties for noncompliance. The incentive and outreach compliance programs are designed to encourage companies and facilities to comply with environmental statutes and regulations. *A central focus of these programs is to create a culture of compliance in which businesses and facilities comply with environmental obligations – without regulatory agencies having to resort to harsher penalty measures.* Compliance assistance programs often work best when coupled with the threat of enforcement for serious noncompliance.

Tailored Information to Industry and Facilities

Statute-Specific Information

As defined by EPA, compliance assistance means “helping businesses, federal facilities, local governments, and tribes meet their environmental regulatory requirements.”⁹¹ Compliance assistance providers who work for or on behalf of federal or state government assist the regulated entities to comply with environmental laws. The methods of assistance include: *one-on-one counseling, online resource centers, fact sheets, guides, and training.* Providers include EPA regional office staff; state, local, and tribal governments; federal and state small business and pollution prevention technical assistance extension agents, consultants, and trade associations.⁹²

EPA uses compliance assistance as part of an integrated strategy, combining compliance monitoring (inspections), compliance incentives and auditing (self-disclosure policies), and enforcement. EPA provides assistance for specific statutes and regulations, such as the Clean Air Act, the Clean Water Act, The Emergency Planning and Community Right-to-Know Act (EPCRA), The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), The Resource Conservation and Recovery Act (RCRA), The Safe Drinking Water Act (SDWA), and The Toxic Substances Compliance Act (TSCA).

⁹¹ U.S. Env'tl. Prot. Agency, *Compliance Assistance*, <http://www.epa.gov/oecaerth/assistance/index.html>.

⁹² *Id.*

Example: EPA's Compliance Assistance Webpage for Clean Air Act

<http://www.epa.gov/compliance/assistance/bystatute/caa/index.html>

Clean Air Act Compliance Assistance - This Web site focuses on EPA's compliance assistance tools supporting air quality. It enhances the access to air-related environmental compliance assistance, compliance monitoring and enforcement information by providing links to documents, tools, information and other related and linked Web sites for compliance with environmental requirements to protect air resources.

Overview [Clean Air Act \(CAA\)](#) - Includes a link to the text.

Compliance and Enforcement National Priorities

[Air Toxics](#) - Provides a strategy to reduce emissions of hazardous air pollutants. [New Source Review](#) - Provides a strategy to increase compliance with New Source Review/Prevention of Significant Deterioration.

Monitoring Information on the [CAA Compliance Monitoring](#) program, including inspections.

Enforcement Information on the [civil enforcement](#) program for air.

Tools and Information on How to Comply

[Technology Transfer Network \(TTN\)](#) is a collection of technical Web sites containing information about many areas of air pollution science, technology, regulation, measurement, and prevention. In addition, the TTN serves as a public forum for the exchange of technical information and ideas among participants and EPA staff.

[CAA Stationary Source Compliance Monitoring Strategy \(PDF\)](#) provides an overview of the national compliance monitoring strategy for stationary sources.

[Sector Notebooks](#) provide information on selected major industries, which focus on key indicators that present air, water and land pollutant release data.

[National Compliance Assistance Clearinghouse](#) links to public and private compliance assistance materials. Users may post documents and interact with assistance providers, both within and outside of EPA.

Information for Concerned Citizens

[AIRNow](#) - Daily air quality index (AQI) forecasts as well as real-time AQI conditions for over 300 cities, and provides links to more detailed state and local air quality Web sites.

[About air toxics, health, and ecological effects](#) - Plain English guide to air toxics.

[Evaluating Exposures to Toxic Air Pollutants: A Citizen's Guide](#) - Step-by-step guide for evaluating exposures to toxic air pollutants.

Statute specific information sources, such as EPA's Clean Air Act website, provide information to regulated entities about how to comply with different environmental laws and regulations. *However, information in the statute or through media dissemination alone is insufficient for smaller affected parties to comply with environmental regulations.* Many smaller organizations (firms and municipalities) may need help in understanding the laws and regulations they need to follow. To remedy this, EPA has worked to develop the information needed to help these businesses meet standards.

Sector Specific Information

In addition to information on statutory requirements, EPA also provides compliance assistance on a sector-by-sector basis.⁹³ In addition to websites and materials developed specifically for each industrial sector, EPA has created Compliance Assistance Centers (CACs) in partnership with industry, academic institutions, or non-profit organizations.⁹⁴ CACs use agency resources efficiently to help businesses, local governments, and facilities understand and comply with environmental requirements and save money through pollution prevention techniques.⁹⁵ *CACs provide user-friendly access to comprehensive, easy-to-understand environmental compliance information, packaged to fit the specific needs of regulated businesses in several industry sectors, particularly those with a large number of small and medium-sized entities.* CAC resources include: websites targeted to industry sectors, virtual plant tours, telephone assistance, “ask the expert” tools (online question-and-answer), e-mail discussion groups, and State Resource Locators (which provide state environmental compliance information).

Currently, there are CACs for the following sectors: agriculture, automotive recycling, automotive service and repair, chemical manufacturing, colleges and universities, construction, federal facilities, food processing, health care, local government (municipalities), metal finishing, paints and coatings, printing wiring board manufacturers, printing, ports, tribal governments, and the United States border and import/export issues. The automotive recycling CAC is a partnership among EPA, the Automotive Recyclers Association, and the National Center for Manufacturing Sciences. Similarly, the Agriculture CAC is a joint effort of EPA and the U.S. Department of Agriculture.

CACs are heavily used and are growing – in 2008 alone their websites were visited over two million times. Available feedback indicates that CAC users are satisfied with their services.⁹⁶ EPA tracks usage of CAC services and surveys a random selection of users to determine satisfaction. According to EPA, in 2008, 86 percent of the regulated community surveyed that used CACs agreed that CACs helped them understand regulations that apply to a business or

⁹³ <http://www.epa.gov/oecaerth/assistance/sectors/index.html>.

⁹⁴ Thomas, et al. *Environmental Compliance Assistance Centers Deliver Targeted Help to the Regulated Community*, (2008), http://www.inece.org/conference/8/proceedings/70_Thomas-Limanon-Simachaya&Nepomuceno.pdf

⁹⁵ <http://www.epa.gov/oecaerth/assistance/centers/index.html>.

⁹⁶ Compliance Assistance Centers, FY 2008 Fact Sheet, U.S. Environmental Protection Agency, <http://www.epa.gov/oecaerth/resources/publications/assistance/centers/factsheet.pdf>.

government center. Moreover, 77 percent of the regulated community surveyed that used CACs agreed that CACs helped them understand applicable environmental requirements. Most survey respondents took action to improve environmental management practices based on CAC information, and half of those who responded reduced, treated, or eliminated pollution.

Besides CACs, other institutions also provide on-site compliance assistance, including EPA regional office staff; state, local, and tribal governments; federal and state small business and pollution prevention technical assistance extension agents, consultants, and trade associations. On-site compliance assistance can take the form of workshops, presentations, assistance visits, or responses to inquiries.⁹⁷

Compliance Incentive Programs and Subsidies

EPA offers monetary incentives for businesses and municipalities to comply with environmental regulations. These monetary incentives involve either subsidies or reduction in penalties.

Compliance Incentives

Compliance incentives are defined by EPA as “policies and programs that reduce or waive penalties under certain conditions for business, industry, and government facilities that voluntarily discover, promptly disclose, and expeditiously correct environmental problems.”⁹⁸

EPA’s Audit Policy

EPA’s audit policy provides several incentives for regulated entities that are out of compliance to voluntarily come into compliance with environmental standards.⁹⁹ As discussed in the civil penalties section of this report, penalties have two major components: an amount based on the severity or “gravity” of the violation, and the amount of economic benefit a violator received from failing to comply with the law.¹⁰⁰ EPA’s audit policy allows for the gravity component of the penalty to be partially or totally waived. The conditions for penalty mitigation are as follows:

- **Systematic discovery** of the violation through an environmental audit or the implementation of a compliance management system.
- **Voluntary discovery** of the violation which was not detected as a result of a legally required monitoring, sampling, or auditing procedure.

⁹⁷ U.S. Env’tl. Prot. Agency, *Increasing Understanding of Environmental Requirements is the Heart of EPA Assistance* (FY 2008), <http://www.epa.gov/compliance/resources/reports/assistance/08cafactsheet.pdf>.

⁹⁸ U.S. Env’tl. Prot. Agency, *Compliance Incentives*, <http://www.epa.gov/compliance/incentives/programs/>.

⁹⁹ *Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations*, EPA, (Apr. 11, 2000), 65 Federal Register 19618.

¹⁰⁰ *Id.* EPA’s civil penalty policy is discussed at length in the part of this report entitled *Agency Enforcement Tools: Administrative, Civil, and Criminal Penalties*.

- **Prompt disclosure** in writing to EPA within 21 days of discovery or such shorter time as may be required by law. Discovery occurs when any officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a violation has or may have occurred.
- **Independent discovery and disclosure** before EPA or another regulator would likely have identified the violation through its own investigation or based on information provided by a third party.
- **Correction and remediation** within 60 calendar days, in most cases, from the date of discovery.
- **Prevention of recurrence** of the violation.
- **Repeat violations are ineligible**, where the specific (or closely related) violations have occurred at the same facility within the past 3 years or where they have occurred as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years. If the facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.
- **Cooperation** by the disclosing entity is required.

If all of the conditions above are met, then there is no gravity-based penalty (economic benefit penalties may still apply). If all conditions but “systematic discovery” are met, then the gravity-based penalties are reduced by 75 percent.

EPA tailors these audit policies for new owners that want a “clean start” at newly acquired facilities by addressing environmental noncompliance that began prior to acquisition. This allows for more penalty reduction for such companies that self-police environmental compliance at their facilities, promptly disclose any violations discovered, and take steps to prevent future violations.¹⁰¹

As part of EPA’s audit policy, EPA has flexibility on whether to recommend criminal prosecution for entities that disclose criminal violations, depending on whether the applicable conditions under the policy are met. Systematic discovery is not a requirement for eligibility for this incentive, although the entity must be acting in good faith and adopt a systematic approach to preventing recurring violations.

Unlike EPA, certain states’ audit policies allow for privilege and immunity.¹⁰² Audit privilege and immunity laws shield environmental information related to an audit from disclosure to the public or regulatory agencies, prohibit the use of the information in an administrative or judicial proceeding, including an enforcement proceeding, and generally provide immunity from fines or penalties for violations detected during an audit and disclosed to a regulatory agency. *EPA strongly opposes such laws because of restricted public access to environmental information and the constrained ability to enforce environmental laws.*

¹⁰¹ *Interim Approach to Applying the Audit Policy to New Owners*, EPA, Fed. Reg., 44091, (Aug. 1, 2008).

¹⁰² Steven Herman, *NCSL Study Finds That State Environmental Audit Laws Have No Impact on Company Self Auditing and Disclosure of Violations*, National Environmental Enforcement Journal, (Dec. 1998/ Jan. 1999).

Small Business and Small Municipality Compliance Incentives

EPA's small business program, as articulated in its Small Business Compliance Policy [FRL-6576-4], comes from the Small Business Regulatory Enforcement Fairness Act (SMREFA) of 1996.¹⁰³ It mandates that EPA will waive or reduce civil penalties whenever a small business makes a good faith effort to comply with environmental regulations, whether by discovering violations as part of a government sponsored compliance assistance program or a voluntary environmental audit, promptly disclosing those violations, and correcting them in a timely manner.

The two biggest differences between the Audit Policy and the Small Business Policy are:

1. The Small Business Policy allows up to 100 percent reduction of the gravity component of the civil penalty through an audit or a government-sponsored on-site compliance activity.
2. The Small Business Policy allows 180 days to correct violations (360 days for pollution prevention modifications), as opposed to 60 days under the Audit Policy.

EPA's Small Local Government Compliance Assistance Policy promotes environmental compliance by allowing penalty reductions for small local governments that achieve comprehensive compliance or implement an Environmental Management System (EMS).¹⁰⁴ EPA generally defers to a state's decision to reduce or waive the normal noncompliance penalty for small local governments that fulfill its requirements. *Removing the fear of a large penalty encourages small local governments to learn about their environmental obligations and to develop the technical, managerial, and financial capacity necessary to achieve and sustain comprehensive environmental compliance.* Resources available to help local governments achieve and sustain environmental compliance include training, checklists, compliance guides, grant-writing tutorials, and mentoring programs.¹⁰⁵

Subsidies to Municipalities

EPA works with municipalities to fund improvements which are needed by them to comply with environmental regulations. EPA assists municipalities by providing both grants and loans. These grants can fund air, waste, and water environmental assets.¹⁰⁶ The loans are offered at reduced rates, and communities that enter into a binding enforcement agreement have the priority for loans.

¹⁰³ The SMREFA is part of 5 U.S.C. §§ 601-612, and was P.L. 104-121 (1996).

¹⁰⁴ U.S. Env'tl. Prot. Agency, *Small Local Governments Compliance Assistance Policy*, 69 Fed. Reg. 31278, June 2, 2004.

¹⁰⁵ U.S. Env'tl. Prot. Agency, *Small Local Governments Compliance Assistance Policy brochure*, (Apr. 2006).

¹⁰⁶ U.S. Env'tl. Prot. Agency, *Financing for Environmental Compliance*, <http://www.epa.gov/oecaerth/assistance/financing/steps/options.html>.

Other Incentive Programs to Promote Better Environmental Performance

In addition to the programs above to encourage compliance with specific regulations, EPA also has financing and grant programs to create incentives for better environmental performance. For instance, EPA's SmartWay Clean Diesel Program issues competitive grants to establish national low-cost revolving loans or other financing programs that help fleets reduce diesel emissions.¹⁰⁷ Government entities such as school districts, municipalities, metropolitan planning organizations (MPOs), cities and counties, as well as nonprofit organizations and institutions focused on improving air quality and education can apply for funding for financing programs for the purchase or retrofit of vehicles and equipment.

EPA also focuses on incentives such as awards, certifications, and other types of recognition to secure industry participation in programs to improve environmental performance. An example is the ENERGY STAR program, a joint program of EPA and the U.S. Department of Energy.¹⁰⁸ ENERGY STAR is a voluntary labeling program designed to identify and promote energy-efficient products to reduce greenhouse gas emissions and is found on major appliances, office equipment, lighting, home electronics, and more. EPA has also extended the label to cover new homes and commercial and industrial buildings. Because it saves consumers' money and provides environmental benefits, ENERGY STAR products have been instrumental in the wider deployment of energy efficient technologies. The label encourages manufacturers to produce more energy-efficient products in order to be able to use the label.

Finally, EPA has recognition and award programs designed to highlight good environmental performers. For instance, it recently recognized a group of manufacturing sites that have met the ENERGY STAR Challenge for Industry and reduced their energy intensity by 10 percent within 5 years or less.¹⁰⁹

Shortcomings

The most significant shortcoming of current incentive and outreach compliance programs is possible "free riding" or abuse of the system by regulated entities, especially in a situation of "agency capture." If a government does not wish to enforce environmental laws, they can design incentive programs in a way that could give polluters undeserved benefits. The case studies below show some ways in which this might occur.

¹⁰⁷ U.S. Env'tl. Prot. Agency, *Grants & Funding: SmartWay Finance Program*, <http://www.epa.gov/cleandiesel/prgfinance.htm>.

¹⁰⁸ *History of Energy Star*, http://www.energystar.gov/index.cfm?c=about.ab_history.

¹⁰⁹ *Press Release, Environmental Protection Agency, EPA Challenges Manufacturing Industry to Improve Energy Efficiency: 10 percent savings within 5 years set as industry goal; several facilities show early results* (May 6, 2010), <http://yosemite.epa.gov/opa/admpress.nsf/0/7F7B31081D0CD27E8525771B00525BB6>.

Case Studies

Energy Star: Successes and Challenges

ENERGY STAR has been a very successful program. EPA claims that “Americans, with the help of ENERGY STAR, saved enough energy in 2009 alone to avoid greenhouse gas emissions equivalent to those from 30 million cars — all while saving nearly \$17 billion on their utility bills.”¹¹⁰ Organizations like NRDC routinely direct consumers to ENERGY STAR products.¹¹¹ An NRDC expert describes the program as “an important labeling program used to help consumers identify the more energy efficient models within a product category. The ENERGY STAR requirements are often used by utility, state, and federal rebate programs to encourage production and purchase of the most efficient products available.”¹¹² However, even a successful program like ENERGY STAR serves as an example of how incentive programs have to be carefully designed.

NRDC’s energy expert identifies the following problem with the ENERGY STAR program:

The ENERGY STAR program is a manufacturer self certification program. This means manufacturers select the samples and in some cases use their own testing laboratory to develop the test data needed to qualify for the ENERGY STAR label. Given this arrangement, there is a potential for mischief. On several recent occasions ENERGY STAR qualified models failed to meet the ENERGY STAR requirements.

Until now, ENERGY STAR has done very little to verify that the products are performing as promised. To ensure consumers are getting the energy and operating cost savings they expect when they purchase ENERGY STAR labeled products, EPA and DOE need to ramp up their verification testing and enforcement program.¹¹³

As with other efforts to improve environmental performance such as regulatory programs, environmental agencies still need to have programs in place to verify environmental performance for incentive programs so that the rewards of the incentive program do not accrue to poor environmental performers at the expense of good performers.

¹¹⁰ *About Energy Star*, http://www.energystar.gov/index.cfm?c=about.ab_index.

¹¹¹ Natural Resources Defense Council, *How to Reduce Your Energy Consumption*, <http://www.nrdc.org/air/energy/genenergy/longterm.asp>.

¹¹² Noah Long, Switchboard, *Putting Energy Star to the Test*, (Mar. 23, 2010), http://switchboard.nrdc.org/blogs/nlong/putting_energy_star_to_the_tes.html.

¹¹³ *Id.*

The Life and Death of the National Environmental Performance Track Program

In March 2009, EPA closed the National Environmental Performance Track Program.¹¹⁴ The Performance Track was established in 2000 with great fanfare as an incentive program to recognize and reward companies that went beyond meeting compliance standards to achieve higher environmental performance.¹¹⁵ The Performance Track was intended for top-performing facilities and companies with a proven record of regulatory compliance, an operational environmental management system, a demonstrated commitment to continued improvement, and outreach to the local community and the public. As a reward, facilities were to gain regulatory and administrative flexibility that included streamlined reporting requirements, reduced monitoring, and more flexible procedures.

A Philadelphia Inquirer exposé found that the Performance Track was “an EPA charade”.¹¹⁶ This exposé found troubling facts that later led EPA to shut down the program. These facts include the following:

- EPA recruited companies with mixed – even dismal records to become Performance Track members.
- Despite offering members regulatory breaks, EPA failed to independently verify that Performance Track companies actually reached their goals.
- Performance Track members paid fines to settle EPA accusations that they broke environmental rules.
- At least a dozen Performance Track members actually increased the amount of toxic chemicals they pumped into the air and water.
- The program became so desperate for new members that it turned to gift shops and post offices with trivial environmental impact to pad its numbers.

While the program had some promise, it was never realized. The Performance Track program was so ineffective that NRDC called it a “clear pattern of corporate coziness, deficient accountability, and disregard for the public good”. It became a means for EPA to give marketing benefits to companies that could call themselves “green” but in reality were not.

¹¹⁴ *EPA Halting Ineffective ‘Green Club’ for Businesses*, HUFFINGTON POST, Mar. 16, 2009.

¹¹⁵ “EPA ‘Performance Track’ Rewards Companies for Improved Practices”, Indiana Environmental Compliance Update, August 2000.

¹¹⁶ John Sullivan and John Shiffman, *Green Club an EPA Charade*, PHILADELPHIA INQUIRER, Dec. 9, 2008.

KEY POINTS: Incentive and Outreach Compliance Programs

Incentives

- Assistance and incentive programs work best when combined with a strong enforcement program.
- Reduced penalties are appropriate when companies voluntarily disclose violations and promptly correct problems. However, increased enforcement is necessary to gain voluntary compliance. In general, voluntary incentive efforts to get increased compliance are ineffective without effective enforcement to meet carefully designed criteria.
- Governments should not shield information related to an audit from disclosure to the public or regulatory agencies.
- Incentives can help increase environmental compliance if properly designed.

Outreach Programs

- Government compliance assistance should be tailored to specific environmental compliance requirements for different industrial sectors. The assistance programs should be developed together with affected parties and delivered to those parties through multiple avenues.
- Small businesses and municipalities should receive extra compliance assistance and incentives if they agree to comply promptly with environmental regulations.

Principle 5: Agency Enforcement Tools: Administrative, Civil and Criminal Authority

U.S. agencies have various enforcement authority, ranging from administrative, civil, and criminal authority. *With flexible enforcement power, the regulatory agency is able to maximize resources depending on the specific pollution problem at hand. On the one hand, administrative actions, such as surprise inspections or the mere threat of fines, can be sufficient to ensure compliance. On the other hand, malicious actors need more aggressive enforcement actions such as criminal prosecution.* This feature is one of the most important to consider when replicating a strong environmental regulatory regime elsewhere. As EPA concluded in its Report on Environmental Compliance and Enforcement in India, “The ability to address violations and assess penalties administratively without resorting to the courts would enable the Government to address violations in a more timely, cost-effective manner. An immediate and predictable enforcement response by the Government would have a significant deterrent effect on the regulated community. This approach also would reduce the environmental workload of the courts and enable them to focus on the most egregious violations and repeat violators.”

Administrative Authority

Congress granted environmental agencies administrative authority when it delegated them responsibility to implement environmental statutes. Many environmental laws even specify various types of administrative authority that can be used to achieve compliance with environmental laws. An effective regulatory agency’s administrative authority includes the following categories of action and tools which allow the agency to tailor its action to the situation at hand:

Information-Gathering

- Letters requesting information related to operations, discharges, emissions, etc.
- Announced inspections of facilities and records
- Unannounced inspections of facilities and records

Administrative Orders by the Agency

- Notices of Violations
- Cease and Desist Orders
- Time Schedule Orders for Compliance, specifying a timeline for compliance

Administrative Penalties

- Monetary Fines
- Sanctions

These pre-adjudication tools are a key component of the enforcement agency’s toolbox to ensure compliance with the laws. *The tools allow the agency to draw the attention of conscientious facilities to violations that they may not be aware of so that they can rectify the violations quickly. Conversely, the tools allow the agency to draw the attention of facilities knowingly violating the law to let them know their violations have been noticed, thus encouraging them to comply with the law quickly or face stiffer penalties.* They thus allow the agency to address many violations quickly without going through a time-and-resource-intensive adjudicatory

process. Many administrative actions actually never progress to the adjudicatory stage. This can not only save the agency time and resources, it also allows the agency to spend that time and those resources on more and better enforcement.

Information Gathering Tools

Agencies are statutorily empowered to request and collect information from regulated entities. *Gaining information about compliance is often the beginning of EPA's enforcement process, as it also serves the dual purpose of assuring compliance with environmental standards.* In general, these requests for information come in three forms: information request letters, announced inspections, and unannounced inspections. All of these can be part of an agency inspection focused on a specific pollution problem or facility.

Agencies have broad authority to issue **letters requesting a variety of information** from regulated entities about their compliance. *By law, EPA can require regulated emissions sources to "provide such...information as the Administrator may reasonably require."*¹¹⁷ This means that regulated entities are required to provide compliance-related information to EPA upon request. Such letters give regulated entities a fixed time period to provide information requested by EPA. The environmental regulations have provided the agencies with broad power to request and access information. Thus, in addition to letters, agencies can obtain information through a variety of informal means, such as phone calls, meetings, etc. The advantage of using a formal letter is that it produces a written record of the information requested and (often) a deadline for that information to be given to EPA. *However, the flexibility given to agencies in obtaining information from regulated entities allows for the choice of inexpensive (but important) signals to regulated entities that they are being watched for compliance.* In some cases, a regulated entity that is out of compliance may work to obtain compliance simply because they learn that EPA is observing them.

Announced inspections of facilities are another means to gather information. Announced inspections can be conducted independently or conducted following information requests through letters, phone calls, and email. During announced inspections, EPA can gain both the information that would be part of an information request letter, along with actual observations of the regulated entity. Inspectors can meet with officials and workers to gain more specific compliance information. Inspections also allow for verification of monitoring equipment and operation of installed pollution control devices, such as scrubbers or aerators.

Announced inspections are conducted in circumstances when specific information is needed by the agency which must be prepared by the source, or where the source must make significant accommodations for the inspector to gather the information. Announced inspections are also conducted when the assistance of specific plant personnel is necessary for the successful performance of the inspection, i.e. the information they provide cannot be obtained from other on-duty plant personnel or by a follow-up information request. Announced inspections are also

¹¹⁷See e.g. 42 U.S.C. 7414(a)(1)(G) for the Clean Air Act. Similar language is included in other laws like the Clean Water Act, The Safe Drinking Water Act, and the Resource Recovery and Conservation Act (RCRA).

used for inspection of government facilities or when inspecting unmanned or extremely remote sources.

Agencies are also authorized to conduct **unannounced inspections**. These inspections are reserved for serious pollution problems and when informal information gathering and announced inspections have not provided sufficient information. These are relatively infrequent, but when they happen they can have both a region-wide and/or industry-wide effect encouraging compliance. Unannounced inspections allow the agency to observe the source under normal operating conditions, detect surreptitious violations, detect visible emissions and operation and maintenance problems, increase attention on a source, and project a more serious attitude toward surveillance by the agency. *Research by an EPA Regional Office found the “in violation” rate in one state to be three times higher at sources where inspections were unannounced versus announced.*¹¹⁸ Some of the disadvantages of unannounced inspections are that the source may not be operating, or personnel may not be available.

Administrative Orders

Based on the information collected through letters, inspections, and documents, agencies are empowered to use various tools in the form of administrative orders to achieve compliance and enforce environmental regulations. *Administrative orders threatening fines and penalties allow for cost-effective compliance, because they avoid longer and more resource intensive enforcement actions, such as court cases.* In addition, administrative orders can also be based on information obtained through routine self-reporting and self-monitoring requirements as part of permits. Agencies have flexibility in selecting the type of order they issue in order to efficiently use agency resources.

A **notice of violation (NOV) or finding of violation** is one of the most common enforcement tools used by agencies.¹¹⁹ A NOV letter informs an entity that an environmental rule, law, or permit condition has been violated. A NOV is issued when a violation is observed or discovered. The NOV letter may be issued by the director of the agency and/or the agency board.

There is a relatively low threshold to issue an NOV, because the purpose of an NOV is to initiate corrective action that will stop the violation and reduce pollution. To provide an incentive for continuing compliance, NOV's may result in stern monetary penalties if the violation is not corrected.

For minor or technical violations, agencies can provide **informal notice** to the regulated entity. The informal notice may notify the entity that a formal enforcement proceeding may follow if the violation is not quickly corrected. Serious or repeated violations that show blatant disregard

¹¹⁸ U.S. Env'tl. Prot. Agency, *Final Guidance on the Use of Unannounced Inspections*, (Sept. 6, 1984), <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/unann-insp-rpt.pdf>.

¹¹⁹ U.S. Env'tl. Prot. Agency, *Enforcement and Compliance History Outline*, <http://www.epa.gov/echo/faq.html>.

for the law and for public health may lead to large civil penalties or criminal prosecution, as discussed below.

Cease and Desist Orders are another type of administrative order available to agencies. When the agency finds that an entity is violating an environmental standard or permit condition, the agency can issue a cease and desist order, directing the entity to stop violating the law and requiring the entity to comply immediately, or comply based on a specified time schedule, and/or take remedial or preventative action. Cease and desist orders can be very specific and can restrict or prohibit volume, type, or concentration of a pollutant.

Time Schedule Orders are also used by agencies to correct violations. Agencies can issue time schedule orders whenever the agency finds an entity is violating an environmental standard or permit condition. In the time schedule order, agencies can require the entity to submit for approval a detailed schedule of specific actions that the entity will take in order to correct or prevent the violation. The agency can then approve or modify the actions and timeframe proposed by the entity.

Cleanup and Abatement Orders can be issued by agencies to require cleanup of pollution or abatement of the effects of pollution. These orders, like the cease and desist orders, can also be used for threatened pollution or nuisance. Moreover, the agency can require payment for additional costs, such as water services replacement costs. In instances where there is a great public health risk or polluter delay, the agency can undertake the cleanup action itself and seek reimbursement by the polluting entity. In other instances, such as with smaller businesses, the agency can assist the polluting entity by securing government cleanup funds or providing agency funds.

Environmental laws give teeth to administrative orders by *explicitly allowing civil and criminal penalties to flow from a violation of such an order*.¹²⁰ These laws allow EPA to enforce an administrative order in federal court, assessing fines or seeking permanent or temporary injunctions on the grounds that the alleged wrongdoer “has violated, or is in violation of” any “rule” or “order.”¹²¹ Even criminal penalties may stem from a “knowing violation of such orders,” for example under the Clean Air Act.¹²²

As mentioned above, filings of administrative orders are simple. EPA (or the state equivalent) sends out an NOV, giving time for a violator to comply. If the violator does not comply within the specified period of time (usually thirty days), then EPA may be able to impose administrative penalties or file suit in federal court to enforce the order. Alleged violators can appeal the

¹²⁰ See 42 U.S.C. § 7413 (b)(2) and (c)(1) (conferring civil and criminal penalties, respectively, for violations of the terms of an AO).

¹²¹ See 42 U.S.C. § 7413(b)(2) (allowing monetary fines not to exceed \$25,000 per day per violation and/or a temporary or permanent injunction).

¹²² 42 U.S.C. § 7413(C).

decisions. Reviewing courts can usually only set aside the administrative order if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”.¹²³

Administrative Civil Penalties

As soon as 30 days after the issuance of a NOV letter, an agency can issue administrative civil penalties to the violator.¹²⁴ At this point, the alleged violator can decide whether to comply immediately with the administrative penalty order, or appeal within the agency. Often the threat of administrative civil penalties can be sufficient to achieve compliance, and complying with EPA’s initial order can include immediate negotiation with EPA to determine the exact fine and/or corrective action. If, however, the alleged violator decides to appeal, the appeal goes to formal adjudication within the agency.¹²⁵

Alleged violators have significant incentives to comply quickly with administrative penalty orders. For ongoing violations, many civil penalties are assessed daily from the day the regulated entity or facility is in violation of environmental standards or permits.¹²⁶ For past violations, the penalty can increase with lack of cooperation from the alleged violator. Also, many violations are clear and easy to prove as they come from self-monitoring equipment installed and maintained by the regulated entity. If settlement is not reached, the violation is then administratively adjudicated by an **Administrative Law Judge (ALJ)**.¹²⁷ Administrative adjudication involves a trial-like hearing with witness testimony, a written record, and a final decision, and is conducted by an ALJ who is employed by the agency. However, there are regulations and procedures that separate the ALJ in the appeal from the agency staff prosecuting the case. Instead of a jury, the ALJ decides the administrative appeal, much like a bench trial.¹²⁸ The ALJ then decides on the appropriate civil penalty. Because of the streamlined procedures associated with formal administrative adjudication, it is usually cost-effective and speedy to rely on administrative adjudications rather than criminal or civil trials.

If either the government or the alleged violator wishes to appeal the decision of the ALJ, they can appeal to EPA’s three-person **Environmental Appeals Board (EAB)**. Also, the EAB may itself choose to review a case. The EAB then makes the final decision within the agency; the EAB can consult with the EPA Administrator if the EAB wishes. EAB decisions are appealed to federal court.

If an alleged violator wishes to appeal to a federal district court, their right is subject to several caveats. First, if the violation is ongoing, the eventual fine continues to grow over time. Second,

¹²³ 5 U.S.C. 706(2)(A).

¹²⁴ 42 U.S.C. § 7413 (a)(1)(B).

¹²⁵ Attorney General’s Report on the Administrative Procedure Act (1947).

¹²⁶ U.S. Env’tl. Prot. Agency, *Policy on Civil Penalties*, (Feb. 16, 1984).

¹²⁷ 40 C.F.R. § 22.04.

¹²⁸ In federal law, any statute with the phrase “opportunity for an agency hearing” invokes formal agency adjudication if the parties cannot come to an agreement before such a hearing is to take place. 5 U.S.C. § 554(a). Also, 40 C.F.R. § 22 (Consolidated Rules of Procedure) describe the regulations governing formal adjudication in environmental cases. These regulations were developed from the APA.

the court cannot review the case *de novo*; in other words, the court cannot reverse the results of administrative adjudication simply because it disagrees with the result. Instead, the court can only reverse the decision if it is “arbitrary and capricious”, is an “abuse of discretion”, or is “otherwise not in accordance with the law” or the Constitution.¹²⁹ These cases then can be appealed through the court system to the United States Supreme Court.

State systems have structures similar to the federal structure. A majority of environmental enforcement occurs at the state level, as part of environmental programs that are either created by the states or delegated to the states by EPA.

Civil and Criminal Authority

Civil and criminal federal court suits are reserved for the most serious cases. These cases are prosecuted by experienced litigators at the U.S. Department of Justice, at EPA’s request. EPA rarely sues directly in federal court, because federal court suits are expensive and time-consuming to litigate. However, federal court suits set important precedents and can lead to very large fines and/or imprisonment for the most serious cases. All national environmental statutes allow the Department of Justice to sue violators in federal court for the violation of federal law. Civil and criminal authority varies by statute. In a civil suit, the federal government sues for large fines and injunctions if the pollution is continuing, usually following the administrative process outlined above.

Criminal Penalties

Although very rarely used, most environmental statutes provide criminal penalties for “knowing” or “willful” violations of environmental regulations.¹³⁰ The Clean Air Act makes almost all knowing violations of any requirement of the Act a felony¹³¹, including violations of recordkeeping and reporting requirements. Both the Clean Water Act and the Clean Air Act impose criminal penalties for certain negligent acts.¹³² In fact, responsible corporate officials can be held criminally liable for violating health and safety regulations even without requiring proof of intent.¹³³ Juries can infer that acts are “knowing” or “willful” from evidence demonstrating that a defendant should have known that an act is a violation.¹³⁴

An example of “knowing” or “willful” acts in this context comes from *United States v. Sellers*.¹³⁵ In this case, Sellers was convicted of knowingly and willfully disposing hazardous paint waste without obtaining a permit, in violation of the Resource Conservation and Recovery

¹²⁹ 5 U.S.C. § 500.

¹³⁰ See, e.g., Clean Air Act § 113(c); Clean Water Act § 309(c); CERCLA §§ 103(b), (c), and (d)(2); RCRA §§ 3008(d) and (e); TSCA §§ 15 and 16, FIFRA §14(b).

¹³¹ Felonies are a higher level of crime under U.S. law than lesser crimes, termed misdemeanors.

¹³² CWA § 309(c)(1); CAA § 113(c)(4).

¹³³ *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975).

¹³⁴ See, e.g. *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991); *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *United States v. Buckley*, 934 F.2d 84 (6th Cir. 1991).

¹³⁵ 926 F.2d 410 (5th Cir. 1991).

Act (RCRA). He contended that the jury charge should have required the government to prove that he knew the paint waste was hazardous or harmful to persons or the environment if improperly disposed of. In affirming the conviction, the court held that when a person knowingly possessed an instrumentality that by its nature was potentially dangerous, then he should have known that it was dangerous to human beings and the environment and that regulations governed its disposal.¹³⁶ In other words, the violator is assumed to know that the hazardous substances it uses are dangerous and subject to laws for their proper disposal.

The Clean Air Act and Clean Water Act both expressly provide that “any responsible corporate officer” may be held liable for criminal acts.¹³⁷ A corporation can be held criminally liable for the unlawful acts of its employees if the acts were done to benefit the corporation and related to the employees’ duties, whether or not the offending employees had any managerial authority. Employees can be held criminally liable if they knew or should have known that their employer failed to comply with the applicable regulations.¹³⁸ Even federal contractors can be found criminally liable.¹³⁹ Criminal penalties are especially severe for knowing violations that endanger human life. The Clean Water Act provides penalties of up to 15 years in prison and fines up to \$250,000 for violations when a defendant knows “that he thereby places another person in imminent danger of death or immediate bodily injury.”¹⁴⁰

The Choice of Criminal Prosecution

Since criminal prosecution is expensive, and the sanctions are harsh, the exercise of prosecutorial discretion in deciding when to invoke the criminal sanction in the environmental laws has been a source of considerable controversy. When considering these cases, the Department of Justice considers the following standards:¹⁴¹

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management;
3. The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. The existence and adequacy of the corporation’s pre-existing compliance program;

¹³⁶ *Id.*

¹³⁷ CWA §309(c)(6); CAA §113(c)(6).

¹³⁸ *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001); *United States v. Johnson & Towers*, 741 F.2d 662, 663 (3d Cir. 1984).

¹³⁹ *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990).

¹⁴⁰ Clean Water Act Section § 309(c)(3).

¹⁴¹ These standards come from the Filip Memo, at Department of Justice, U.S. Attorneys’ Manual 9-28.100 (2008). These standards apply to all corporate crime, of which environmental crimes are a growing subset.

6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. The adequacy of remedies such as civil or regulatory enforcement actions.

Civil Penalties: Assessing Penalties and Sanctions

The main reasons for civil penalties are deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems.¹⁴² Under EPA's enforcement penalty policy, EPA requests the statutory maximum penalty for cases that go to court. As proceedings warrant, EPA will pursue a penalty no less than that supported by the applicable program policy. This provides for fair and equitable treatment of the regulated community by detailing policies that are both consistent and flexible.¹⁴³ Consistency is needed because otherwise the sanctions might be arbitrary.¹⁴⁴ Flexibility is needed to make sure that the penalty can reflect differences between legitimate violations. For deterrence, the agency seeks to accomplish swiftness, severity, and certainty of punishment. Given EPA's limited budget, swiftness and certainty of punishment are strongly related. Taking cases to trial is expensive and time-consuming; the government cannot afford to bring even a fraction of violations to trial.¹⁴⁵ Thus, swiftness and certainty of punishment are best realized if environmental violations are settled before trial.

To encourage quick settlements and maintain deterrence, EPA provides many incentives for violators to settle. In fact, less than 5 percent of all environmental cases go to trial in the United States. Many EPA penalties increase with each day a regulated party is out of compliance. If a regulated party decides to appeal a penalty and loses, the penalty will be much more expensive than it would have been had the party settled with the government immediately. Also, EPA will consider reducing penalties for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation. Furthermore, EPA will consider accepting additional environmental cleanup as part of a pre-litigation settlement, but not after litigation has started. Combined, these incentives give regulated parties very strong incentives to settle cases before trial or adjudication. This is especially true because many environmental violations are clear and easy to prove (like most violations of emissions permits).

¹⁴² U.S. Env'tl. Prot. Agency, Policy on Civil Penalties, Feb. 16, 1984.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Dinkins, *Shall We Fight or Shall We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 ELR 10,398 (1984).

In assessing the penalty, the agency seriously considers the economic benefit to the violator of polluting. In addition, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied. Therefore, under EPA's penalty policy, the violator is fined more than the economic benefit of noncompliance. This is done by fining violators their economic benefit plus a "gravity" amount that varies depending on the seriousness of the crime. This gravity component should be high enough to deter others from violating environmental regulation.

Case Study

Concentrated Animal Feeding Operations

The United States has large numbers of Concentrated Animal Feeding Operations (CAFOs). A CAFO is a farm that:

- raises animals in a confined situation for 45 days or more during a 12-month period,
- brings feed to animals rather than having the animals graze or seek feed in pastures or fields or on rangeland, and
- raises large numbers of animals in one location (1,000 or more cattle, 2,500 or more hogs, or 125,000 or more chickens).¹⁴⁶

CAFOs raise environmental concerns for a number of reasons including the large amount of manure that they produce.¹⁴⁷ Generally, CAFOs retain the manure they produce and periodically dispose of it by using it as fertilizer on nearby cropland. However, improper management of manure is against both the Clean Air Act (emissions of ammonia, hydrogen sulfide particulates, and smog-forming volatile organic compounds) and the Clean Water Act (discharges of nitrogen, phosphorus, bacteria, and other organic matter into federally regulated waters).

In order to combat environmental problems from CAFOs, EPA has developed enforcement plans.¹⁴⁸ These plans start with data collection on the largest CAFOs and the areas with the most Clean Water Act and Clean Air Act violations. Early efforts to control water pollution from CAFOs had mixed results. These early efforts began with a 1998 Compliance Assurance Implementation Plan which set goals for CAFO operations, developing compliance assistance materials, developing inspector guidance/training, maintaining a CAFO inventory, and developing and implementing State Specific CAFO strategies.

From 2000-2002, EPA inspected 600 CAFOs. From 1997-2002, EPA issued 205 federal administrative actions. In the same time period, there were seven judicial actions against CAFOs, including one criminal action. The largest cases were both settled, with large fines and Consent Decrees requiring significant pollution control measures. However, CAFOs still remain a major source of pollution, and there is a lack of enforcement personnel to regulate them and the associated permitting requirements.

¹⁴⁶ 40 C.F.R. § 122.23(b).

¹⁴⁷ Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern, General Accountability Office, Sept. 2008, p. 1.

¹⁴⁸ See, e.g., Mark Pollins (Director, Water Enforcement Division, EPA), *Final CWA Enforcement Strategy Update for Concentrated Animal Feeding Operations*.

KEY POINTS: Agency Enforcement Tools: Administrative, Civil and Criminal Authority

Remedies Available to Regulators

- Regulated entities are required to give any reasonable information to regulators. This can be done through inspections, information request letters, and more informal meetings and phone calls.
- The law authorizes a great range of formal and informal administrative remedies to enforce environmental regulations. These range from informal remedies to more formal NOVs, AOs and APOs, and formal administrative adjudication.
- Formal adjudication is streamlined in the agency context.
- Civil and criminal prosecutions in federal court are usually focused on the most serious violations. Criminal cases and government investigation and litigation of civil cases are handled by federal employees who specialize in environmental issues.

Limits on Penalties

- Review of administrative action in state and federal court is limited to “arbitrary and capricious” and illegal actions.
- In order to encourage settlements, fines increase quickly with the time the polluter is out of compliance. Cooperation with the government is considered while determining the total penalty. The government gives ample opportunity for polluters to settle out of court.
- EPA penalty policies are designed to ensure that penalties are always greater than the economic benefit from noncompliance.

Principle 6: Agency Accountability

Review and accountability mechanisms are necessary to ensure environmental laws are carried out transparently and fairly. *These mechanisms also build credibility for the agency's role and expertise in civil society, among other government bodies, and within the regulated agency itself.* The three main mechanisms to enhance agency accountability are:

- (1) external accountability by the executive, congress and the courts;
- (2) internal EPA accountability review procedures to assure consistent rulemaking and enforcement while maintaining the flexibility needed to adapt to local circumstances; and
- (3) EPA procedures to ensure that authority delegated to state agencies is exercised properly.

Carefully designed accountability systems are particularly important in the context of environmental compliance and enforcement. Effective environmental regulation requires balancing the public interest in preventing environmental damage and the concerns of regulated entities. Moreover, environmental enforcement must often be tailored to unique local circumstances, requiring accountability mechanisms to ensure consistent rulemaking and enforcement across regions.

External Accountability by the Executive, Congress and the Courts

Officially, EPA is considered an independent agency, not within any other agency or any executive department; nonetheless, EPA is by no means free from influence by the **President or other executive agencies**. For example, the D.C. Circuit explicitly upheld the authority of President Carter to influence the development of an EPA rule on coal emissions by holding meetings with EPA officials. Explaining the relationship between the President and administrative agencies, the court wrote:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.¹⁴⁹

EPA's mission sometimes also overlaps with other executive agencies, and these agencies may also influence EPA's actions.

The danger of politicization of administrative agencies is real, and the politically sensitive nature of environmental regulation only intensifies the risk that EPA's administrative expertise will be subject to political bias. For example, in *Massachusetts v. EPA*¹⁵⁰ (the case holding that EPA can classify carbon dioxide as a pollutant), the United States Supreme Court expressed concern about ensuring that the agency's expert judgment was free from political influence—particularly

¹⁴⁹ *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

¹⁵⁰ 549 U.S. 497 (2007).

from the President and political appointees within the agency itself.¹⁵¹ Agency “capture” by regulated industries, which can lead to the prioritization of industry priorities over environmental ones, is also a major concern and a considerable impediment to effective agency enforcement and compliance actions.

Several features of environmental regulation in the United States help counter these pressures. Public participation laws help civil society organizations and the public stay informed about the progress of environmental regulation and enforcement, and to raise concerns in the media, with the legislature, or in the courts. (See section on *Transparent and Meaningful Public Participation* and *Citizen Suits* for more). The legislature can act to counter political pressure from the presidential administration on its own initiative or on the basis of concerns raised by the public or civil society organizations. The courts can also provide a backstop, holding the agencies to their legal obligations, usually through litigation initiated by civil society groups.

Congress can also influence agency actions by directly reviewing agency actions, holding hearings that shine a spotlight on agency actions, and controlling agency budgets. Congress may engage in the direct review of agency activities. For example, the Congressional Review Act (CRA),¹⁵² passed in 1996, requires that agencies submit all proposed rules (and an accompanying cost-benefit analysis) to the appropriate congressional committee for review before they take effect. Though very rarely used,¹⁵³ the CRA allows Congress the opportunity to review and potentially revise an agency rulemaking. However, any disapproval of regulations must also be signed by the President, limiting its utility in countering politicization of the issues by the presidential administration.

Congress may also investigate agency regulations or decisions. Initial review of agency regulations is often conducted by the **Government Accountability Office (GAO)**, the investigative arm of Congress.¹⁵⁴ The GAO is an outside investigator. In the past year, the GAO has issued nearly three dozen reports on EPA’s progress in implementing environmental laws. In addition to targeted reports and investigations, the GAO maintains a list of “high risk” government programs, which are those that need “broad based transformation” and priority attention from the new administration and Congress.¹⁵⁵ In January 2009, the GAO put EPA’s

¹⁵¹ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 52.

¹⁵² 5 U.S.C. §§ 801-808 (2006).

¹⁵³ As of 2008, only one out of more than fifty thousand final agency rules was invalidated under the CRA. Christine A. Klein, *The Environmental Deficit: Applying Lessons from the Economic Recession*, 51 ARIZ. L. REV. 651, 674-75 (2009).

¹⁵⁴ For example, see Gov’t Accountability Off., GAO-06-669, *Clean Air Act: EPA Should Improve the Management of Its Air Toxics Program* 4 (2006), which criticized the failure of EPA to update its list of hazardous air pollutants. It should be noted that EPA has never expanded the list of hazardous air pollutants specified in the Clean Air Act itself, though it has occasionally considered adding carbon dioxide. See J. Brian Hudson, Casenote, *Out of the Rabbit Hole: The D.C. Circuit Brings EPA back from Wonderland in New Jersey v. EPA*, 21 Vill. Environmental L.J. 45, 73 (2010).

¹⁵⁵ Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 VAND. L. REV. 1817, 1825-26 (2009).

program implementing the Toxic Substances Control Act on the list.¹⁵⁶ The GAO determined that EPA was unable to complete timely assessments of new chemicals: nearly 70 percent of all ongoing assessments had been pending for more than five years and only nine assessments had been completed in the previous three fiscal years. This has influenced Congressional efforts to overhaul the Act.

In addition to GAO reports, Congressional committees convene hearings on issues of interest and can call in environmental agency administrators and staff to better understand an issue or to question an agency about its actions. The degree to which congressional supervision impacts the behavior of regulatory agencies varies.¹⁵⁷ However, the intense scrutiny of agency activities, particularly given the overtly critical tone that hearings can sometimes take, can have harmful effects on the reputation and public perception of the agency.¹⁵⁸ This can serve as an incentive for administrative agencies to vigorously and assiduously carry out their statutory mandates. Perhaps more crucially, Congress has tremendous influence over the budgets of agencies and can direct resources to or remove funding for particular agencies or programs. Congressional interest in an issue, therefore, can be a significant spur for agency action. A hostile Congress can be equally a block and an impediment to agency action.

The **courts'** involvement in ensuring agencies' adherence to their statutory mandates is usually the result of litigation brought by civil society organizations either to require agency action or to enforce laws against polluters. If the laws are sufficiently clear and stringent, the courts can and do help ensure that political considerations do not overwhelm health and environmental considerations. For instance, in the development of national ambient air quality standards under the Clean Air Act, U.S. courts have ensured that the implementing agency follows the statutory and procedural requirements of the Clean Air Act so as to set proper standards.¹⁵⁹ The public's role, including in the context of the courts, in ensuring that the agency effectively carries out its enforcement and compliance roles is more fully discussed in other sections concerning Transparent and Meaningful Public Participation and Citizen Suits.

Internal Agency Control Mechanisms

The most important internal agency control mechanism is an internal watchdog. EPA has an independent Office of the Inspector General, with separate funding from Congress, which

¹⁵⁶ See Gov't Accountability Office, Report to the Congress, High-Risk Series: An Update 22 (2009), available at <http://www.gao.gov/new.items/d09271.pdf>.

¹⁵⁷ Compare Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* 195 (1990) ("Congress plays an active role both in writing the laws that establish the skeleton and muscle and in setting the budgets that give the lifeblood to administrative agencies. When Congress shows an interest, agencies ignore it at their peril.") with Joel E. Mintz, *Enforcement at EPA: High Stakes and Hard Choices* 102 (1996) (quoting Steven Shimberg, former chief counsel of the Senate Committee on the Environment and Public Works, as arguing that congressional oversight may have an effect on minor decisions, but that in major policy decisions congressional input is given equal weight as that of other commentators).

¹⁵⁸ See Mintz at 112.

¹⁵⁹ *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 464-71 (2001); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148-50 (D.C. Cir. 1980).

regularly audits the performance of the agency.¹⁶⁰ The Office routinely assesses the agencies performance and helps keep the agency honest and true to its mission.

Supplementing the work of the Office of the Inspector General, EPA has instituted some mechanisms to help ensure the effective functioning of the agency. To help ensure the independence of key enforcement and legal officials within EPA, the agency is structured to avoid conflicts of interest. For instance, the Office of Enforcement is separate from the offices and programs focused on drafting rules and standards, as is the Office of the Inspector General. An overview of the high-level organizational structure of EPA is provided in the figure below.

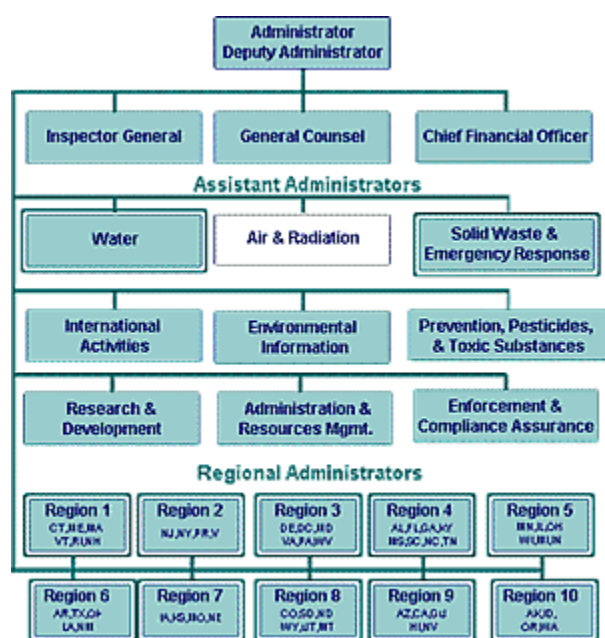


Figure: EPA Organizational Structure

The agency is structured with headquarters in Washington, D.C., supplemented by regional offices that help the agency stay abreast of the real-world implementation of the laws in different parts of the country and to work effectively with the state agencies implementing the laws. EPA has also created a number of **internal offices** to ensure the consistent development of regulatory policy and compliance with congressional directives. For example, EPA maintains an Office of Policy Analysis and Review (OPAR) within the Office of Air and Radiation which, among other things, is responsible for implementing the Clean Air Act and considering and responding to proposed regulations from other offices within EPA. The OPAR is intended to serve as an ombudsman, coordinating direction from Congress, offices in EPA responsible for developing substantive policy, and other administrative agencies to help ensure that regulations

¹⁶⁰ U.S. Env'tl. Prot. Agency, *About the EPA Office of Inspector General*, http://www.epa.gov/oig/about_epa_oig.htm.

implementing the Clean Air Act remain in line with administration policies and the broader regulatory goals of EPA.¹⁶¹

Agencies can also take steps to track their enforcement activities to both help ensure that the agencies are meeting their obligations to ensure compliance and to provide the public and Congress the information necessary to evaluate its performance. For example, EPA has created an online database to track regulated facilities and the history of actions against the facilities.

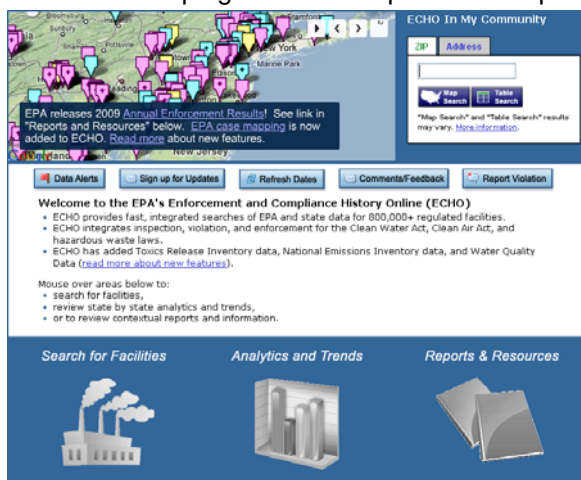
Case Study: EPA's Online Enforcement & Compliance Data Base

<http://www.epa-echo.gov/echo/index.html>

EPA maintains an online database of regulated facilities, called **ECHO, Enforcement and Compliance History Online**. EPA and state regulating agencies are responsible for monitoring whether facilities comply with environmental laws, such as: Clean Air Act, Clean Water Act; Resource Conservation and Recovery Act; Federal Insecticide, Fungicide, and Rodenticide Act; Emergency Planning and Community Right-to-Know Act; and Toxic Substances Control Act. ECHO is an online interactive site that provides both summary and detailed information about facilities' compliance and enforcement status and history. According to EPA, ECHO can be used by:

- the public to learn about regulatory oversight and to retrieve the compliance records of facilities in their community;
- corporations to monitor compliance across facilities they own;
- investors to supplement their assessments of environmental performance at the facility and corporate level.

It can also be instrumental in helping the EPA keep track of its performance.



The case study below discusses the database in greater detail.

¹⁶¹ See generally U.S. Env'tl. Prot. Agency, *Office of Policy Analysis and Review*, <http://www.epa.gov/oar/opar.html>.

EPA Review of State Environmental Action

As discussed in greater detail in the section on *Coordination between Federal and State Entities*, national laws often set the minimum standards for environmental regulation and delegate critical functions to the states and state agencies. This means that EPA must also ensure that the state is meeting the minimum national requirements. The national statutes explicitly provide for EPA review of state actions. For example, Section 110 of the Clean Air Act requires states to submit plans for carrying out the requirements of the Act (known as implementation plans) to the Administrator of EPA. Section 110(a)(2) details the requirements imposed on state implementation plans, including requirements for the provision of data to EPA, assurances that the state will be capable of enforcing its plan, and other requirements that the Administrator may deem necessary. Should a state fail to adequately adopt or enforce an implementation plan, EPA may seek a revision, issue an overriding Federal Implementation Plan, or issue sanctions by withholding federal highway funds from noncompliant states under Section 179 of the Act.¹⁶²

In addition, EPA may enforce directly against violators of the Clean Air Act. The EPA Administrator may intervene and begin to federally enforce the Act when a state regulator fails to effectively enforce regulations leading to widespread violation.¹⁶³ Such violations may be detected through the periodic reports that the directors of state or regional programs must supply to EPA.¹⁶⁴ Moreover, any information gathered by a state in the course of its enforcement and monitoring activities must generally be made available to EPA without restriction.¹⁶⁵

Case Study: States and Advocacy Groups Holding EPA Accountable, *Massachusetts v. EPA*

Ordinarily, administrative agencies are granted fairly wide discretion in setting regulatory and enforcement agendas.¹⁶⁶ However, in the landmark case, *Massachusetts v. EPA*,¹⁶⁷ the Supreme Court rejected EPA's stated reasons for denying a rulemaking petition and ordered the agency to make a clearer statement. The following events led up to this case: In 1999, several states and nonprofit organizations filed a petition with EPA requesting that it regulate carbon dioxide emissions of new motor vehicles under authority granted by the Clean Air Act.¹⁶⁸ Fifteen months after the submission of the petition, EPA issued a call for comments, particularly stressing the need for comments detailing the scientific uncertainties in anthropogenic climate change.¹⁶⁹ In 2003, EPA formally denied the petition, arguing that the agency did not have

¹⁶² 42 U.S.C. § 7509.

¹⁶³ See 33 U.S.C. § 1319.

¹⁶⁴ See 40 C.F.R. §§ 123.45.

¹⁶⁵ 40 C.F.R. § 123.41.

¹⁶⁶ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Generally, refusals to initiate enforcement proceedings are not subject to judicial review. See *Heckler v. Chaney*, 470 U.S. 821 (1985). Review for refusals to promulgate rules, however, is available though such review is "extremely limited" and "highly deferential." See *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989).

¹⁶⁷ 549 U.S. 497 (2007).

¹⁶⁸ 549 U.S. at 510.

¹⁶⁹ 549 U.S. at 511.

authority to regulate greenhouse gas emissions, and that even if it did, regulations were ill advised at that time.¹⁷⁰ The Supreme Court granted review on two questions: first, whether the Clean Air Act authorized EPA to regulate emissions of greenhouse gases; and, second, whether EPA presented sufficient reasons grounded in the statute for declining to regulate.

The Court's resolution of the latter question is a valuable example of how administrative agencies can be held accountable to their statutory mandates and the need for clarity in congressional grants of regulatory authority. The Clean Air Act requires the Administrator of EPA to issue regulations for any air pollutant “which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”¹⁷¹ In responding to the petition to regulate greenhouse gases, EPA primarily relied on policy arguments that other executive programs dealt with global warming, that regulations might interfere with negotiations with developing nations, and that regulating motor vehicle emissions would be an inefficient approach to the problem of global climate change.¹⁷² The Court, though not passing judgment on the validity of those reasons, noted that EPA was commanded by statute to make its judgment solely on the basis of whether or not motor vehicle emissions constituted a significant threat to the public health or welfare.¹⁷³ Nor was the Court swayed by EPA's reliance on scientific uncertainty: if that uncertainty militated against a judgment that automotive exhaust was a danger to the public health or welfare, EPA was obligated to make that reasoning plain.

¹⁷⁰ 549 U.S. at 511.

¹⁷¹ 42 U.S.C. § 7521(a)(1) (2006).

¹⁷² 549 U.S. at 533-34.

¹⁷³ 549 U.S. at 534.

KEY POINTS: Agency Accountability

**The Importance of
Agency
Accountability**

- Ensuring that environmental laws are fairly and transparently carried out builds greater credibility for the agency's role and expertise within government, civil society, and the agency itself.

**Mechanisms for
Agency
Accountability**

- External review and engagement by Congress or the President to direct or influence the EPA.
- Internal review procedures to ensure consistent rulemaking while maintaining flexibility.
- EPA review to ensure that authority delegated to state agencies is exercised properly.

Direct Review

- The OMB has the authority to review the substance of all EPA regulations.
- The GAO can investigate agency regulations and decisions.

**Internal Agency
Accountability
Mechanisms**

- EPA's hierarchical structure is designed to avoid political influence.
- A number of small internal agencies have been created to ensure the consistent development of regulatory policy.

State Oversight

- Major environmental statutes require that EPA closely oversees state compliance and enforcement.

The National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) requires U.S. federal agencies to evaluate and consider the environmental impacts of projects before taking action. The purpose of the NEPA process is to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”¹⁷⁴ NEPA applies to any proposed agency actions that “may have significant environmental effects.” Agency actions that may trigger NEPA obligations include financing, assisting, conducting, permitting or approving projects or programs; agency rules, regulations, plans, policies, or procedures; and legislative proposals made by agencies. NEPA requires a careful evaluation of environmental consequences and a rigorous analysis of alternatives to the proposed project.

The Center on Environmental Quality (CEQ), a U.S. federal agency, established the minimum requirements for NEPA implementation.¹⁷⁵ NEPA requires agencies to prepare a detailed Environmental Impact Statement (EIS) as part of their review process for major Federal actions, which will result in significant environmental effects.¹⁷⁶

The lead agency is required to prepare an Environmental Assessment (EA) “when necessary under the procedures adopted by individual agencies to supplement [NEPA’s] regulations”.¹⁷⁷ Generally, an EA is prepared to determine whether an EIS is required, or in some cases an agency will proceed directly to the EIS.¹⁷⁸ “An EA must include ‘brief discussions’ of the need for the proposal, of reasonable alternatives, and of the anticipated environmental impacts.”¹⁷⁹ After evaluating whether there will be environmental impacts, the EA process concludes with either a Finding of No Significant Impact (FONSI) or a decision to prepare an EIS. A FONSI explains why the agency concluded that there are no significant environmental impacts anticipated as a result of the agency’s action.

When an EIS is required, it must include a detailed discussion of:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses . . . and enhancement of long-term productivity, and

¹⁷⁴ See 40 C.F.R. § 1500.1(c).

¹⁷⁵ Executive Office of the President of the United States, *National Environmental Policy Act*, (2010), http://ceq.hss.doe.gov/publications/citizens_guide_to_nepa.html.

¹⁷⁶ See 42 U.S.C. § 4332(C).

¹⁷⁷ See 40 C.F.R. § 1501.3.

¹⁷⁸ See 40 C.F.R. § 1501.3.

¹⁷⁹ *Hapner v. Tidwell*, 621 F.3d 1239, 1244 (9th Cir. 2010) citing 40 C.F.R. § 1508.9(b).

- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁸⁰

Each agency “must ‘[r]igorously evaluate all reasonable alternatives’ to the action” in the EIS¹⁸¹ The alternatives analysis is considered “the heart of the environmental impact statement.”¹⁸² A “no action” alternative, as well as a discussion of “mitigation measures” must also be included in the statement.¹⁸³ There are two main purposes of an EIS:

First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.¹⁸⁴

An agency must consider direct, indirect, and cumulative impacts or effects under NEPA.¹⁸⁵ Cumulative impacts are broadly defined to include incremental actions, which may have a collective impact when combined with other past, present, and reasonably foreseeable future actions.¹⁸⁶

The agency also needs to publish, for public access, a Notice of Intent in the Federal Register indicating that an EIS has been prepared and considered. The notice should describe the proposed action and alternatives, the agency’s scoping process, and it should also provide contact information for an agency individual who can answer questions.¹⁸⁷ An agency must “make diligent efforts to involve the public in preparing and implementing their NEPA procedures” and public hearings may be held as part of this process, where appropriate.¹⁸⁸

Public participation is crucial to the NEPA process, and there are minimum requirements outlined by CEQ. The lead agency must circulate the Draft EIS (DEIS) to public agencies and interested persons for public comment for at least 45 days.¹⁸⁹ The agency must address all substantive comments in the final EIS.¹⁹⁰ Assuming the agency follows all required procedures, the agency can then adopt the FEIS and make its final decision. The lead agency shall then

¹⁸⁰ *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1135 (9th Cir. 2010) (citing 42 U.S.C. § 4332(C)).

¹⁸¹ *See Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 2010 WL 3704200, at *8 (9th Cir. 2010) (623 F.3d 633) (citing 40 C.F.R. § 1502.14(a)).

¹⁸² *Id.* (internal quotation marks omitted).

¹⁸³ *See* 40 C.F.R. § 1502.14(d), (f).

¹⁸⁴ *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 2010 WL 3704200, at *7-8 (9th Cir. 2010) (623 F.3d 633) (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)) (internal quotation marks and citations omitted).

¹⁸⁵ *See* 40 C.F.R. § 1508.8.

¹⁸⁶ *See* 40 C.F.R. § 1508.7.

¹⁸⁷ *See* 40 C.F.R. § 1508.22.

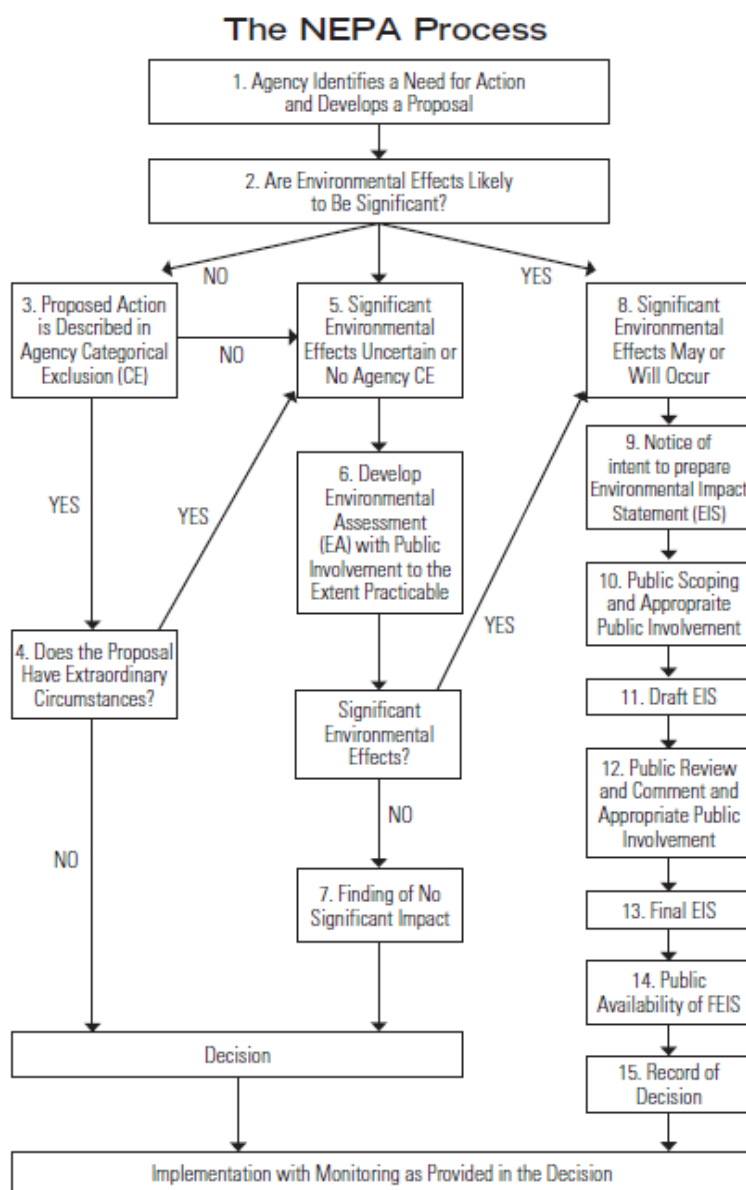
¹⁸⁸ *See* 40 C.F.R. § 1506.6(a), (c).

¹⁸⁹ *See* 40 C.F.R. § 1506.10(c).

¹⁹⁰ *See* 40 C.F.R. § 1503.4.

prepare a record of their decision (ROD), which shall include its decision, a discussion of alternatives, and state whether it has adopted “all practicable means to avoid or minimize environmental harm. . . .”¹⁹¹ The ROD serves as an accurate record of decisions made if the matter is appealed or results in litigation.

¹⁹¹ See 40 C.F.R. § 1505.2.



**Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision (CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c)).*

Table from the Citizen's Guide to NEPA, available at http://ceq.hss.doe.gov/publications/citizens_guide_to_nepa.html

Principle 7: Transparent and Meaningful Public Participation

In the United States both ordinary citizens and, more often, civil society organizations, with expertise in and a focus on environmental and health issues, participate in developing and enforcing environmental laws.¹⁹² Affected businesses and trade associations, academics, and others outside government also participate.¹⁹³ *Often trade associations and civil society groups have significant expertise, employing staffs comprised of a mix of attorneys, scientists, and policy analysts that work toward environmental protection and compliance.*

Public involvement in the development and compliance of environmental laws serves a number of important purposes. *It improves agency transparency by including local and expert participation, provides expert-information on compliance issues in resource-scarce areas, and holds agencies accountable for their actions.*¹⁹⁴ There are formal processes for including the public through “notice and comment” proceedings for rulemakings and permits as well as informal process, such as public advocacy campaigns and community monitoring groups. Citizen groups can also comment on agency settlements in enforcement actions against polluters.

Public Participation in the Formation of Regulations & Permits

Public participation in the formation of national regulations is largely governed by the *Administrative Procedure Act* (APA).¹⁹⁵ The APA establishes minimum procedures for ensuring the consideration of public input. Other statutes establishing procedures for public involvement build on this baseline, often mirroring the APA’s requirements.¹⁹⁶ Many states have state versions of the APA that establish rules for public processes.¹⁹⁷

The APA governs the procedures that agencies must use in promulgating regulations and judicial review of those regulations. The APA also governs procedures for individual administrative adjudications and informal rulemakings, also known as “notice-and-comment rulemakings.” These legally mandated procedures ensure opportunities for substantial public dialogue with the agency before it makes decisions. “In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decision-making require that agency decisions be made only after affording interested persons notice and an opportunity to comment.”¹⁹⁸ The core

¹⁹² Environmental Law Institute, *Public Participation in Environmental Regulation* 1 (1991) (hereinafter “ELI”).

¹⁹³ Cary Coglianese, et al., *Transparency and Public Participation in the Federal Rulemaking System: Recommendations for the New Administration*, 77 *George Washington Law Review* 924, 926 (June 2009).

¹⁹⁴ See Coglianese at 926-30; International Network for Environmental Compliance and Enforcement, *Principles of Environmental Compliance and Enforcement Handbook* § 5.8.2 (April 2009, 2nd ed.) (hereinafter “INECE”), http://www.inece.org/principles/05_requirements_sept09.pdf.

¹⁹⁵ Administrative Procedure Act, 5 U.S.C. § 552.

¹⁹⁶ See, e.g., *Ethyl Corp v. Env'tl. Prot. Agency*, 51 F.3d 1053, 1064 (D.C. Cir. 2004) (finding that the Clean Air Act’s “arbitrary and capricious” standard is the same as the APA standard).

¹⁹⁷ See, e.g., California Government Code § 11370 (outlining chapters of Government Code constituting the California Administrative Procedure Act).

¹⁹⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

APA requirements are: (1) Notice of Proposed Rulemaking, (2) Public Comment, (3) Purposeful Consideration, and (4) Publication.

Notice of Proposed Rulemaking - The APA mandates that an agency publish a notice of proposed rulemaking in the Federal Register before any final decisions are made.¹⁹⁹ In addition to the published notice, agencies also inform the interested stakeholders and the public through websites and email (usually 30-90 days prior to the hearing).²⁰⁰ The timing of the notice is designed to ensure that the agency considers public comment before reaching a final decision.²⁰¹ The notice must include the time, place, and type of public proceedings; a description of the proposed rule or the issues to be addressed in the rulemaking; and the agency's authority to issue the rule.²⁰² Similarly, although not explicitly required, in order to meet the APA's purpose of facilitating public participation, the agency should explain the essential purpose of the rules in a way that non-experts will be able to understand, provide access to the relevant data, and provide an explanation of the agency's rationale and basis for the proposed rule. Some statutes which supplant the APA with their own requirements for public participation, such as the Clean Air Act, explicitly provide for such explanation.²⁰³ Sometimes agencies specify the requisite amount of notice for rulemakings through separate rulemakings covering these procedural issues.²⁰⁴

Public Comment - After the notice is published, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."²⁰⁵ Public interest organizations like NRDC and others regularly participate in the administrative process and submit detailed (often lengthy) comments addressing the legal, scientific, and policy aspects of proposed regulations. Public comments can bring underrepresented viewpoints to the agency's attention and can direct attention to the latest science, cutting edge technology, and innovative solutions to problems. Grassroots organizations, individual citizens, and regulated entities affected by regulation can provide invaluable perspective on the impacts of the rule that can inform the final regulations. *Written comments are always accepted, but large decisions require a public hearing to give people the ability to comment orally.*²⁰⁶ These hearings – *moderated by agency staff* – encourage the participation of people who may find it difficult to express themselves persuasively in writing.²⁰⁷ It also provides a more personal, public forum for the airing of issues and can sometimes deliver the message more effectively to agency staff. The agency often plans

¹⁹⁹ 5 U.S.C. § 553(b).

²⁰⁰ INECE at Box 5-5; *See International Snowmobile Manufacturers' Association v. Norton*, 304 F. Supp. 2d 1278, 1293 (D. Wyo. 2004) ("By giving limited comment periods and providing the final implementing regulations the day after the comment period has ended, the [National Park Service] has failed to provide meaningful participation in the rulemaking process to the public under the APA.")

²⁰¹ *See* ELI at 6.

²⁰² 5 U.S.C. § 553(b).

²⁰³ 42 U.S.C. § 7607(d)(3).

²⁰⁴ *See, e.g.,* Notice of Proposed Rulemaking 40 C.F.R. 750.33.

²⁰⁵ 5 U.S.C. § 553(c).

²⁰⁶ *See* 5 U.S.C. § 553(c).

²⁰⁷ *See* ELI at 9.

multiple hearings so that people with different schedules living in different areas potentially affected all have a chance to attend.

Purposeful Consideration – It is not enough for the agency to solicit comments; the agency must also purposefully consider the comments submitted.²⁰⁸ The agency must *give reasoned responses* to all comments.²⁰⁹ Without this step, public comments would be meaningless. The APA requires the agency to make decisions rationally. The APA provides that the agency must document the “basis and purpose” of its rule so that the agency reasoning can later be reviewed by the courts.²¹⁰ The agency must consider “the relevant factors and articulate a rational connection between the facts found and the choice made.”²¹¹ Agencies often issue detailed explanations for their decisions in a preamble to the final rule, including responses to significant comments. If a court finds that the agency has been “arbitrary and capricious” in its rulemaking, the rule will be overturned.²¹²

Publication – After the agency has received and responded to comments and drafted a final rule, it must publish this rule, again in the *Federal Register*. The agency must allow at least 30 days after this publication before the rule may take effect in most cases.²¹³ This delay allows the companies or people who will be regulated a chance to come into compliance with new regulations.²¹⁴ It also gives them and/or citizens a chance to challenge the agency in court for failing to follow APA procedures. In addition to these core elements of the informal rulemaking process, the APA also includes provisions allowing citizens to petition to amend, repeal, or adopt rules.²¹⁵

Public Participation in Compliance and Enforcement

In addition to participating in the development of regulations, the public can also play a number of other roles in the compliance of environmental laws by filling gaps in government enforcement caused by resource constraints.²¹⁶ These activities can range from community monitoring to major advocacy programs.

²⁰⁸ 5 U.S.C. § 553(c).

²⁰⁹ *City of Portland, Oregon v. Env'tl. Prot. Agency*, 507 F.3d 706, 714 (D.C. Cir. 2007).

²¹⁰ 5 U.S.C. 553(c).

²¹¹ *Natural Res. Defense Council v. United States Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir.1997).

²¹² 5 U.S.C. 706.

²¹³ Rules that may take immediate effect are rules that relieve restrictions, state general policy, or that can be justified by the agency “for good cause.” The last category usually includes tax rules and other rules that would be rendered ineffective if delayed.

²¹⁴ ELI at 10.

²¹⁵ 5 U.S.C. § 553(e).

²¹⁶ Susan Casey-Lefkowitz, J. William Futrell, Jay Austin, & Susan Bass, Env'tl. Law Inst., *The Evolving Role of Citizens in Environmental Enforcement*, in Fourth International Conference on Environmental Compliance and Enforcement 2 (1996), <http://www.inece.org/4thvol1/futrell.pdf>.

Citizens can monitor for violations and report incidents to government authorities. After all, citizens live near the pollution where a limited number of government monitors might never reach and are more likely to be aware of a polluter's violations. While a lack of expertise or expensive technical equipment often can be a hindrance for monitoring by citizens and civil society organizations, organized efforts by civil society organizations can help overcome these barriers in some instances.²¹⁷ In the United States, for instance, some civil society organizations have sponsored "harbor walks" during which people scan the waters for oily slicks. National and local tip hotlines allow community members to report pollution outbreaks to authorities. Many organizations have trained members to identify the location of pollutant emissions and impacts on water quality or indicator species in rivers in the area; these reports are collected by a national clearinghouse for the organization, which informs government agencies. Thousands of community organizations have sprung up to spot and report environmental violations.²¹⁸ Students of all ages are also often involved with these efforts. In spite of such efforts, lack of access to private facilities can hinder community monitoring.²¹⁹

Advocacy campaigns by civil society can also help compliance by spotlighting attention on a focused issue, such as specific refinery or scientific integrity in decision-making. Civil society can work both with the agency or separately to bring attention to issues and solutions that drive compliance. For

Case Study: Advocacy Campaign Protecting Scientific Integrity (<http://www.ucsusa.org/>)

Advocacy campaigns, such as those led by groups like *The Union of Concerned Scientists*, are drivers for strong environmental compliance and enforcement. The Union of Concerned Scientists is a leading U.S. science-based nonprofit group that conducts independent scientific research and citizen action for responsible changes in government policy, corporate practices, and consumer choices.

A recent advocacy campaign by the Union of Concerned Scientists focused on scientific integrity. In advocating for protecting scientific integrity in the federal policy-making process, the group issued a report detailing recommendations for President Obama and Congress to adopt to restore scientific integrity to federal policy making. These recommendations are based on input from thousands of scientists, current and former government science advisors, congressional aides, reporters, and public interest organizations from throughout the political spectrum.

The report recommendations focus on:

- Protecting federal government scientists from political interference
- Increasing transparency and openness in agency decision-making
- Reaffirming the important role of science in the regulatory process
- Providing high-quality advice from scientists and researchers to federal policymakers
- Improving the monitoring of existing programs to ensure adequate enforcement of current laws

Altogether, more than 15,000 scientists have expressed concern about political interference in science and called for reform. The Union of Concerned Scientists and other groups continue to make sure the scientific integrity is a top priority in government decision-making and actions.

²¹⁷ *Id.* at 6.

²¹⁸ Barton H. Thompson, Jr., *Symposium: Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185, 189 (2000).

²¹⁹ E. Roberts and J. Dobbins, *The Role of the Citizen in Environmental Enforcement*, *Envtl. L. Inst.* § 2.1.1.1 (1992), <http://www.inece.org/2ndvol1/roberts.htm>.

example, civil society groups, with scientific, technical, and policy experts can prepare fact sheets, research papers, and web information to recommend solutions to an agency – such as the upgrade of a wastewater treatment plan. The civil society experts can also meet with the agency and regulated entity to discuss solutions to the problems under consideration. Working with civil society allows the agency to send a signal to the regulated entity that the local community and public are behind its decision to ensure compliance.

Transparent Decision-making & Public Access to Information

Transparent decision-making and public access to information are important to both rulemaking and campaigns. Transparent decision-making and access to information helps the public keep agencies accountable for their actions and facilitates public participation in environmental compliance and enforcement. When people have access to information on pollution in their communities, they can better understand and act upon the impacts of the pollution. They may appeal to polluters to comply with laws, call attention to violations to spur greater enforcement, and advocate for tougher controls. Statutes designed to make such information available thus play an important role in informed public participation in environmental enforcement and compliance. The main laws aimed at transparent decision-making are:

The *American Procedures Act* (APA), which was discussed above.

The *Freedom of Information Act* (FOIA), which allows the public to request almost all agency records.²²⁰ The United States Supreme Court explains:

The Freedom of Information Act (FOIA) accords “any person” a right to request any records held by a federal agency. No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act’s enumerated exemptions, the agency must “make the records promptly available” to the requester. If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction “order[ing] the production of any agency records improperly withheld.”²²¹

These records must be provided at reasonable fees, capped at the cost of search, review, and duplication for ordinary, non-commercial requestors.²²² Many states have adopted similar statutes for state agencies, such as the Public Record Act in California. The information accessed through a FOIA request enables the public, including civil society organizations, to effectively review the decision-making process of agency administrators. If the records demonstrate that an agency’s decisions rely on considerations outside the established record and on information not available to the public, people can openly question the agency’s decision-making or bring a lawsuit challenging the agency’s decision.²²³ If the FOIA disclosure reveals

²²⁰ 5 U.S.C. § 552.

²²¹ *Taylor v. Sturgell*, 553 U.S. 880 (2008) (internal citations omitted).

²²² 5 U.S.C. § 552(a)(4).

²²³ See 5 U.S.C. § 706.

information about violations which the agency has not enforced against, citizens or civil society groups can file their own actions against the violator in a citizen suit.

The Government in the Sunshine Act, which mandates transparency in government meetings, the site of crucial decision-making.²²⁴ Agencies must notify the public of the proposed meeting time and format. The meeting may be open to public attendance or closed to protect privacy and sensitive information. If the meeting is closed, then the agency must provide the public with prompt records in the form of a transcript or minutes. If the agency does not, any person may sue to obtain these records or ensure that the records of future meetings will be provided. When administrators are required to vote on an action, then a public record of the vote of each member must be provided.

The *Emergency and Planning and Community Right-to-Know Act* (EPCRA) mandates that any facility releasing hazardous substances must inform the community, and publish a plan for dealing with hazardous waste in emergencies.²²⁵ The information about releases is collected in a Toxics Release Inventory that is available in print and online. Many states and cities have adopted mini-EPCRA's. The city of Eugene, Oregon, even amended its charter to provide for a "toxics right-to-know" in its highest governing document.²²⁶ The purpose of the inventory is to inform the public about toxic releases, to aid government agencies and researchers with research, and to help in the development of appropriate regulations and standards.²²⁷ As EPA points out, the data helps give communities "more power to hold companies accountable and make informed decisions about how toxic chemicals are to be managed in their area."²²⁸ Critics point to the inaccuracy and incompleteness of the Toxics Release Inventory, which relies on self-reporting, but does not include a verification or oversight mechanism.²²⁹ This can diminish the effectiveness of advocacy relying on the Inventory. Building in a verification or oversight mechanism in similar laws may help address the problem.

Benefits

Public participation can foster better-informed, fairer decision-making to address environmental problems, which is part of the goal of U.S. statutes, such as the APA and the Clean Air Act, which seek to achieve this goal through procedural requirements facilitating public participation. Public participation can thus lead to more practical and enforceable regulations with potentially broader public support and less opposition.²³⁰ Allowing public participation in the development

²²⁴ 5 U.S.C. § 552b.

²²⁵ 42 U.S.C. § 116.

²²⁶ Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. Environmental L. & Litig. 207, 233 (2002) (citing Toxics Right-to-Know Charter Amendment, Eugene City Charter, Sec. 54, Amendment IV).

²²⁷ 42 U.S.C. & 11023(h).

²²⁸ Env'tl. Prot. Agency, *TRI for Communities*, <http://www.epa.gov/tri/stakeholders/communities/> (last updated Feb. 25, 2010).

²²⁹ Kathryn E. Durham-Hammer, *Left to Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-know Act of 1986*, 29 Colum. J. Environmental L. 323, 336-41 (2004);

²³⁰ INECE at § 5.8.2.

and implementation of environmental laws also strengthens public support for and awareness of environmental goals.²³¹ Public participation can also supplement limited government resources for enforcement, increasing the enforcement and effectiveness of environmental laws. Finally, allowing public participation gives legitimacy to the implementing agencies and increases support for their existence and mandate.

Shortcomings

Public participation laws in the U.S. are not without their shortcomings. The APA procedural requirements can be time-consuming and can add to the expense of rulemaking.²³² The requirements can slow promulgation and implementation of environmental regulations. Concerns have also been raised that the time and expense of rulemaking are leading to the circumvention of notice and comment requirements. Because of the expense and time associated with public procedure requirements, concerns have been raised that agencies are increasingly relying on informal guidance documents rather than going through formal notice-and-comment rulemaking.²³³ Policing the line between guidance and rules can also lead to resources being spent on litigation to decide the issue.²³⁴ Such concerns could potentially be addressed by guidance documents and appropriate procedures for their issuance in law.

²³¹ Casey-Lefkowitz at 2.

²³² Mantel, at 351.

²³³ *Id.* at 351-52.

²³⁴ *See id.* at 353.

KEY POINTS: Transparent and Meaningful Public Participation

Legal Basis

- The basis for public participation in the formation of most national regulations is in the Administrative Procedure Act (APA).
- The APA mandates a notice for proposed rulemaking, a period of time for public comment, time for purposeful consideration, and then publication.
- Environmental laws supplement the APA by increasing public access to information.

Public Participation in Enforcement and Compliance

- As those who are usually most directly affected by environmental violations, citizens are well placed to help monitor, investigate, and complain about these violations.

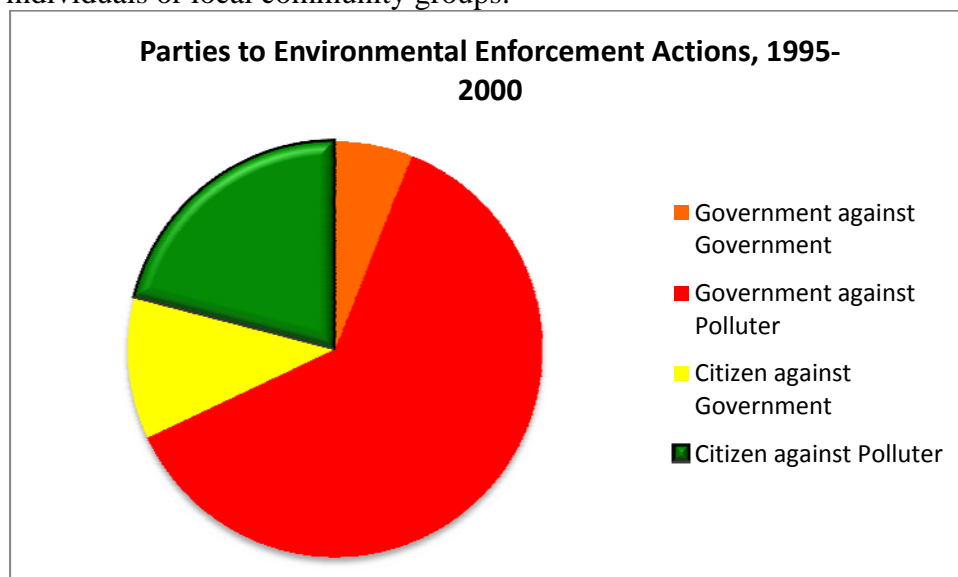
Benefits and Shortcomings

- Improved public participation can result in more informed, fairer decision making; and
- Can lead to more practical and enforceable regulations, with broader public support.
- If these programs are inadequate, then the federal government assumes this authority.

Principle 8: Citizen Suits

American environmental laws are ambitious in both reach and depth. *The U.S. agencies responsible for enforcing the environmental laws, including EPA, have insufficient resources to address all the violations.*²³⁵ In addition, the agencies are sometimes slow to act or are unresponsive to the needs of communities facing environmental burdens.²³⁶ Recognizing the resource constraints and the potential for agencies to fail to meet their legal mandate, the U.S. legislature granted citizens the ability to supplement agency efforts by bringing citizen suits in many of the U.S. environmental laws.

“Citizen suits” give ordinary people the right to sue both polluters that do not comply with the laws and government agencies that fail to follow the requirements of the law. Statutes such as the Clean Air Act and the Clean Water Act give “any person,” including private individuals, corporations, states, or civil society organizations, the right to bring citizen suits.²³⁷ Citizen suits form a substantial portion of all enforcement suits filed in the U.S.²³⁸ Organized civil society organizations have brought the bulk of citizen suits filed, often in coalitions with affected individuals or local community groups.



Adapted from Smith (2004)²³⁹

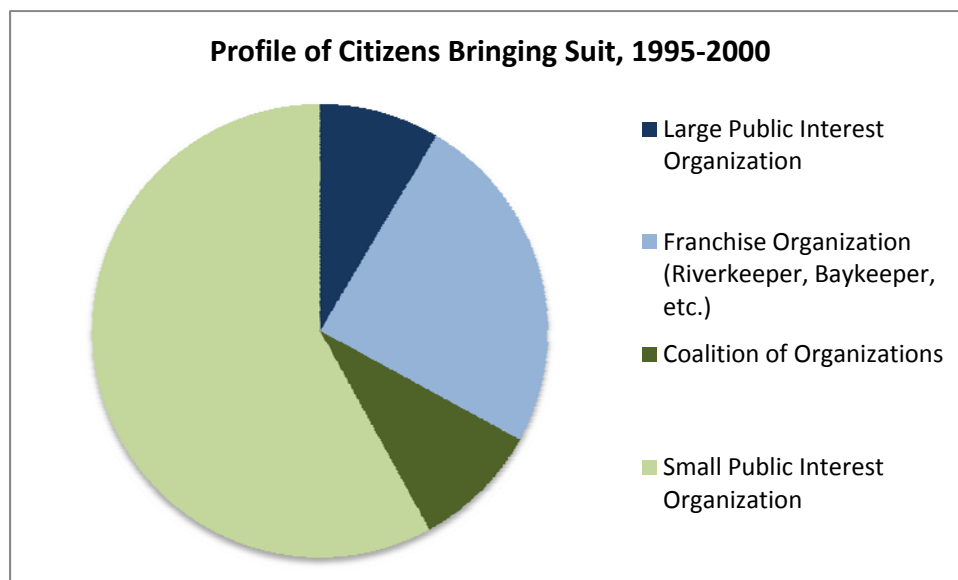
²³⁵ Env'tl. Law Institute, *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice* 35 (2002) (hereinafter “Citizen's Guide”), [http://yosemite.epa.gov/R10/ocrej.nsf/eb1daa9965e73fdf88256b800071a40b/280e766a6452517e882570ad00833d22/\\$FILE/citizen_guide_ej.pdf](http://yosemite.epa.gov/R10/ocrej.nsf/eb1daa9965e73fdf88256b800071a40b/280e766a6452517e882570ad00833d22/$FILE/citizen_guide_ej.pdf).

²³⁶ *Id.*

²³⁷ 42 U.S.C. § 7604(a)(1); 33 U.S.C. § 1365(a)(1).

²³⁸ Edward Lloyd, *Citizen Suits and Defenses Against Them*, American Law Institute –American Bar Association Continuing Legal Education, SP059 ALI-ABA 781 § I (June 24-27, 2009); Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 Colum. J. Env'tl. L. 359, 368 (2004).

²³⁹ Suits against government in the enforcement context refer to suits responding to pollution by public entities such as public utilities and sewage treatment plants. See Smith at 368.



Adapted from Smith (2004)

Citizens are uniquely motivated to prosecute polluters because compliance directly affects their lives. When the stream flowing past a local factory runs murky with pollution, people understand that their health and well-being are at stake. They are driven to investigate the pollution, find the violator, push for corrective action, and if all else fails, sue the violator in court.

In the U.S., major environmental statutes include explicit citizen suit provisions that specify who may bring a lawsuit and on what grounds.²⁴⁰ State environmental laws have also increasingly added citizen suit provisions.²⁴¹ In other countries, citizens may sue for the proper enforcement of environmental laws under a variety of legal tools.²⁴² Citizens in India or South Africa may seek redress of a constitutional right to a clean environment.²⁴³ Citizens in Colombia or the

²⁴⁰ See, e.g., Clean Water Act, 33 U.S.C. § 1365 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(a)(1) (1994); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1994); Noise Control Act of 1972, 42 U.S.C. § 4911 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994 & Supp. III 1997); Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1994); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (1994); Deepwater Port Act of 1974, 33 U.S.C. § 1515 (1988); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1994); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 60121 (1994).

²⁴¹ See, e.g., Conn. Gen. Stat. 22a-14 to -20; Fla. Stat. Ann. 403.412; Ind. Code 13-30-1-1 to 13-30-1-12; Iowa Code 455B.111; La. Rev. Stat. Ann. 30:2026; Md. Code Ann., Nat. Res. 1-501 to -508; Mass. Gen. Laws ch. 214, 7A; Mich. Comp. Laws 324.1701-1706; Minn. Stat. 116B.01-.13; Nev. Rev. Stat. Ann. 41.540-.570; N.J. Stat. Ann. 2A:35A-1 to :35A-14; N.D. Cent. Code 32-40-01 to 32-40-11; S.D. Codified Laws 34A-10-1 to 34A-10-17. See also Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 Yale L.J. 1003, 1007 (2001).

²⁴² Susan Casey-Lefkowitz, J. William Futrell, Jay Austin, & Susan Bass, Env'tl. Law Inst., *The Evolving Role of Citizens in Environmental Enforcement*, in Fourth International Conference on Environmental Compliance and Enforcement 2 (1996).

²⁴³ India Const. art. 21, South Africa, Bill of Rights, § 24

Netherlands may pursue a civil action authorized by their country's civil code that requires them to prove fault and causation,²⁴⁴ similar to English common law tort remedies. Both these kinds of citizen suit provisions put a relatively heavy burden on citizens, either to prove a violation of the right to a clean environment—what constitutes a violation of a right to a clean environment?— or to prove fault and causation.

The American system attempts to reduce such difficulties and provides citizens the right to enforce the violations of environmental standards without having to make such showings of harm and causation. Under the U.S. citizen suit provisions, citizens may sue to stop pollution exceeding health- or ecologically-based pollution limits without having to prove, for example, that the air pollution from a particular factory caused the citizen's respiratory illness.

Legal Framework

The first citizen suits provision was written into the Clean Air Act in 1970, and served as a model for American environmental laws thereafter.²⁴⁵ There are two types of citizen suits. Citizens may sue polluters for pollution or other acts in violation of the environmental laws, e.g. “an emission standard or limitation under [the Clean Air Act].”²⁴⁶ Citizens may also sue an agency when it fails to carry out its legislatively mandated duty.²⁴⁷ The elements of citizen suits against polluters and citizen suits against environmental agencies are very similar.

*Before the Lawsuit*²⁴⁸

Typically, 60 days before bringing a lawsuit based on the environmental laws, citizens must provide a written notice of intent to sue to polluters and the relevant government agencies. The notice is designed to give polluters a chance to come into compliance, and federal and state environmental agencies a chance to bring a lawsuit themselves. As citizen suits are meant to complement, not duplicate government efforts, citizens are barred from proceeding when the government has already brought a lawsuit against the polluter on the alleged violations. However, citizens may intervene in the government's lawsuit, giving them a greater ability to influence any settlement agreements in the case.²⁴⁹ Lawsuits must usually be brought within a specified period of time, calculated from the date of the violation or incident at issue in the case.

Proving the Violation

Once in court, citizens have the burden of proving the violation. Citizens often rely on the self-reported emissions or discharges of polluters or on publicly available government records, accessible via transparency laws giving citizens access to government records, to prove their

²⁴⁴ Casey-Lefkowitz at 9.

²⁴⁵ Jeffrey G. Miller, *Envtl. Law Inst., Citizen Suits: Private Enforcement of Federal Pollution Laws* 4 (1987).

²⁴⁶ Clean Air Act, 42 U.S.C. § 7604 (1994); *Citizen's Guide*, at 35.

²⁴⁷ *Id.*

²⁴⁸ Unless otherwise noted, this subsection relies generally on *Citizen's Guide*, at 35.

²⁴⁹ See, e.g., *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 218 (3d Cir. Pa. 1979).

case.²⁵⁰ Citizen suits are more likely to be brought when public records are available.²⁵¹ Citizens need only prove a violation of statutory requirements or of standards set pursuant to law, but need not show harm, although they may need to show that they have a stake in the outcome of the case.²⁵²

Remedies

If the court finds a violation of the law, it may impose a civil penalty (fine) or an injunction (a judicial order to cease the violating activity), as provided in the relevant statute.²⁵³ Civil penalties imposed by the courts are usually guided by criteria, including maximum penalties, provided in the statutes²⁵⁴ and are paid into the United States Treasury.²⁵⁵ Citizens or communities thus do not get compensated for harms to their health or property, unless the statutory claim is accompanied by a common law claim for harm or injury.

Attorneys' Fees

Environmental statutes generally include a provision awarding litigation costs, including attorneys' fees, for successful plaintiffs in a citizen suit.²⁵⁶ Fees for suits against the government are also sometimes available to prevailing parties under the Equal Access to Justice Act²⁵⁷. Without these fees, citizens would be forced to absorb the substantial costs of bringing suits, and the expense would discourage citizen enforcement.²⁵⁸ Upon success, courts award "reasonable" fees – measured by a standard fee per hour, multiplied by the number of hours the attorneys submit to the court and adjusted for other considerations.²⁵⁹

²⁵⁰ See Lloyd, § III.C.

²⁵¹ See *id.*; Smith, at 393

²⁵² The requirement of a stake in the outcome is constitutionally based, and is called "standing." *Horne v. Flores*, 129 S.Ct. 2579, 2592 (2009). "[F]or purposes of standing a petitioner need not establish the merits of a case, i.e., that localized harm has in fact resulted . . . , but rather must demonstrate," in addition to other requirements, that there is a "substantial probability" that the plaintiff's interests will be adversely affected. *American Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000). Aesthetic injuries (such as a reasonable fear of using a river that has been polluted that the plaintiff would otherwise use) are sufficient to satisfy this requirement. See *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 184 (2000).

²⁵³ See, e.g., 42 U.S.C. § 7604.

²⁵⁴ See, e.g., 33 U.S.C. § 1319(d).

²⁵⁵ See, e.g., 42 U.S.C. § 7604(g).

²⁵⁶ See, e.g., 42 U.S.C. § 7604(d); *Southfield Marine, Inc. v. U.S.*, 535 F.3d 1012, 1017 (9th Cir. 2008) (stating that Clean Water Act penalties are paid to U.S. Treasury).

²⁵⁷ See 5 U.S.C. § 504

²⁵⁸ *Natural Res. Defense Council, Inc. v. Env'tl. Prot. Agency*, 512 F.2d 1351, 1357 (D.C. Cir. 1975).

²⁵⁹ *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986).

Issues Specific to Citizen Suits Against Polluters

Generally, civil penalties are only available for violations of environmental standards and not for an agency's failure to carry out its duties. They must be paid directly into the U.S. Treasury.²⁶⁰ The requirements for payments to go to the Treasury respond to Congressional concerns that lawsuits would be brought for personal financial gain, leading to a flood of litigation.²⁶¹ Unfortunately, this sometimes means that local environmental effects which often motivate lawsuits against polluters remain unaddressed by the litigation. Here, settlements can be an attractive option for many citizen suit plaintiffs.

Citizens often settle with polluters out of court.²⁶² Settlements are useful tools for citizens and their communities because they may allow for payments to address harms to plaintiffs or to local organizations to mitigate environmental harms, instead of payment of civil penalties to the Treasury.²⁶³ Settlement agreements may specify that the polluter provide detailed and enforceable plans for compliance, payments to the Treasury, Supplemental Environmental Projects (SEPs) that aid the local community, and cover litigation costs, including attorneys' fees.²⁶⁴ However, some statutes have begun to make explicit provisions to allow for some penalties to be directed towards mitigating the harms caused by the pollution that leads to the suit, for instance in a 1990 amendment to the Clean Air Act.²⁶⁵

Issues Particular to Citizen Suits Against the Government

Through citizen suits, citizens can force a government agency to take action when it fails to perform its legislatively mandated duties, such as carrying out rulemakings or other actions by specified deadlines or failing to require that a polluter's permit be consistent with all aspects of federal law. However, civil penalties are generally not available for suits alleging an agency's failure to carry out its duties under a statute.²⁶⁶

Suits against government entities also raise the issue of sovereign immunity. The federal government waives its sovereign immunity from citizen suits in some authorizing statutes by specifically allowing citizens to sue "any person (including the United States)" for certain kinds of cases, e.g. those for failing to carry out mandated duties.²⁶⁷ Some federal statutes waive sovereign immunity for certain kinds of penalties against federal government agencies and not for others,²⁶⁸ limiting the availability of penalties even when the agency is a polluter. Citizens seeking to sue a state or state agency must also overcome state sovereign immunity issues for

²⁶⁰ See, e.g., 42 U.S.C. 7604(a).

²⁶¹ See Elizabeth L. Thagard, *The Rule That Clean Water Act Civil Penalties Must Go to the Treasury and How to Avoid It*, 16 Harvard Environmental Law Review 507, 509 (1992).

²⁶² Smith, at 387; Lloyd, § V.I.

²⁶³ Smith, at 389-90.

²⁶⁴ *Id.*

²⁶⁵ Lloyd, § V.H.2.C; 42 U.S.C. § 7604(g).

²⁶⁶ See *id.* § V.B.2.

²⁶⁷ See, e.g., Clean Air Act 42 USC §7604

²⁶⁸ Lloyd, § V.B.2.d.

any lawsuit, whether seeking penalties or injunctive relief.²⁶⁹ Though the U.S. Constitution protects states from suits without consent, states can waive immunity by adopting laws allowing citizen suits against them. In limited circumstances, Congress may take away a state's immunity from lawsuit.²⁷⁰ However, most citizen suits against state actors for violations of the federal laws proceed by suing the state official responsible for the violation under the theory that a state cannot sanction the violation of federal laws and that therefore actions of state officials which violate federal law are not state actions.²⁷¹ Such suits may only seek injunctive or declaratory relief. Any statute aiming to allow citizen suits against government agencies may have to address these sovereign immunity issues.

Benefits

Citizen suits are integral to the effective implementation of environmental laws. Citizens both increase the number and quality of enforcement actions, and hold government agencies accountable for carrying out their responsibilities.

Citizen suits add more than mere numbers to environmental enforcement, often pioneering innovations in enforcement, and addressing issues and types of cases that the government tends to ignore. Citizens can focus their efforts on different laws than government prosecutors to ensure full coverage of environmental enforcement.²⁷² When government enforcement efforts fall below historical levels, citizens file suits more actively.²⁷³ Strategies first innovated in citizen suits have later been adopted by government officials in enforcement efforts.²⁷⁴ Citizen suits have added to the vigor and quality of enforcement proceedings.

Citizens can also help ensure that the government meets its obligations under environmental laws. When a deadline for an agency action passes or an agency fails to enforce the law's requirements, citizens can enforce the laws.

Enabling the ordinary person to sue large and often more politically influential corporations, citizen suits promote fairness and equality.²⁷⁵ These suits truly embody democratic values by involving people in all aspects of policy, from its formation to its enforcement.²⁷⁶

United States Supreme Court Justice Thurgood Marshall best summarized the incalculable value that citizens seeking to protect the environment add to the legal process. Marshall extolled that people suing on behalf of the public interest "have broadened the flow of information to

²⁶⁹ See *id.* § V.B.2.b; *MCI Telecommunications Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 503 (3d Cir. 2000).

²⁷⁰ *MCI*, 271 F.3d at 503.

²⁷¹ *Id.* at 506; Lloyd, § V.B.2.d.

²⁷² Smith, at 386.

²⁷³ *Id.* at 366.

²⁷⁴ Barton H. Thompson, Jr., *Symposium: Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185, 198 (2000).

²⁷⁵ *Id.* at 199.

²⁷⁶ E. Roberts and J. Dobbins, *The Role of the Citizen in Environmental Enforcement*, Env'tl. L. Inst. (1992).

decision-makers. They have made it possible for administrators, legislators and judges to assess the impact of their decisions in terms of all affected interests. And by helping to open the doors to our legal system, they have moved us a little closer to the idea of equal justice for all.”²⁷⁷

Shortcomings

Where sovereign immunity has been inadequately addressed in a statute, it may prevent citizens from seeking penalties against government agencies, even where the government agency is a polluting entity. While a penalty would go into the Treasury, it would still be a deterrent to future pollution by the agency which would lose part of its operating budget. Immunity for such polluting agencies has the perverse effect of requiring all but government agencies to follow the law.

Furthermore, statutory requirements for penalties to be deposited in the U.S. Treasury can limit the full potential of citizen suits by disallowing the mitigation of environmental harm to individuals and communities even where such mitigation would not risk flooding the courts with financially-motivated litigation. The example of the Clean Air Act, which allows for a certain amount of civil penalties to be directed to mitigation consistent with the Act and beneficial to public health or the environment,²⁷⁸ may help address this limitation without forcing citizens to settle a lawsuit.

²⁷⁷ Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision Making: Putting People Back into the Picture*, 19 Ariz. Journal of International & Comparative Law 643, 645 (quoting Thurgood Marshall, *Financing the Public Interest Law Practice: The Role of the Organized Bar*, A.B.A.J., 1487 (1975)).

²⁷⁸ 42 U.S.C. § 7604(g)(2).

Case Study: Citizen Suit to Force Mercury Cleanup

Dangerously high mercury levels combined with inaction by the regulating agency, led the Natural Resources Defense Council (NRDC) and Maine People's Alliance to file a citizen lawsuit against a giant chemical company to force the cleanup of the local bay in the Northeastern United States.²⁷⁹ From 1967 to 1982, Mallinckrodt, Inc. owned a plant in the state of Maine that openly dumped mercury-contaminated sludge into the local bay.²⁸⁰ In fact, the bay was so polluted that public health signs were posted warning residents against eating fish from the bay. Meanwhile, there were some unsuccessful efforts in government enforcement, and the chemical company attempted to ship the poisonous mercury to India.²⁸¹



In 2000, NRDC and the Maine People's Alliance sued Mallinckrodt/Holtrachem under the Resource Conservation and Recovery Act (RCRA) to clean-up the toxic contamination of the soil and bay from the plant's chlor-alkali operations. RCRA allows citizens to sue owners, even past owners, when their hazardous waste may severely endanger human health.²⁸² During trial, a scientific expert testified that there were high levels of mercury in the river, its lobsters and mussels and other seafood. The

sampling demonstrated that a pregnant woman could not eat a single fish from the river without endangering her child's health. The district court (the first court to hear this case) ordered that Mallinckrodt conduct a study of the impacts of its mercury pollution in the river, and then clean up its mess. As part of its cleanup obligations, the Court ordered Mallinckrodt to spend \$4 million on laboratory analyses, and ultimately to clean up the bay, including the bio-accumulative, persistent organic pollution it had caused.

In addition to stopping this huge public health threat, the lawsuit created a new legal precedent. This citizen victory was the first time that an industrial polluter in the United States had been held responsible for contaminating natural resources downstream of a plant site, and had been required to clean up that contamination. NRDC expanded the frontiers of RCRA law by expanding a legal concept that was normally used to clean up specific industrial sites to clean up contamination of an entire river.

Photo: Mercury Instruments <http://www.mercury-instrumentsusa.com/AULA254.htm>

²⁷⁹ <http://www.mainepeoplesalliance.org/environment/holtrachem.html>.

²⁸⁰ *Me. People's Alliance v. Holtrachem Mfg. Co., L.L.C.*, 211 F. Supp. 2d 237 (D. Me. 2002).

²⁸¹ *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 295 (1st Cir. Me. 2006) (quoting H.R. Rep. No. 98-198, pt. 1, at 20 (1983)) (In 1984, the legislature investigated EPA enforcement of hazardous waste pollution violations, and found that it was making an "inadequate effort", especially during "an astonishing two years of mismanagement").

²⁸² 42 U.S.C. § 6973 (1965).

KEY POINTS: Citizen Suits

The Scope of Citizen Suits

- A number of environmental statutes allow for citizens to sue polluters AND government agencies that fail to follow the requirements of the law.
- Agencies are often under-resourced and unable to respond to every environmental violation - citizen suits supplement agency efforts.

Legal Framework

- Citizens must provide violators with a notice of intent to sue.
- Once in court, citizens have the burden of proving the violation. These efforts are aided by access-to-information and self-monitoring and reporting laws.
- Remedies include civil penalties and/or injunctions. Environmental statutes usually provide for attorneys' fees for successful plaintiffs.

Benefits and Shortcomings

- Promotion of fairness and equality.
- Statutes still allow for sovereign immunity, which may allow government polluters to escape liability.
- Penalties only flow to the treasury, which means that those affected most by environmental violations may not have their injuries directly compensated for or the pollution of concern cleaned up.

APPENDIX: STATUTORY/REGULATORY LANGUAGE

Electronic Access:

The U.S. Code can be obtained electronically at the U.S. Government's website: <http://www.gpoaccess.gov/uscode/> and Cornell University Law School's Legal Information Institute at <http://www.law.cornell.edu/uscode/>

Statutory Language: Cooperation between Federal and State Entities

Clean Air Act: State Implementation Plans

42 U.S.C. § 7413 (2010)

"Nothing in this title shall be construed as preventing a State...from adopting...ambient air quality standards and implementation plans, including emission requirements, to implement an air quality program which will (A) attain and maintain a higher level of air quality than is specified in any national ambient air quality standard promulgated pursuant to this Act, or (B) attain and maintain the level of air quality specified in any national ambient air quality standard within a shorter period of time than required by this Act, or from adopting within the time provided in section 114 or section 115 of this Act, or revising after such time, emission standards more stringent than those established by the Secretary."

Sanctions

42 U.S.C. § 7509 (2010)

(1) Highway sanctions

(A) The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants [...]. Such prohibition shall become effective upon the selection by the Administrator of this sanction.

For Clean Water Act: State Implementation Plans, See 32 U.S.C. § 1313 (2010)

Clean Water Act: Non-attainment areas and Total Maximum Daily Load (TMDL's)

32 U.S.C. § 1313 (2010)

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USC § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USC § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USC § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall

include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USC § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USC § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

Statutory Language: Retaining Highly Qualified Professionals and Dedicated Agency Resources

§ 5105. Standards for classification of positions

(a) The Office of Personnel Management, after consulting the agencies, shall prepare standards for placing positions in their proper classes and grades. The Office may make such inquiries or investigations of the duties, responsibilities, and qualification requirements of positions as it considers necessary for this purpose. The agencies, on request of the Office, shall furnish information for and cooperate in the preparation of the standards. In the standards, which shall be published in such form as the Office may determine, the Office shall--

(1) define the various classes of positions in terms of duties, responsibilities, and qualification requirements;

(2) establish the official class titles; and

(3) set forth the grades in which the classes have been placed by the Office.

(b) The Office, after consulting the agencies to the extent considered necessary, shall revise, supplement, or abolish existing standards[...]

(c) The official class titles established under subsection (a)(2) of this section shall be used for personnel, budget, and fiscal purposes.²⁸³

§ 5311. The Executive Schedule

The Executive Schedule, which is divided into five pay levels, is the basic pay schedule for positions, other than Senior Executive Service positions and positions in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, to which this subchapter [5 USCS §§ 5311 et seq.] applies.²⁸⁴

§ 5332. The General Schedule

(1) The General Schedule, the symbol for which is "GS", is the basic pay schedule for positions to which this subchapter [5 USCS §§ 5331 et seq.] applies. Each employee to whom this subchapter [5 USCS §§ 5331 et seq.] applies is entitled to basic pay in accordance with the General Schedule.

(2) The General Schedule is a schedule of annual rates of basic pay, consisting of 15 grades, designated "GS-1"

²⁸³ 5 U.S.C. § 5105 (2010)

²⁸⁴ 5 U.S.C. § 5311 (2010)

through "GS-15", consecutively, with 10 rates of pay for each such grade. The rates of pay of the General Schedule are adjusted in accordance with section 5303 [5 USCS § 5303].²⁸⁵

Statutory Language: Self Monitoring, Reporting and Compliance for Permitted Agencies

Emergency Planning and Community Right-to-Know Act Section 313 (42 U.S.C. § 11023)

(a) Basic requirement

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

(b) Covered owners and operators of facilities

(1) In general

(A) The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

(B) The Administrator may add or delete Standard Industrial Classification Codes for purposes of subparagraph (A), but only to the extent necessary to provide that each Standard Industrial Code to which this section applies is relevant to the purposes of this section.

(c) Toxic chemicals covered

The toxic chemicals subject to the requirements of this section are those chemicals on the list in Committee Print Number 99–169 of the Senate Committee on Environment and Public Works, titled “Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986” [42 U.S.C. 11023] (including any revised version of the list as may be made pursuant to subsection (d) or (e) of this section).

(f) Threshold for reporting

(1) Toxic chemical threshold amount

The threshold amounts for purposes of reporting toxic chemicals under this section are as follows:

(A) With respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year.

(B) With respect to a toxic chemical manufactured or processed at a facility—

(i) For the toxic chemical release form required to be submitted under this section on or before July 1, 1988, 75,000 pounds of the toxic chemical per year.

(ii) For the form required to be submitted on or before July 1, 1989, 50,000 pounds of the toxic chemical per year.

(iii) For the form required to be submitted on or before July 1, 1990, and for each form thereafter, 25,000 pounds of the toxic chemical per year.

(2) Use of available data

In order to provide the information required under this section, the owner or operator of a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such data are not readily available, reasonable estimates of the amounts involved. Nothing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment

²⁸⁵ 5 U.S.C. § 5332 (2010)

beyond that monitoring and measurement required under other provisions of law or regulation. In order to assure consistency, the Administrator shall require that data be expressed in common units.

(h) Use of release form

The release forms required under this section are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities. The release form shall be available, consistent with section [11044 \(a\)](#) of this title, to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes.

(j) EPA management of data

The Administrator shall establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section. The Administrator shall make these data accessible by computer telecommunication and other means to any person on a cost reimbursable basis.

For Comprehensive Environmental Response, Compensation and Liability Act: See 42 U.S.C. § 9603

For Toxic Substances Control Act: See 15 U.S.C. § 2607

For Clean Air Act: See 42 U.S.C. § 7414

For Clean Water Act: See 33 U.S.C. § 1342

Statutory Language: Incentive and Compliance Outreach Programs

There is little legislative language discussing incentive and compliance outreach programs. The most significant legislative language comes from EPA's Penalty Assessment sections.

Penalty assessment criteria: 42 USC 7413(e)

(1) In determining the amount of any penalty to be assessed under this section or section 7604 (a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607 (a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

Statutory Language: Agency Enforcement Tools

This part of the paper details key legislative language from U.S. statutes. Here we choose the Clean Air Act (CAA) and the APA. While environmental statutes have their differences, the language for administrative, civil, and criminal authority is similar in each statute. We have also included relevant excerpts of the APA because while the APA is not an environmental statute, it describes the procedures that the U.S. Government must follow when it enforces most environmental regulations.

Clean Air Act, 42 U.S.C. § 7413

(a) In general

(3) EPA enforcement [...] – Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds

that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, ...including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter..., the Administrator may

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title [Note: Section 7605 states that the Attorney General shall represent EPA in federal court in a civil case with attorneys appointed by the Administrator of EPA], or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders – An order issued under this subsection [...] shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date of the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) [allows action against polluters if states don't enforce new source requirements]

(b) Civil judicial enforcement – the Administrator shall, [...] commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. [...]

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter..., including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

(b) (continued) [allows for any action under this subsection to be enforced in federal court. Notice of such an action should be given to the State air pollution control agency.]

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition),..., shall, upon conviction, be punished by a fine...or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly—

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter shall, upon conviction, be punished by a fine pursuant to title 18 or by

imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter,..., shall, upon conviction, be punished by a fine pursuant to title 18 or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant...or any extremely hazardous substance... , and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5) (A) Any person who knowingly releases into the ambient air any hazardous air pollutant...or any extremely hazardous substance...., and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than \$1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

[...]

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person—

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued

(i) during any period of federally assumed enforcement, or

(ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter... or

(C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

(1, continued) The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed \$200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)

(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with [the APA]. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil

penalties not to exceed \$5,000 per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to [the APA], but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek [judicial] review [in federal court], by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator and the Attorney General... Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order—

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator, the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed [plus interest]. In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay [penalty, interest, and enforcement expenses]

The relevant parts of the APA state:

- (5 U.S.C. 554(b)) Persons entitled to notice of an agency hearing shall be timely informed of
 - (1) the time, place, and nature of the hearing;
 - (2) the legal authority and jurisdiction under which the hearing is to be held; and
 - (3) the matters of fact and law asserted
- (5 U.S.C. 554(c)) The agency shall give all interested parties opportunity for
 - (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit; and
 - (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.
- (5 U.S.C. 556 (c)) Subject to published rules of the agency and within its powers, employees presiding at hearings may
 - (1) administer oaths and affirmation;
 - (2) issue subpoenas authorized by law;
 - (3) rule on offers of proof and receive relevant evidence;
 - (4) take depositions or have depositions taken when the ends of justice would be served;
 - (5) regulate the course of the hearing
 - (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided...;
 - (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
 - (8) require the attendance at any conference help pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
 - (9) dispose of procedural requests or similar matters;

- (10) make or recommend decisions in accordance with section 557 of this title; and
- (11) take other action authorized by agency rule consistent with this subchapter

(5 U.S.C. 556(d)) Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence...A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

42 U.S.C. § 7509 (Failure of States to Meet Clean Air Act Requirements)

(a) State failure

[If a state fails to meet Clean Air Act Requirements] one of the sanctions referred to in subsection (b) of this section shall apply, as selected by the Administrator, until the Administrator determines that the State has come into compliance, except that if the Administrator finds a lack of good faith, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. In addition to any other sanction applicable as provided in this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 7405 of this title.

(b) Sanctions [See Statutory Language: Cooperation between Federal and State Entities]

(c) Notice of failure to attain

(1) As expeditiously as practicable after the applicable attainment date for any nonattainment area, but not later than 6 months after such date, the Administrator shall determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date.

(2) Upon making the determination under paragraph (1), the Administrator shall publish a notice in the Federal Register containing such determination and identifying each area that the Administrator has determined to have failed to attain. The Administrator may revise or supplement such determination at any time based on more complete information or analysis concerning the area's air quality as of the attainment date.

(d) Consequences for failure to attain

(1) Within 1 year after the Administrator publishes the notice under subsection (c)(2) of this section (relating to notice of failure to attain), each State containing a nonattainment area shall submit a revision to the applicable implementation plan meeting the requirements of paragraph (2) of this subsection.

(2) The revision required under paragraph (1) shall meet the requirements of section 7410 of this title and section 7502 of this title. In addition, the revision shall include such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any non air quality and other air quality-related health and environmental impacts.

(3) The attainment date applicable to the revision required under paragraph (1) shall be the same as provided in the provisions of section 7502 (a)(2) of this title, except that in applying such provisions the phrase "from the date of the notice under section 7509 (c)(2) of this title" shall be substituted for the phrase "from the date such area was designated nonattainment under section 7407 (d) of this title" and for the phrase "from the date of designation as nonattainment".

Regulatory Agenda (5 U.S.C. § 602 (2006))

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

- (1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;
- (2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking,^[1] and

- (3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).
- (b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.
- (c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.
- (d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

For Small Business Regulatory Fairness Act: See 5 U.S.C. § 603, 604

Legislative Language: Effective Institutional Oversight and Auditing Functions

Clean Water Act NPDES: 33 U.S.C. § 1342

[. . .]

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317 (b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of

(A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,

(B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or

(C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284 (b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314 (i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314 (i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) **Limitations on partial permit program returns and withdrawals.**— A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue

(A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or

(B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on

such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

...

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

For Clean Air Act State Implementation Plans Oversight, See Statutory Language: Cooperation between Federal and State Entities; 42 U.S.C. § 7410

Statutory Language: Public Participation

Freedom of Information Act

5 U.S.C. § 552

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

[...]

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--
(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

[...]

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes

such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

[...]

(4) (A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

[...]

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

[...]

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.[...]

(b) This section does not apply to matters that are--

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USC § 552b]), if that statute--

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.

- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

- (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and-
 - (A) the investigation or proceeding involves a possible violation of criminal law; and
 - (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
 - (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
 - (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.
- (d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.
- (e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--
 - (A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
 - (B)

(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—[data on information request response time]

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

For EPA Regulations on Public Participation, See 40 C.F.R. 25.3

For Public Participation Provisions in the Administrative Procedure Act, See 5 U.S.C. § 553, 706

Statutory Language for Citizen Suits

Clean Air Act, 42 U.S.C. § 7604

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) [Notice requirements]

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Non-restriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.