SCRUTINIZING ENVIRONMENTAL ENFORCEMENT: A COMMENT ON A RECENT DISCUSSION AT THE AALS

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I. INTRODUCTION

For much of the last century, the Association of American Law Schools ("AALS") has had a quiet yet significant role in the development of American law. Founded in 1900, the Association is composed of 162 United States law schools, each of whose faculty members are AALS members. The Association sponsors a number of events annually, the most significant of which is its annual meeting at the beginning of January, which typically attracts between 3500 and 4000 participants.[1]

Over a span of four days, this meeting features exhibits, breakfasts, luncheons, receptions sponsored by various law schools and organizations, field trips, half or full day "workshops" on particular topics, a plenary session (regarding a broad topic or theme), and numerous sessions sponsored by one or more of the

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1. Telephone Interview with Traci Thomas, AALS (Apr. 13, 2000). For an interesting discussion of the history of the AALS, *see* ROBERT STEVENS, LAW SCHOOL (1983).

AALS's sections (i.e., groups focused on particular fields of law or topic areas).[2]

Last year, the AALS annual meeting was held in Washington, D.C. (from Thursday, January 6th until Sunday, January 9th). One particularly provocative (and well attended) section-sponsored session at this meeting was a panel discussion (held on Friday, January 9th) that was organized by the Association's Environmental Law Section and entitled "Deterrence vs. Cooperation: The Struggle Over the Future Direction of Environmental Enforcement."

This session was moderated by Professor Clifford Rechtschaffen of Golden Gate Law School, a clinician and scholar who has written perceptively about enforcement in a lengthy and thoughtful law review piece.[3] Other participants included Lois Schiffer, the current Assistant Attorney General for Environment and Natural Resources in the U.S. Department of Justice; Steve Herman, the present Assistant Administrator for Enforcement and Compliance Assurance at the U.S. EPA; Terry Bossert, a private practitioner who served four years as the Chief Counsel of the Pennsylvania Department of Environmental Protection; Fran Dubrowski, a former Senior Attorney with the Natural Resources Defense Council; and Ernie Rosenberg, the President of a trade association (the Soap and Detergent Association) and, until November, 1999, a Vice President for Health and Environmental Issues with Occidental Petroleum.

The purpose of this essay is to summarize and analyze critically the thoughtful remarks of the participants in this panel discussion. I shall begin by recounting (and briefly supplementing) the opening remarks of Professor Rechtschaffen with respect to current trends in environmental enforcement and compliance assistance in the United States. I will then summarize the comments of the AALS session panelists with respect to four distinct topics that their discussion touched upon: the proper role of traditional deterrent enforcement efforts (and of governmental compliance assistance to regulated companies); the extent to which state environmental enforcement and compliance programs should be autonomous; the appropriate way (or ways) to measure enforcement success; and the complexity of environmental regulation. Finally, I will offer some thoughts as to the vital role that budgetary resources play with

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2. For a polemical critique of the last AALS annual meeting from a politically conservative point-of-view, *see* David Mayer, *Hobnobbing With Fellow Wizards: A Report On the Law Professors' Conferences In Washington, D.C.*, CAP. U. L. FEDERALIST SOC'Y NEWSL., Mar. 2000, *available at* http://www.law.capital.edu/student/federalistsociety.

3. *See* Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

respect to proposals to improve governmental environmental enforcement programs.

II. ENVIRONMENTAL ENFORCEMENT IN THE RECENT PAST: MAJOR TRENDS AND COMPETING THEORIES

Clifford Rechtschaffen opened the panel discussion by noting that, over the past five to ten years, there have been many calls to change the way the government enforces environmental laws. He posited that there are two "basic theories" of environmental enforcement: "deterrence-based" enforcement and a "cooperation-based" model.[4]

Deterrence-based enforcement reflects the traditional way that we regulate unlawful conduct in society. It is based upon the notion that regulated entities are rational economic actors who will comply with legal requirements where the economic (and other) costs of noncompliance are greater than the costs of compliance. The task for regulators, under this approach, is to make noncompliance penalties sufficiently high - and the probability that violations will be detected sufficiently great - that it will be economically irrational for regulated businesses not to comply with applicable standards. As Rechtschaffen stated, "Under this view, if there are violations they should be met with sanctions. Enforcement responses should be timely and appropriate; and the level of enforcement activity should have a deterrent effect."

In contrast with the deterrent approach, cooperation-based enforcement starts with the presumption that most businesses are generally inclined to comply with the law. In light of this, the imposition of sanctions on regulatory violators is disfavored or, under a more extreme position, even seen as a failure of the system to work. Instead, in a cooperation-based system, regulatory agencies have the job of providing advice and consultation to businesses in order to help them understand the pertinent rules. In the event of noncompliance, such agencies are tasked with counseling regulated entities as to how to come into compliance.

Professor Rechtschaffen pointed out that, in practice, no regulatory system rigidly adhered to one enforcement model or the other. He observed that EPA has primarily relied upon a deterrence-based approach, as evidenced by its penalty policy, its enforcement response policies, and other Agency policies and activities.

However, beginning in 1993, EPA has also engaged in significant "enforcement reform" by devoting more of its resources to promoting

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4. *See id.* for a more comprehensive discussion of those theories.

and assisting compliance. The Agency has expanded its compliance assistance activities and it has adopted compliance incentive programs (such as its self-audit policy, its small business policy, and other similar initiatives). EPA has also engaged in a very ambitious national performance strategies program to develop new measures for evaluating the success of enforcement programs.

For their part, Rechtschaffen suggested, most state environmental agencies have also pursued a deterrent enforcement approach "in theory." Nonetheless, he believes that many states have been "less than enthusiastic" in practice about deterrence-based enforcement. In Rechtschaffen's words:

> In recent years, the states have been leading the charge to reform enforcement practices. The states now conduct between 80% and 90% of all [environmental] enforcement actions. They've been delegated authority to administer about 75% of the major environmental programs. Quite deliberately, the states have expanded the resources and effort they've allocated towards compliance assistance, and cut back on traditional enforcement activity. This includes inspections, enforcement, orders and penalties.[5]

Professor Rechtschaffen also made mention of what he termed "a growing body of evidence that rates of noncompliance with environmental laws are substantial and may be on the increase." He noted that the EPA itself has reported that the rate of "significant noncompliance" with the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) ranges between 20% and 28%. Moreover, he stated an environmental organization, the Environmental Working Group, has concluded that, among major facilities in five industrial sectors, the rate of noncompliance with Clean Air Act requirements is approximately 40%.[6] Thus,

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5. Professor Rechtschaffen provided several examples in support of his point. He noted that the EPA has reported that, between 1993 and 1997, there was a 50% decline in RCRA enforcement activity on the part of the states. He mentioned that, in 1996, the Commonwealth of Virginia reported a 98% decline in the amount of penalties collected under its environmental statutes. He also observed that numerous states have adopted amnesty laws that mandate forgiveness for certain environmental statutes, and that 24 states have adopted some sort of environmental audit privilege or immunity law. *See* Rechtschaffen, *supra* note 3.

6. *See* Sylvia Lawrence, Principal Deputy Assistant Administrator of the Office of Enforcement and Compliance Assistance, U.S. EPA, Presentation: *Innovations in EPA's Compliance and Enforcement Program* (Feb. 3, 1999); *see also* ENVIRONMENTAL WORKING GROUP, ABOVE THE LAW: HOW THE GOVERNMENT LETS MAJOR POLLUTERS OFF THE HOOK

Rechtschaffen mentioned, citizens groups among others have taken the view that government agencies should be more aggressive and more focused on the goal of deterrence in their enforcement efforts.

How accurate and useful is Clifford Rechtschaffen's overview of recent trends and approaches in environmental enforcement? In my judgment, Rechtschaffen's summary is indeed perceptive and sound. This seems especially true when one takes account of his candid acknowledgment that he was "painting in broad strokes" in presenting his observations and of the time constraints he faced in the setting of a panel discussion.

I would add to Rechtschaffen's overview only one caveat, as well as brief mention of two trends that Professor Rechtschaffen would most likely have mentioned himself if he had had more time. In my experience with environmental enforcement (both as a participant and an observer), I have found that it is often risky to generalize about classes of actors or institutions in the field (such as federal enforcement officials, Congressional oversight committees, local agency inspectors, EPA regional offices, environmental citizens organizations, etc.). This is especially true with respect to states and state environmental agencies.

State agencies do differ from one another in the vigor and philosophical orientation of their enforcement programs. In addition, internal changes in the leadership of state governments (as state governors and legislators are replaced and reemerge in response to the outcomes of elections and constitutional term limits) frequently have important impacts on the direction and scope of state environmental enforcement programs. Moreover, within state agencies, enforcement approaches in different environmental media (air, water, waste, etc.) may be inconsistent, and state agencies are also subject to extensive turnover among their professional staffs that may influence the nature and extent of their enforcement efforts.

In noting those things, I do not question the overall validity of Professor Rechtschaffen's conclusion regarding state agency attitudes towards the role of environmental enforcement. His observation is largely correct in my view (as are the recent criticisms of state enforcement expressed by the EPA's Inspector General (IG) and the U.S. General Accounting Office).[7] I only wish to suggest that, like so many facets of environmental enforcement, the performance and attitudes of state environmental agencies is a matter about which it is not easy to generalize.[8]

(1999).

7. *See* Cohen, *infra* note 13 and accompanying text.

8. In one respect, however, this observation must be qualified. As discussed further *infra*,

Two recent trends that Rechtschaffen's thoughtful summary did not refer to are a marked increase in organized lobbying by state environmental agencies in favor of greater state autonomy in implementing federally mandated environmental requirements, and a significant paucity of resources (at all governmental levels) to establish and enforce environmental standards.

In the mid-1990's, the Environmental Council of States (ECOS) was created. This organization, whose members are political appointees that head state environmental agencies, led a well organized and politically effective effort to criticize EPA "arrogance" and discourage Agency "interference" with state agency decisions and activities. ECOS's rising national influence (which coincided with the advent of Republican Party control of the U.S. Congress and a majority of state governorships) has been the backcloth against which recent EPA conflicts and tensions with particular states (over enforcement as well as other issues) have been played out.

At the same time, both EPA and the states have been faced with ever-increasing regulatory mandates and enforcement responsibilities, and a stagnant or declining pool of budgetary resources. Adjusted for inflation, the EPA's budget has essentially remained constant since 1984.[9] At the same time, however, the requirements imposed upon the Agency during that period (under amendments to the Clean Air Act, Safe Drinking Water Act, Federal Insecticide Fungicide and Rodenticide Act, and other statutes) have increased many times. The situation at the state level is no more sanguine. In fact, according to the U.S. General Accounting Office, environmental regulations at both the federal and state levels consider inadequate resources to be the single greatest problem that they face.[10]

III. THE PROPER ROLE OF COMPLIANCE ASSURANCE

Notwithstanding its title, the AALS panel discussion on environmental enforcement focused on the relative appropriateness of deterrence-based and cooperation-based enforcement to a surprisingly minimal extent.

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over the past several years (as a political strategy intended to further what are evidently seen as their common interests) individual states have been speaking about enforcement and environmental federalism issues with something of a singular voice through the Environmental Council of States (ECOS).

9. *See* U.S. Gen. Accounting Office, *EPA and the States: Environmental Challenges Require A Better Working Relationship*, GAO/RCED-95-65 (1995).

10. *Id.*

Steve Herman confirmed one aspect of Cliff Rechtschaffen's summary by stating that "[at EPA], traditional enforcement is at the base of our program." He opined that "a law without a sanction is not worth very much" and noted that an EPA analysis of the "root courses of pollution" had found that, in a number of cases, companies had exceeded environmental standards in order to gain a competitive advantage over economic competitors in the same industry.

At the same time, however, Herman allowed that "all of the violators are not bad guys, and whether they are or not is irrelevant because our statutes are trying to protect us from bad behavior and pollution - whether it is from good guys or bad guys." He took the view that "different tools and approaches can reach different communities in different ways." Thus, EPA has supplemented its traditional judicial and administrative enforcement regimes with a self-disclosure policy which "has resulted in several hundred companies voluntarily disclosing their violations, and either having no penalty or a very mitigated penalty if the violations are corrected."[11]

Herman added that the Agency has opened "online compliance assistance centers" for several industrial sectors (including auto repair, dry cleaning, printing, etc.). People who work in those sectors may ask EPA questions, by e-mail, with regard to their compliance problems and issues. They may also discuss compliance problems among themselves on designated "chat rooms."

Terry Bossert indicated that the Pennsylvania Department of Environmental Protection "didn't hesitate" to use traditional enforcement tools where they were deemed appropriate. They were also willing to pursue compliance assistance when it was needed. To Bossert, "the debate should really be about the balance of the two enforcement tools, not one or the other." Moreover, in his opinion, governmental compliance assistance should be used primarily to help small companies which "lack the internal resources" to set up and adhere to functioning environmental management systems.

Fran Dubrowski briefly expressed a far more skeptical view of compliance assistance. She exclaimed, "[L]et's face it, there are some real horror stories buried in this very euphoric-sounding language about compliance assistance!" At the same time, however, Dubrowski indicated a preference for giving state agencies "an

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11. Incentives For Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995). *See also* Incentives For Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

opportunity to manage for real world environmental results, as opposed to paper-shuffling."

Finally, Lois Schiffer also saw "a continuing need for strong and effective enforcement - both at the federal and the state level." She explained the essentiality of a deterrent enforcement approach through a simple yet persuasive analogy to income tax requirements:

> Most of us file now our tax forms on or before April 15th. If I came to you and I said it would be very nice if you did that, and I'll fill out the form and show you how to do it, but nothing bad will happen to you if you don't do it, you might do it anyway the first year. I could say that if you don't do it again I'll publish an announcement and you'll be shamed. That might get you to do it a second year. But if nothing bad happens to you, pretty soon you would wake up and say "I'm not going to do it."

In fact, deterrent enforcement is a critical element in any effective regulatory enforcement program. Without it, presently noncomplying companies will have a self-interested reason to continue to violate environmental standards. Noncomplying firms will be permitted to disrupt the marketplace by benefiting economically through their violations.[12] Moreover, some entities that presently comply with environmental requirements will be encouraged to "backslide" and, over the long term, environmental protection will once again become a low priority for numerous firms and communities.[13]

Despite this, as I have suggested in another essay,[14] governmental compliance assistance to certain regulated parties does have a legitimate place in the work of environmental agencies. Such assistance will be most effective if it is kept on a small scale, focused on smaller businesses and communities, provided mostly in the pre-enforcement stages of regulatory implementation, and given with discretion and care so as not to undermine planned and ongoing deterrent enforcement cases.

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12. For an interesting essay that expands upon this point, *see* Robert A. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2377-78 (1996).

13. Empirical research by social scientists over the past fifteen years supports these conclusions. For a useful summary, *see* Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ENVTL. L. REP. 10245 (Apr., 2000).

14. *See* Joel A. Mintz, *Rebuttal: EPA Enforcement and the Challenge of Change*, 26 ENVTL. L. REP. 10538 (Oct., 1996).

Compliance assistance is indeed a worthwhile supplement to a deterrent enforcement effort. Ideally, it can encourage regulatory compliance while building good will for regulatory agencies. At the same time, however, compliance assistance can be a prescription for regulatory timidity and inaction if it serves (whether intentionally or by default) to supplant a vigorous, even-handed program of deterrent enforcement.

IV. How Much Enforcement Authority Should State Environmental Agencies Have?

At the close of his opening summary at the AALS panel discussion, Clifford Rechtschaffen posed the following specific question to Terry Bossert: "There have been a series of reports by the U.S. General Accounting Office (GAO) and the EPA's Inspector General (IG) over the past five years, that document revealed very serious deficiencies in the way that states enforce environmental laws.[15] Yet EPA, through the National Environmental Performance Partnership System (NEPPS) has been seeking to provide greater autonomy to the states in how they enforce environmental laws. Is this greater autonomy justified?"

Bossert responded that, from a state perspective, he did not agree with some of the characterizations that were made by the GAO and EPA's IG. Nonetheless, he conceded, "there definitely have been glitches between the states and EPA."

Bossert expressed the view that EPA has been "too planning-focused" with regard to enforcement and that it has tried to force that orientation on state environmental agencies. He added, "By the same token the states have been too resistant to that and have too long relied on the excuse that 'Things come up; we have to deal with problems as they arise.'"

Bossert views the EPA's performance partnership system as a "potential opportunity" for the Agency to accommodate the states' needs to pursue enforcement and compliance assistance "where it is really needed." In his opinion, that may or may not be with regard to major industrial facilities, since such facilities may or may not

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15. *See* U.S. EPA Office of Inspector Gen., Consolidated Report on OECA's Oversight of Regional and State Air Enforcement Programs (Sept. 25, 1998); *State Alternative Environmental Compliance Strategies: Hearings Before the House Subcommittee on Oversight and Investigations of the House Commerce Committee*, 10th Cong. 97 (1997) (prepared testimony of Nikki Tinsley, Acting Inspector General, U.S. Environmental Protection Agency, summarizing several pertinent IG reports); U.S. Gen. Accounting Office, *Water Pollution: Observations on Compliance and Enforcement Activities Under the Clean Water Act*, GAO/T-RCED-91-90 (1991); U.S. Gen. Accounting Office, *Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention*, GAO/RCED-96-23 (1996).

cause the major environmental problems. The states thus need flexibility as to how best to use their own enforcement and compliance assistance resources.

At the same time, Bossert opined, performance partnership agreements also give EPA an opportunity to force the states to lay out a cogent strategy for balancing the use of traditional enforcement and compliance assistance. He candidly noted, when he served as General Counsel of the Pennsylvania Department of Environmental Protection, that "Trying to get some of the people in my own agency to recognize there was a benefit in that was like pulling teeth! . . . It was very difficult."

From the EPA's perspective, Steve Herman stated that federal environmental statutes contemplate both state and federal enforcement and "the system only works where there is both."

Herman took note of the fact that "there was – and to some extent still is – a significant tension and struggle between the states and the federal government." The emphasis on "partnership" and "state autonomy," without a clear definition of those terms, has led to "some very serious problems and misunderstandings." He stated that, particularly in 1994 and 1995, some states understood their partnership with the Agency to be a "one way street" in the sense that "the states would declare what they wanted to do and EPA would agree to it."

Herman mentioned that EPA's headquarters have instructed the Agency's regional personnel to have separate "enforcement planning meetings" with state officials in which national, regional, and state priorities are identified. However, he stated, "getting EPA regions and the states to agree on what the priorities are going to be, and the roles each are going to play, has been a major effort." In Herman's words:

> With some states there has been success in collaboration in some major cases. On the other hand, some states have taken the position that if an [enforcement] program is delegated to the state, EPA is out. We don't agree with that. We have a responsibility to maintain a level playing-field among the states so you don't have a "pollution-haven" formed in the states.[16]

16. Over the past few years there has been a heated debate among legal academics as to this notion, often referred to as the "race-to-the-bottom" rationale for federal environmental regulation. For a sampling of law review articles from that debate, *see* Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Daniel C. Esty,

Lois Schiffer disagreed with Rosenberg. She cited the example of the Smithfield Company, a meatpacking firm in Virginia that had stated it would leave that state if state officials enforced the Clean Water Act against it.

Despite these intergovernmental conflicts over questions of enforcement jurisdiction and methodology (which Steve Herman believes are "not very different from the federalism battles being fought in other contexts"), Herman believes that, from EPA's standpoint, genuine progress has been made in recent years. He stated that, "in many places, over the last three to four years, there has been a change." Now, according to Herman, "our regions have been getting more cooperation in terms of the [enforcement] planning process."[17]

Fran Dubrowski stated that she views greater autonomy for state agencies as "something of a mixed bag." She noted that, in mid-1999, EPA proposed to amend its Clean Water Act pretreatment regulations so as to allow local municipalities to ease the basic standards at issue with little guidance from or oversight by EPA. "Let's call a spade a spade," she declared. "That's not autonomy-giving. That's a rollback!"

Dubrowski observed that EPA has never "pulled a state program, despite extreme provocation" once that program has been delegated to the state. She cited as an example the Agency's inaction in the face of a decision of the Commonwealth of Virginia to disband its mobile laboratories. These labs had given that state the capability to do random spot-checks on the accuracy of Discharge Monitoring Reports (DMR's) submitted to state inspectors by industrial discharges. "Autonomy," she suggested, "has to be coupled with a broader sense of responsibility."

Revitalizing Environmental Federalism, 95 MICH. L. REV. 570 (1996); Joshua D. Sarnoff, *The Continuing Imperative (But Only From A National Perspective) For Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Peter P. Swire, *The Race To Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions In Environmental Law*, 14 YALE J. ON REG. 67 (1996); Kirsten H. Engel and Scott R. Saleska, *"Facts Are Stubborn Things": An Empirical Reality Check In the Theoretical Debate Over The Race-To-The-Bottom In State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55 (Fall 1998).

In the discussion, Ernie Rosenberg took issue with Steve Herman's last conclusion. He stated that "the level playing field is not a real issue in the enforcement area.... Corporations just don't make their decisions on the basis [of state enforcement policies and the stringency of regulations]." Instead, he indicated that "where states drive corporations away it is because of difficulties with getting on with business and the process and paperwork of the state."

17. Mr. Herman's observation is undoubtedly true in part. Nonetheless, recent conversations with EPA enforcement personnel in several regional offices lead me to believe that the new federal-state cooperation which Herman describes is not a universal phenomenon.

Finally, Ms. Dubrowski urged that the EPA set aside "a pot of money" to provide federal resources to substitute for state programs that are not being enforced. Unless that happens, she suggested, "the push for autonomy will not really have any credibility."

Ernie Rosenberg took a differing position. He indicated that "you don't really have any choice about giving the states additional autonomy at this stage of the game."

Rosenberg pointed out that, in annual Congressional budgetary deliberations, EPA competes with other agencies and departments (such as Housing and Urban Development, National Aeronautics and Space Administration, and Veterans Affairs) that are within the same budgetary "account" and have politically influential constituencies of their own. In view of this, Rosenberg opined, the prospects for an increase in EPA's resources are "minimal." Thus, he concluded, if EPA did set aside money for an enforcement contingency fund (to be expended in the event that state-level enforcement proved inadequate) that money "would just disappear in the next budget round."

Finally, Steve Herman responded to Fran Dubrowski's suggestion that EPA should be more aggressive in taking back enforcement programs it has delegated to state environmental agencies. Herman stated that the larger question raised by her proposal is the following: if the EPA does "pull back" a delegated program in a state, will the Agency do a better job of administering it than the state is already doing? In Herman's view, while this is partly a question of will and outlook, it is also, in very large part, a matter of resources.

Herman noted that EPA's personnel numbers are not growing while its responsibilities are on the increase. "What we're trying to do in the enforcement area and others," he explained, "is to see where we can get the biggest bang for the buck – in terms of protecting public health and the environment – with these resources we have." Given this, Herman indicated, EPA has been reluctant to withdraw state enforcement authority in certain states.

As mentioned earlier in this essay, state agencies tend to differ considerably with regard to environmental enforcement. Their performances in this area also vary over time. In view of this, EPA would do well to base its decisions as to where and when to delegate enforcement programs (and grant states "enforcement autonomy") on uniform objective criteria which go to state agencies' levels of personnel resources, experience, and past performance in inspection and enforcement. These criteria should be applied without regard to political favoritism, and EPA determinations with respect to delegations (and the level of EPA oversight of enforcement in

particular states) should be revisited, at regular intervals, to take account of charges in institutional performance at the state level.[18]

To at least some extent, Terry Bossert is right to suggest that EPA should accommodate the needs of particular states for flexibility in pursuing enforcement and compliance assistance. At the same time, however, where states are reluctant or unwilling to take enforcement actions against major industrial violators, the Agency should place the burden on state officials to show specifically why those sources are not causing major environmental harm.

Fran Dubrowski's intriguing proposal for a "contingency fund" to be used by EPA where the Agency must remove state enforcement authority due to inadequate performance may well be politically naive. Certainly, under current circumstances, withdrawals of state authority seem exceptionally unlikely. Nonetheless, other governmental entities in this country – most notably the United States military – do regularly maintain "reserve" personnel units, and there would seem to be little harm if the Agency's leadership at least requested the establishment of such a budgetary fund (for possible use in very rare cases of extreme noncooperation by state authorities).

V. HOW TO MEASURE ENFORCEMENT SUCCESS

The question of how environmental agencies should measure the success of their own enforcement programs has long been in controversy. At the AALS panel discussion, Terry Bossert suggested that it was appropriate for federal and state environmental agencies to measure the results of their enforcement activities in terms of their environmental impact. In his view, that approach is more important than such traditional measures as how many enforcement actions were initiated by the agency or how much money it has collected in penalties. Bossert suggested that if agencies focus exclusively on actions taken and penalties collected, "for the rank and file [within the agency] that becomes the be-all of their performance." However, such measures cast little light on how much the agency has done to promote future compliance.

Fran Dubrowski seemed to agree with Terry Bossert in part. She opined that enforcement and compliance programs should be assessed by asking two questions: 1) Are pollution levels going down; and 2) Is the public actively involved at all stages of implementation of the program?

Dubrowski noted that the Clinton Administration recently reported that some 40% of the nation's streams do not meet state

18. Rena Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351 (2000).

Water Quality Standards – approximately the same level of non-compliance as was reported in 1984 and 1994. However, state agencies have only surveyed 17% of river and stream miles, and much of that surveillance is based upon "evaluative guesses" rather than actual monitoring data. Thus, many undetected problems may not be revealed by these statistics.[19]

In order to assess enforcement based upon environmental indicators, Dubrowski suggested the water quality monitoring program needs to be changed and improved. There is a need for more monitoring stations and more sophisticated and accurate monitoring at those stations. Moreover, she stated, "we have to collect the data in a way that is coordinated as to sampling methods, locations of stations, and frequency of sampling (from jurisdiction to jurisdiction and from year to year)."

As to public participation in governmental enforcement programs, Dubrowski expressed the view that it is "widely viewed as broken." She stated:

> Decisions are often made behind closed doors. The public is involved too little and too late. That must be fixed. Programs should be evaluated in terms of that. Moreover, better means of evaluating public participation should be created than merely checking on whether letters [of notification as to meetings and hearings] are responded to.

Ernie Rosenberg was even more emphatic than Terry Bossert in his rejection of traditional methods of evaluating enforcement programs. He declared that "measuring the number of cases being brought is just useless." In Rosenberg's view, such data says nothing about the "overall universe of performance" within jurisdictions. In counting cases and penalties, he urged, "we're measuring failure, we're not measuring success."

Speaking for EPA, Steve Herman expressed a preference for gathering a comprehensive set of information to evaluate governmental enforcement performance. Herman stated "I'm for counting everything Terry [Bossert] and others want to count <u>and</u> for counting the enforcement actions."

Herman acknowledged that merely counting numbers of enforcement cases that have been initiated does not distinguish simple from complex cases. EPA has been attempting to measure

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19. J. Charles Fox, Testimony before Subcommittee on Department Operations, Oversight Nutrition and Forestry of the U.S. House of Representatives Committee on Agriculture (Oct. 28, 1999).

levels of pollution that are reduced as a result of specific enforcement actions. The Agency has also been trying to measure overall compliance rates in various industrial sectors and to evaluate the extent to which compliance assistance programs are effective in "getting results."[20]

Steve Herman noted that, in discussions with EPA, many states resist counting the number of traditional enforcement actions that they initiate. In some situations, in Herman's opinion, "that is a cover for not doing enforcement."

Mr. Herman noted that the Agency has given grants to 20 or more states to come up with new measures of enforcement effectiveness. "This is a difficult area," he observed, "and it will have to be a long-term effort."

Finally, Lois Schiffer took a position very similar to that expressed by Steve Herman. She indicated that environmental agencies need to measure both the environmental impacts of enforcement and overall numbers of enforcement actions and activities. According to Schiffer: "All of those . . . in the aggregate[,] give a picture of what's going on."

Ms. Schiffer made mention of the difficulties involved in measuring environmental results. She stated that it is especially hard to measure the deterrent effect that individual cases have "on other companies, down the road, who now have decided I might get caught too so I need to put on the pollution control equipment."[21]

Schiffer also agreed with Fran Dubrowski's view as to the importance of public participation in enforcement activities. In this regard, she noted, "you have to make sure you look at all the customers," including people who are hurt by pollution from non-complying facilities.

Who is right? How should governmental enforcement and compliance efforts be evaluated? No single measure (or set of measures) is likely to yield a fully accurate assessment of the strengths and weaknesses of environmental enforcement programs.[22] Contrary to the assertions of Bossert and Rosenberg,

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20. *See* U.S. EPA, National Performance Measures Strategy For EPA Enforcement and Compliance Assurance Program (1998).

21. While essentially correct, Ms. Schiffer's point here may well have been understated. In fact, at present, it seems virtually impossible (rather than merely "especially hard") to measure the kind of deterrent effect of particular enforcement cases that her statement refers to. This difficulty is because, in the current atmosphere, regulated companies are unwilling to admit or reveal instances when they have pursued pollution control measures more vigorously or carefully because they fear the potential consequences of environmental enforcement.

22. For a more extensive analysis of this question, *see* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 119-125 (1995).

numerical indications of enforcement actions initiated, penalties assessed, administrative orders issued, etc. are neither "useless" nor "unimportant." Taken together they are at least one yardstick, however crude or incomplete, of the tenacity and vigor with which environmental enforcement is being pursued.

At the same time, however, numerical indicators, standing alone, do have their shortcomings. Steve Herman is quite correct that such statistics frequently fail to distinguish simple enforcement cases from more complex (and resource consumptive) matters. Because of this, reliance on records of enforcement activity to measure enforcement success may well encourage enforcement officials to pursue minor, easily resolvable matters, while ignoring larger, more environmentally significant violations. Enforcement activity levels tell us nothing of the relative environmental impacts and benefits of enforcement actions. Moreover, raw enforcement activity statistics provide no indication of the promptness with which government officials initiate and complete enforcement cases and no data as to the number and severity of known violations that those officials have chosen not to address.

Fran Dubrowski's suggestion with regard to measuring enforcement success by environmental indicators has considerable appeal. If the purpose of environmental statutes and agencies is to roll back and prevent pollution, it seems logical to assess the efficacy of enforcement programs by their actual environmental results. Nonetheless, as Ms. Dubrowski's own comments regarding ambient water quality monitoring reflect, given the current, flawed state of environmental monitoring programs, reliance on ambient environmental data to evaluate environmental enforcement and compliance assistance efforts can be misleading.

Changes in environmental conditions may result from various factors wholly unrelated to enforcement, including weather conditions and variations in market conditions. For water, air and other media, the governmental records that are kept as to environmental trends are often incomplete, inconsistent, or inaccurate. It is particularly difficult to measure the environmental impact of enforcement or compliance with environmental requirements (such as spill prevention plans, contingency plans, employee training programs, etc.) that are primarily intended to prevent environmental problems rather than to eliminate existing difficulties. Moreover, many states have simply not devoted the numerous resources necessary to evaluate enforcement based upon environmental conditions.

The EPA was surely justified in attempting to estimate levels of pollution reduced as a result of specific enforcement actions. As the Agency has recognized, however, going beyond this to a more

sophisticated analysis of the reasons for environmental trends is a resource intensive task, fraught with practical obstacles.

A third approach to evaluating enforcement success – and one which EPA and some states have now begun to explore, albeit in a preliminary way – is to examine overall levels of compliance in various industrial sectors. This approach, however, when used to the exclusion of other types of measures, is also problematic for several reasons. First, it is difficult to assess industrial compliance rates accurately. At present, those rates are often rough approximations, indirectly supported by partial and incomplete data. Second, standing alone, rates of compliance provide no information as to the relative size or environmental importance of noncomplying pollution sources. Third, high rates of compliance do not necessarily reflect effective enforcement. Instead, they may reflect lax environmental standards, or plant closures resulting from causes wholly unrelated to environmental requirements. Thus, while useful, industrial compliance levels cannot be relied on as the sole (or even the primary) basis for evaluating environmental enforcement.[23]

Finally, as Fran Dubrowski and Lois Schiffer have urged, environmental enforcement programs may be judged by the effectiveness of their public participation programs. Few would suggest, I suspect, that this should be the <u>only</u> measure of enforcement effectiveness. Environmental agencies might do a fine job of inviting and promoting public participation and nonetheless have enforcement programs that are gravely flawed in other respects.

Nonetheless, enforcement programs that are open to public observation and comment are, at least potentially, more accountable to citizens with a stake in prompt, effective enforcement. Moreover, to the extent that environmental violations and enforcement actions are well publicized, the deterrent value of these enforcement actions may well be increased. Dubrowski's (and Schiffer's) recommendations regarding the role of public participation in enforcement are thus well taken.

In sum, no single measuring device can provide a sound basis for assessing the success of the environmental enforcement programs of governmental agencies. The EPA has been wise to expand the

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23. I do not wish to suggest, however, that industrial compliance levels are devoid of any value as a measure for environmental enforcement success. For a thoughtful analysis which concludes that, when types of pollution sources are controlled for, compliance rates may be meaningfully compared as to non-compliance times, *see* Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement In the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1 (1997).

kind and amount of information it gathers for this purpose. The Agency would do well to continue on this course and to encourage state environmental agencies to do the same.

VI. THE COMPLEXITY OF ENVIRONMENTAL REGULATIONS

During the AALS panel discussion, Ernie Rosenberg emphasized that, from the standpoint of regulated industries, EPA's regulations have become needlessly complex. In fact, he contended that regulatory complexity creates "almost an assurance" that there will be non-compliance.

Mr. Rosenberg illustrated his point by recounting an anecdote concerning EPA's Clean Air Act maximum achievable control technology (MACT) standards as to emissions of toxic air pollutants. Those standards contain both generally applicable standards and sets of standards that are industry-specific in their applicability. According to Rosenberg, when those standards were first proposed, the Chemical Manufacturers' Association asked EPA to clarify which portions of the proposed industry-specific standards superceded which portions of the proposed general standards. The Agency responded that the regulations were too complicated for that question to be answered at the front end. Instead, the answer would emerge "in enforcement, later down the road."

Rosenberg also stated that, when he worked at Occidental Petroleum, he and his colleagues had calculated that, at one refining plant, there were "several hundred thousand regulatory transactions per year." (He defined "regulatory transaction" as "any thing you would install or do, changes you would make, etc., that have a regulatory consequence.") In light of this, he suggested "the number of opportunities you have to violate [regulatory requirements] has escalated exponentially."

Rosenberg argued that regulatory complexity frequently stems from "administrative convenience, especially with regard to who has the burden of proof as to compliance." However, he said, "there is a cost to doing that." As an alternative approach, he recommended that EPA look at "the clarity and simplicity of the rules involved" and at "whether or not each of those increments of complexity really give you a benefit from a [pollution] control standpoint and is justified, given the cost of coming into compliance."

Steve Herman responded to Ernie Rosenberg's statements by stating that EPA's regulations "are complicated, but not that complicated really." He noted that, in many instances, the industrial processes that are being regulated are themselves very complex. Regulatory complexity is sometimes a function of that fact. In addition, Herman stated that "if you write a simple,

straightforward regulation, the first time you try to enforce it the industry lawyers will drive a truck through it. So [in drafting regulations] people [in the Agency] try to nail everything down [with specific regulatory language]."

To what extent does the complexity of federal environmental regulations pose a barrier to industrial compliance? While they cannot be entirely discredited or ignored, Ernie Rosenberg's articulately stated concerns on this point do appear exaggerated. Steve Herman is quite right in concluding that the Agency's regulations are "not that complex" in most instances, and where they are complex, this is often the result of Agency accession to regulatory changes demanded (or forced) by regulated entities. Moreover, regulated industries generally have access to well compensated attorneys and consultants, as well as a plethora of written materials, that explain EPA regulations and their applicability in reasonably straightforward terms. That is especially true of the larger, more profitable companies within such industries.

Mr. Rosenberg's anecdote regarding EPA's proposed MACT regulations does make a fair point. All regulated entities should certainly be afforded fair advance notice of the requirements they must meet. To the extent it is accurate, Rosenberg's vignette does reflect a serious failing on the Agency's part in that instance. At the same time, however, this anecdote is not necessarily an indication that EPA's regulations are typically too opaque for regulated companies (or even EPA personnel) to comprehend and apply. One suspects that that problem occurs far more rarely than Rosenberg appears to have implied. Additionally, where EPA regulations have failed to provide regulated parties with clear notice as to what was expected of them, courts have not hesitated to preclude Agency enforcement of those requirements.[24]

Mr. Rosenberg's statement with respect to the excessive number of "regulatory transactions" required at refineries is also difficult to credit. As Steve Herman mentioned, many industrial processes (such as refineries) are highly complex. To regulate them effectively, EPA must, at times, draft regulations that are themselves complex and lengthy. Moreover, Rosenberg provided no indication of the methodology he used in arriving at the striking conclusion that Occidental's plant had "several hundred thousand" regulatory transactions per annum. Nor did he state how many of those "transactions" concerned environmental requirements or how

24. *See, e.g.*, General Electric Co. v. United States EPA, 53 F.3d 1324 (D.C. Cir. 1995).

many "nonregulatory transactions" occurred annually at the same plant, as a result of production-related activities.[25]

Regulatory simplification may, perhaps, be a worthy goal in the abstract. Nonetheless, EPA and state regulators have been perspicacious in recognizing the risks that will result to human health and the environment if that goal is pursued in a careless or heavy-handed way.

VII. CONCLUSION: THE CRITICAL SIGNIFICANCE OF ADEQUATE ENFORCEMENT RESOURCES

The AALS panel discussion considered above raised a number of controversial and provocative questions regarding environmental enforcement at the federal and state levels. Given their diverse backgrounds and interests, it was, perhaps, not surprising that the thoughtful participants in this discussion reached differing conclusions as to the appropriate roles of deterrent and cooperative enforcement, the extent to which state agency enforcement efforts should be autonomous, the most appropriate way to measure governmental enforcement performance, and the significance of regulatory length and complexity in an enforcement context. However, an unspoken yet common theme does appear to emerge from this session: almost every credible, serious solution advanced to improve the efficacy and fairness of environmental enforcement will require an allocation of additional budgetary resources to a federal or state environmental agency.

As discussed previously, governmental compliance assistance to small business and communities seems a worthwhile supplement to a vigorous, deterrent enforcement program. In order for it to be effective, however, compliance assistance must be provided by a sufficient number of well-trained professionals who hold numerous meetings with regulated individuals, create informative Web sites, respond to e-mail inquiries and other information requests, and perform other required tasks. Unless new experts are hired to perform those functions (in federal and state environmental agencies), government technical personnel will have to be transferred to compliance assistance units from deterrent enforcement programs. Such a change would likely undercut the latter programs (which are allegedly understaffed in many cases), and it would diminish the deterrent impacts of their work.

Similarly, as we have observed, EPA's hand would be strengthened in its ongoing disputes with recalcitrant states if the

25. In fairness, in the setting of a panel discussion, one would not typically expect a presentation of these sorts of details.

Agency had the means to establish a contingency fund to be used – in particular states where necessary – to substitute effective EPA enforcement for lax or non-existent state agency enforcement. Obviously, such a fund would require an infusion of new monies into EPA's budgetary accounts.

Given the inadequacies of record keeping for environmental enforcement, we have seen that it would be sensible to supplement traditional compilations of new enforcement cases and penalties with more and better data regarding the environmental effects of enforcement and compliance assistance, compliance rates in industrial sectors, and public participation. However, additional record keeping of this sort will also consume federal and state resources.

Finally, regulatory simplification is also a resource-intensive task. To the extent that it is sound policy for EPA to review its voluminous set of regulations with a view towards simplifying them – without creating "loopholes" that will negate their important purposes and goals – the Agency will need to add to its professional staff to carry out that task.

As noted above, EPA and state level environmental officials have faced chronic resource shortcomings in recent years. This deficiency is not a new situation. As early as 1980, EPA's former deputy administrator, John Quarles, bemoaned the fact that the Agency's statutory responsibilities had increased far more quickly than its pool of personnel had grown.[26] And in March, 1991, a GAO official testified that, for more than a decade, EPA's budget had been "essentially capped" despite an enormous growth in the Agency's duties.[27] The GAO's more recent reports (referred to earlier) demonstrate that EPA's budgetary shortages have only worsened during the rest of the 1990's – as have similar resource gaps among state environmental agencies.

As Ernie Rosenberg has pointed out, some of EPA's budgetary woes stem from the fact that the House and Senate appropriations subcommittees that control EPA's funding levels also have jurisdiction over some 24 other agencies (from the Department of Veterans Affairs to the National Aeronautics and Space Administration). Competition for resources within this limited budgetary account is exceptionally intense. Moreover, unlike

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26. This question appears in Steven A. Cohen, *EPA: A Qualified Success*, *in* CONTROVERSIES IN ENVTL. POL'Y 179 (Sheldon Kaminiecki, Robert O'Brien & Michael Clarke eds., 1986).

27. *See Observations on the Environmental Protection Agency's Budget Request for Fiscal Year 1992, Hearings Before the U.S. Senate Comm. On Environment and Public Works*, 102nd Cong., 1st Sess. (1992) (statement of Richard L. Hembra).

certain of the agencies and departments with which it competes, EPA does not have a single, well-organized, and unified constituency that regularly supports its budget requests.[28]

In view of this situation, what can be done? One helpful step would be for those who are concerned about the declining institutional capability of environmental agencies – from citizen environmental organizations to state and local officials and others – to communicate their concerns to federal and state legislators in an informed and systematic way. Some such communication does now occur. It would certainly be useful, however, if it was more frequent, intensive and coordinated.

Beyond this, over the long-term, environmental organizations would do well to add to their list of goals and priorities a long-overdue reform of Congress' appropriation process (at least as it affects the EPA). The persistently "stacked deck" that EPA faces, as it scrambles for budgetary allocations, need not be accepted as inevitable. Instead, Congress can and should be urged to take discrete steps to alter the roles and composition of some of its own committees.

Specifically, the House and Senate Appropriations Committees can be restructured to create a separate subcommittee for environmental matters. In addition, committee memberships in both houses of Congress can be modified so that there is an overlap between the members of the committees that draft legislation which EPA must implement and the committee members with control over the Agency's budget.

Those changes would not guarantee that EPA and state environmental agencies would begin to receive a share of the federal budget that more closely approximates their important needs in the areas of enforcement and compliance assistance. Nonetheless, they would undoubtedly make that result more likely. And without them, the prospects for significant improvements in federal and state environmental enforcement – and in balanced and accurate assessment of its effectiveness – seem dim indeed.

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28. For more extensive discussion of the institutional arrangements affecting Congressional decisions as to EPA's budget, *see* MINTZ, *supra* note 22, at 115-118.