

## Motivating Enforcement: Institutional Culture and the Clean Water Act

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### SYNOPSIS:

Vigorous enforcement is a critical component of any credible environmental protection program. Congress recognized that fact when it enacted the Clean Water Act in 1972. The Act, therefore, contains an enforceable pollution control scheme, more than adequate federal enforcement tools, and calls upon the states and private citizens to aid in the enforcement of the Act. Unfortunately, enforcement efforts have lapsed several times in the recent past. This article explores a form of self-regulation that would create an ex ante limit on politically motivated attempts to undermine the Act through non-enforcement. While not fail-proof, the full blossoming of a proud, independent law enforcement culture within the enforcement staff itself may be one of the most feasible ways to maintain a stable and vital enforcement program.

### I. INTRODUCTION

In 1972, the United States Congress enacted one of the most complex and revolutionary pieces of legislation in its history. The Federal Water Pollution Control Act (“the Clean Water Act” or “the Act”)<sup>1</sup> made the federal government the dominant authority in an area where the states had long held primacy. It created a new uniform system of technology-based effluent limitations that would demand the same basic level of treatment for a particular industry, regardless of whether it was located in New York or Georgia, Oregon, or Louisiana. Industries could no longer block

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1. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)).

state pollution control efforts by threatening to relocate to more lenient jurisdictions. Discharge limitations could no longer be based on the capacity of a water body to meet state water quality standards, which in some cases protected no use beyond the water's utility for industrial or agricultural usage.<sup>2</sup> State water quality standards, however, were retained, expanded, and strengthened in order to supplement the technology-based limitations by protecting heavily used waters or waters with relatively low flows.<sup>3</sup>

To implement these new technology-based limitations and any more stringent limits necessary to meet state water quality standards, every point source discharger, municipal as well as industrial, was required to obtain a permit and comply with its terms and conditions. These permits transformed the general requirements of the Act into specific obligations that set forth precise numerical limits for each discharger at the point of discharge. The task of compliance as well as enforcement was thus greatly simplified. Proof of harm to the aquatic environment or any specific violation of ambient water standards was no longer required. Instead, one only had to compare the permittee's actual discharge with its permitted limits.

This concern with enforcement and enforceability permeated the design of the entire Act. The primary reason that Congress focused so intently upon enforcement lies in the history of prior federal attempts to control water pollution. The pre-1972 federal water pollution control program<sup>4</sup> had languished for years due to spotty and ineffectual efforts to exact compliance with its water quality objectives.<sup>5</sup> Thoroughly disenchanted with that pattern of impotence, Congress set out to cure the problem, not only by establishing an enforceable pollution control strategy, but also by strengthening the enforcement process itself.

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2. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 286 (2003) [hereinafter Andreen, *Evolution of Water Pollution Control: Part II*].

3. See *id.* at 276.

4. For a discussion of federal involvement in water pollution control prior to 1972, see generally N. William Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality Part III: The Federal Effort*, 52 IOWA L. REV. 799 (1967); Andreen, *Evolution of Water Pollution Control: Part II*, *supra* note 2.

5. See S. REP. NO. 92-414, at 5 (1971), reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1423 (1973) [hereinafter 2 LEG. HIST. 1972].

The Clean Water Act of 1972 gave the U.S. Environmental Protection Agency (“EPA”) enormous power to enforce by means of administrative orders<sup>6</sup> (a power augmented in 1987 by the authority to assess administrative penalties),<sup>7</sup> referrals of civil cases to the United States Department of Justice (“DOJ”) for penalties and injunctive relief,<sup>8</sup> and referrals of criminal cases to DOJ for prosecution.<sup>9</sup> Congress also preserved an important role for state government under the Act. In addition to setting water quality standards, states may obtain permission to administer and enforce the Act’s permit program within their borders.<sup>10</sup> Such state enforcement power, however, is not exclusive. In states with authorized permit programs, the EPA’s enforcement is concurrent with that of the states.<sup>11</sup> This redundant approach to enforcement power, moreover, does not end with joint governmental custody. Congress also empowered private citizens to file civil cases against those alleged to be in violation of the Act.<sup>12</sup>

Congress did not create this system of overlapping enforcement authority by accident. It was a deliberate reaction to earlier instances of enforcement lethargy. It was an expression of Congress’ skepticism about the ability or willingness of the EPA or any other single agency to continuously and vigorously enforce the law.<sup>13</sup> The Act, therefore, added a second governmental layer to the enforcement mix, taking advantage of the opportunities presented by the nation’s federal structure. Furthermore, even beyond these two governmental layers, the Act also called upon

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6. Federal Water Pollution Control Act, 33 U.S.C. § 1319(a) (2000).

7. *Id.* § 1319(g).

8. *Id.* § 1319(b).

9. *Id.* § 1319(c). A conviction subjects a violator to fines and imprisonment. *Id.* It also subjects a violator to debarment from federal contracting. *Id.* § 1368.

10. *Id.* § 1342(b).

11. See William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 218 (1987) [hereinafter Andreen, *Clean Water Act Enforcement*].

12. 33 U.S.C. § 1365(a)(1).

13. Congress’ skeptical attitude towards agency fidelity to its statutory design was expressed in other ways as well. The Act, therefore, contains a long series of mandatory duties, regulatory schedules, and deadlines all designed to thwart bureaucratic inaction and the possibility that future administrations might attempt to undermine the Act’s carefully articulated regulatory program. See William L. Andreen, *The Evolving Law of Environmental Protection in the United States: 1970-1991*, 9 ENVTL. & PLAN. L.J. 96, 98-100 (1992) [hereinafter Andreen, *Evolving Law of Environmental Protection*]. Congress’ use of such prophylactic mechanisms was not motivated only by prior experience or a perception that agencies were prone to capture. Congress, dominated by Democratic majorities, also distrusted the willingness of a Republican Nixon administration to faithfully execute the law. *Id.* at 98.

citizens to act as private attorneys general to either induce or supplement enforcement action by both layers of government.<sup>14</sup> In this way, Congress reduced the possibility of what Professor William Buzbee has called “regulatory underkill,” which can result from the failure to adequately enforce a statutory scheme.<sup>15</sup>

The Clean Water Act, however, did not stop with merely creating various layers of governmental and private enforcement. Through this Act, Congress also attempted to cabin the kind of enforcement discretion that administrative agencies typically enjoy. While Congress gave the EPA discretion in deciding whether or not to refer a civil case to DOJ,<sup>16</sup> the Act provides that the EPA “shall,” upon the finding of a violation, issue an administrative compliance order, unless it has either referred the matter to DOJ or a state (in the case of a state-issued permit) has brought appropriate enforcement action.<sup>17</sup> Despite this mandate, however, statements contained in the legislative history suggest that Congress believed that the EPA would retain enough discretion to enable it to focus its limited administrative enforcement resources upon serious cases.<sup>18</sup> Perhaps unsurprisingly, the federal courts have been largely reluctant to entertain cases challenging EPA enforcement inaction. The majority of such cases have held that the EPA’s duty to issue compliance orders is not mandatory,<sup>19</sup> reflecting the traditional view that the courts are inappropriate fora in which to review an agency’s failure to enforce.<sup>20</sup>

Agencies certainly do need to exercise a certain amount of discretion in their enforcement programs. This discretion is not only necessary but also inevitable.<sup>21</sup> Agencies must be able to tailor their programs to specific priorities and targets; they must be able

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14. See JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 4 (1987).

15. William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108 (2005) [hereinafter Buzbee, *Contextual Environmental Federalism*].

16. 33 U.S.C. § 1319(b) (merely authorizing the commencement of civil action).

17. *Id.* § 1319(a)(1), (3); see also Andreen, *Clean Water Act Enforcement*, *supra* note 11, at 208-09, 239-41.

18. See Andreen, *Clean Water Act Enforcement*, *supra* note 11, at 227-28, 241.

19. See, e.g., *Sierra Club v. Whitman*, 268 F.3d 898, 903 (9th Cir. 2001); *Dubois v. Thomas*, 820 F.2d 943, 951 (8th Cir. 1987); *Sierra Club v. Train*, 557 F.2d 485, 491 (5th Cir. 1977). *But see* *S.C. Wildlife Fed’n v. Alexander*, 457 F. Supp. 118, 134 (D.S.C. 1978); *Save the Valley, Inc. v. EPA*, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000) (construing a similar provision in the Act).

20. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

21. See Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327, 1374 (2004) [hereinafter Rechtschaffen, *Promoting Pragmatic Risk Regulation*].

to husband their resources in prudent fashion, weighing the probabilities of eventual success;<sup>22</sup> they must be able to be flexible in the use of formal and informal enforcement mechanisms; and they must, above all, be reasonable and fair.<sup>23</sup> Discretion, however, can be abused, and Congress anticipated that fact when it drafted the Clean Water Act. It feared, with good reason, that not all future administrations or Congresses would be sympathetic with the goals of the Act or its vigorous enforcement.

EPA enforcement, unfortunately, is quite vulnerable to administrative or political manipulation because the level and quality of EPA enforcement activity is not particularly transparent.<sup>24</sup> No trip wire is breached, no public notice is given, and no report is transmitted to Congress when zeal falters and EPA enforcement efforts fade. On the whole, environmental enforcement is a relatively humdrum, bureaucratic affair—clearly unlike the promulgation or rescission of regulations, which is subject to public notice and comment.<sup>25</sup> Enforcement, therefore, is an attractive target, due to its obscurity, for an administration or a Congress intent on undermining an Act with which it fundamentally disagrees. Rather than risk defeat and public opprobrium in an attempt to directly amend the Clean Water Act, opponents are far more likely to utilize “indirect, less visible techniques” to undercut the Act.<sup>26</sup> Such back door approaches to “regulatory reform” are virtually the only devices available to opponents of environmental regulation when the public continues—as it has for decades—to strongly support environmental protection.<sup>27</sup>

EPA enforcement of the Clean Water Act has suffered through three such periods of diminished enforcement intensity, twice falling victim to administration policy and once to congres-

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22. See *Heckler*, 470 U.S. at 831.

23. See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 17 (1969) (discussing the need to tailor results to the unique facts of particular cases); Rechtschaffen, *Promoting Pragmatic Risk Regulation*, *supra* note 21, at 1334 (noting that EPA enforcers “do not rigidly or uniformly enforce the law in a one-size-fits-all approach”).

24. See Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN’S J. LEGAL COMMENT. 625, 640 (1994) (“few areas of the law . . . are more hidden from the public’s view and oversight than an agency’s enforcement actions”).

25. See Administrative Procedure Act, 5 U.S.C. § 553 (2000) (setting forth the procedure for the promulgation of informal rules).

26. See generally William W. Buzbee, *Regulatory Underkill in an Era of Anti-Environmental Majorities*, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 142 (Michael Allan Wolf ed., 2005).

27. *Id.* at 141.

sional hostility. The first lapse in EPA enforcement occurred during the early years of the Reagan administration. President Reagan, convinced that regulatory costs were too high, attempted to make environmental law more business friendly.<sup>28</sup> At the EPA, this meant that enforcement was to be “nonconfrontational.”<sup>29</sup> Informal efforts to spur voluntary compliance became the order of the day and any civil referrals from a regional office to headquarters became “black mark[s]” against enforcement personnel.<sup>30</sup> In addition, EPA and state enforcement resources fell. Between 1980 and 1983, the EPA’s enforcement budget plummeted 39%<sup>31</sup> and federal aid to state programs fell 29%.<sup>32</sup> The size of the EPA’s pollution enforcement staff, consequently, dropped 35% between 1980 and 1984.<sup>33</sup> As if that was not bad enough, the staff that remained had to endure several reorganizations, which many viewed as attempts to downgrade enforcement.<sup>34</sup> All of this had a predictable impact on morale and enforcement efforts. Between 1980 and 1982, civil referrals to DOJ declined 47%, and administrative actions under the EPA’s two most important statutes, the Clean Water Act and the Clean Air Act,<sup>35</sup> decreased by nearly 50%.<sup>36</sup>

The Reagan era enforcement hiatus came to an end in 1984—not long after the fall of twenty of the EPA’s top political appointees, all victims of a festering scandal surrounding possible political manipulation of hazardous waste clean-up actions and refusal

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28. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 98 (2004) [hereinafter LAZARUS, *MAKING ENVIRONMENTAL LAW*].

29. See JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* 42 (1995) [hereinafter MINTZ, *ENFORCEMENT AT THE EPA*].

30. *Id.*

31. See MARSHAL R. GOODMAN & MARGARET T. WRIGHTSON, *MANAGING REGULATORY REFORM: THE REAGAN STRATEGY AND ITS IMPACT* 132 (1987).

32. EPA provided approximately \$329 million to state programs in 1980. See *Department of Housing and Urban Development—Independent Agencies Appropriations for 1982: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 97th Cong. 281, 287, 535, 641, 709, 759 (1981). By 1983, that had dwindled to \$239 million. See *Department of Housing and Urban Development—Independent Agencies Appropriations for 1985: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 98th Cong. 470, 547, 613, 659, 709 (1984).

33. GOODMAN & WRIGHTSON, *supra* note 31, at 132.

34. See *id.*

35. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

36. Between 1980 and 1982, the number of administrative actions initiated by EPA under the two statutes (and the Safe Drinking Water Act) fell from 655 to 350. See OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, U.S. ENVTL. PROT. AGENCY, *ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989 app.* (1990).

to comply with a congressional subpoena.<sup>37</sup> The agency and its enforcement credibility, however, had been severely damaged by this extreme politicization.<sup>38</sup> The scars would take years to heal.

The second period of retrenchment in environmental enforcement came after the 1994 election of a Republican majority to both houses of Congress. Dedicated to cutting government and freeing the market, the new Republican leadership targeted federal environmental law for “significant curtailment.”<sup>39</sup> Although the anti-environmental forces on Capitol Hill eventually failed to produce significant legislative change,<sup>40</sup> the anti-regulatory mood they created during these years did have a significant impact on environmental enforcement at the EPA. Influenced, perhaps intimidated by this mood on Capitol Hill, many members of President Clinton’s leadership team at the EPA became more cautious in terms of enforcement.<sup>41</sup> They introduced a new emphasis upon compliance assistance and various incentive programs, which siphoned resources from traditional enforcement and confused the staff about the agency’s direction.<sup>42</sup> In addition, a major reorganization of the enforcement program—necessary to consolidate the agency’s enforcement functions, which had been split among numerous offices during the Reagan era—also contributed to a slowing of enforcement momentum.<sup>43</sup> Between 1994 and 1995, civil referrals to DOJ fell 50%, and civil referrals remained 31% below 1994 levels in 1996.<sup>44</sup> Total enforcement actions, moreover, were 18% below 1994 levels in 1995 and fell to 35% below 1994 levels in

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37. See Norman J. Vig, *The President and the Environment: Revolution or Retreat?*, in ENVIRONMENTAL POLICY IN THE 1980S: REAGAN’S NEW AGENDA 77, 91 (Norman J. Vig & Michael E. Kraft eds., 1984).

38. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 347 (1991).

39. See LAZARUS, MAKING ENVIRONMENTAL LAW, *supra* note 28, at 129.

40. *Id.* at 131.

41. Buzbee, *Contextual Environmental Federalism*, *supra* note 15, at 123-24 (“An embattled EPA during the mid-years of the Clinton administration was . . . seldom ‘gung-ho’ regarding enforcement.”).

42. See Joel A. Mintz, “Neither the Best of Times Nor the Worst of Times”: EPA Enforcement During the Clinton Administration, 35 ENVTL. L. REP. (Envtl. Law Inst.) 10,390, 10,392-94 (2005) [hereinafter Mintz, *Enforcement During the Clinton Administration*].

43. See *id.* at 10,395-98.

44. There were 430 civil referrals in 1994, 214 in 1995, and 295 in 1996. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT: FY 1997 A-5 (1998) [hereinafter 1997 EPA ENFORCEMENT REPORT].

1996.<sup>45</sup> Although enforcement stabilized in 1997 by returning to 1994 levels,<sup>46</sup> misunderstanding and confusion had been sown throughout the regulated community.

The third and most recent decline in enforcement vigor came early in the administration of President George W. Bush when the EPA's enforcement staff interpreted a number of statements and actions by the agency's new political appointees as indicating that enforcement "would be given short shrift" in the coming years.<sup>47</sup> As a result, the agency's enforcement efforts foundered. Between 1997 and 2002, EPA referrals to DOJ under the Clean Water Act fell 55%.<sup>48</sup> Total civil referrals were down 41% and remained from 37% to 39% below 1997 levels from 2003 through 2005.<sup>49</sup> Between 1997 and 2002, total enforcement activity dropped 27%; by 2004, however, a rise in administrative orders returned total enforcement figures to normal levels.<sup>50</sup>

Although redundant enforcement mechanisms create the tools through which states could, theoretically, pick up the slack during periods of reduced federal effort, experience indicates that—in general at least—states have not done so.<sup>51</sup> During the

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45. In 1994, there were a total of 4194 actions taken by EPA (including criminal and civil referrals, administrative compliance orders, and administrative penalty complaints), whereas there were 3439 such actions in 1995 and 2728 in 1996. *See id.* at A-3 to A-5.

46. *See* Mintz, *Enforcement During the Clinton Administration*, *supra* note 42, at 10,401.

47. *See* Joel A. Mintz, "Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENVTL. L. REP. (Envtl. Law Inst.) 10,912, 10,914 (2004) [hereinafter Mintz, *Enforcement During the Bush II Administration*]. EPA's enforcement resources were also reduced in recent years. Between 2001 and 2003, EPA's enforcement and inspection staff was pruned by over 12%. *See* Rechtschaffen, *Promoting Pragmatic Risk Regulation*, *supra* note 21, at 1347.

48. *See* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 40 (2003) [hereinafter May, *Trends*].

49. Civil referrals fell from 426 in 1997 to 252 in 2002, 268 in 2003, 265 in 2004, and 259 in 2005. *Compare* 1997 EPA ENFORCEMENT REPORT, *supra* note 44, at A-5, with OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, FY 2005 COMPLIANCE & ENFORCEMENT ANNUAL RESULTS 7 (2005) [hereinafter 2005 EPA ENFORCEMENT RESULTS].

50. EPA took a total of 4131 enforcement actions in 1997 whereas the total was 3035 in 2002 and 4194 in 2004. *Compare* 1997 EPA ENFORCEMENT REPORT, *supra* note 44, at A-3 to A-5 (civil and criminal referrals, administrative compliance orders, and administrative penalty complaints), with 2005 EPA ENFORCEMENT RESULTS, *supra* note 49, at 7, 9, 11 (not including another 200 or so criminal referrals since EPA no longer reports those numbers).

51. A fall in federal environmental zeal creates opportunities for environmentally-inclined states to supplement federal enforcement. Buzbee, *Contextual Environmental Federalism*, *supra* note 15, at 116. Unfortunately, while some states may act to fill the breach, it appears as if most have failed to do so.

Reagan era enforcement hiatus of the early 1980s, for example, state enforcement and inspection activity actually fell.<sup>52</sup> The trend has been even worse during the last fifteen years. State agency referrals of civil cases to their state attorneys general fell every year (except for one) from 1993 to 2001, resulting in an overall decline of 55%—from a total of 690 to 320.<sup>53</sup> In 1995 and 1996, years when the EPA was experiencing a significant drop in enforcement, state administrative enforcement slipped 13% from 1994 levels in 1995 and 17% in 1996.<sup>54</sup> Despite an improvement in 1997 and 1998, state administrative enforcement again decreased between 1998 and 2001, this time a precipitous 40%.<sup>55</sup> Professor Clifford Rechtschaffen also reports, that a number of recent studies have identified serious structural flaws in many state enforcement programs. These include a “failure to carry out inspections, failure to take timely and appropriate enforcement actions, and failure to obtain meaningful penalties, including penalties that recover the economic benefit of noncompliance.”<sup>56</sup>

Although declines in state and federal enforcement greatly hinder acts intended to protect the environment, the vitality of environmental enforcement could be restored, in part at least, by robust citizen suit activity. Such was the case during the Reagan administration when environmental organizations brought hundreds of cases to enforce the terms of the Clean Water Act.<sup>57</sup> Since

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52. See Jeffrey G. Miller, *The Decline and Fall of EPA Enforcement*, ENVTL. ANALYST, Aug. 1983, at 5; see also Rochelle L. Stanfield, *Ruckelshaus Casts EPA as “Gorilla” in States’ Enforcement Closet*, NAT’L J., May 26, 1984, at 1034, 1034-35 (“Unless [the states] have a gorilla in the closet, they can’t do the job. And the gorilla is EPA . . . . The states can’t enforce these laws by themselves. They need us. They’ll complain and scream, but if they don’t have us, they are dead.” (quoting former EPA Administrator William Ruckelshaus)).

53. See May, *Trends*, *supra* note 48, at 46.

54. The states initiated 9785 administrative actions in 1995 and 9306 in 1996 as compared to 11,881 in 1994. See 1997 EPA ENFORCEMENT REPORT, *supra* note 44, at A-6.

55. See May, *Trends*, *supra* note 48, at 46.

56. Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 784 (2004) [hereinafter Rechtschaffen, *Enforcing the Clean Water Act*]. See David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 43-51 (2000) (discussing these deficiencies at length). A few states, however, have actually strengthened their enforcement programs in recent years. See Rechtschaffen, *Enforcing the Clean Water Act*, *supra*, at 785.

57. See ENVTL. LAW INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTION UNDER EPA-ADMINISTERED STATUTES vi-vii (1984); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 997 (4th ed. 2003).

then, however, the federal courts have placed numerous obstacles in the paths of citizens who seek to enforce environmental laws.<sup>58</sup> Perhaps as a consequence, 25% fewer notices of intent to file suit were sent in 2002 than in 1995.<sup>59</sup> Actual citizen suits logged by DOJ under the Clean Water and Clean Air Acts reveal a 38% fall in 2002 from the prior eight year high.<sup>60</sup> Citizen suits, however, remain significant. The forty-eight citizen suits that were logged under the Clean Water and Clean Air Acts in 2002<sup>61</sup> actually compares fairly well with a recent ten-year average of the EPA's civil referrals under both Acts—176 referrals per year.<sup>62</sup> Citizen suits to enforce environmental law remain an important supplement to government action; they are not, however, a replacement.

Breakdowns in federal enforcement seriously undercut law enforcement efforts, produce confusion in the regulated community, encourage non-compliance, and subject the EPA to ridicule.<sup>63</sup> Such lapses also breach an implied social contract with those regulated entities who, relying upon responsible enforcement, have invested substantial amounts of time and money to comply with the law. More importantly, however, the lack of effective federal enforcement breaks faith with the Congress that enacted the Clean Water Act and breaches the government's obligations to the regulatory beneficiaries of the Act—the public. The EPA, in short, has a duty to enforce the law. While this obligation is infused with great discretion, that discretion does not include the power to treat enforcement as if it were an open policy question. The Act has been passed; the regulations promulgated; and permits issued. Enforcement discretion, therefore, should not be treated as an additional bite of the policy apple. It should be treated as a law enforcement not a law-making exercise.

The EPA's law enforcement responsibility and the complexities of its exercise are respected by the courts; consequently,

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58. See May, *Trends*, *supra* note 48, at 21-22.

59. See *id.* at 21.

60. Forty-eight citizen enforcement cases were logged in 2002 compared with seventy-eight in 1996. *Id.* at 25.

61. *Id.*

62. See 1997 EPA Enforcement Report, *supra* note 44, at A-5 (1988 to 1997). Relatively few cases are filed under state citizen suit provisions. Approximately half of the states do not have any such provisions, and, among the states that do, most fail to provide attorneys' fees to prevailing plaintiffs. See James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RESOURCES & ENV'T 53, 56 (2004).

63. An effective enforcement program needs continuity. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 10 (1992).

judges generally shy away from reviewing the exercise of EPA enforcement discretion in the absence of clear language removing or otherwise channeling that discretion.<sup>64</sup> The EPA has thus been empowered with tremendous and, in the view of most courts, judicially unreviewable authority to refrain from enforcing the Clean Water Act in a particular instance. This power, however, is infused with a duty to protect the beneficiaries of the Act, a duty which holds the agency accountable for the exercise of this authority. The duty includes fidelity to the law and prudence in its enforcement—good faith, fairness, impartiality, independence, consistency, and professional competence.

In light of the great power given to the EPA, its enforcement attorneys and engineers should clearly define their roles in terms of the ideals and behavioral norms that reflect tough, professional law enforcement. Imbued with such a professional culture and tradition, the staff should be less sensitive and more resistant to the changing tides of political fortune. Their function, after all, is not policy formulation—which in most cases is subject to judicial review<sup>65</sup>—but law enforcement. The EPA has an excellent, dedicated enforcement staff. Perhaps, however, because they are located within a non-independent executive branch agency with significant policy making responsibilities that is often embroiled in great political controversies, it is sometimes difficult for these law enforcers to be viewed, or even to view themselves, as part of a professional law enforcement entity.

The challenge thus is how to nurture and sustain a tough, consistent, but fair enforcement tradition at the EPA. With so much scholarly and policy attention directed at how to best motivate the business community to comply with the law,<sup>66</sup> it is time to direct at least some attention at how to best motivate those who serve the law through enforcement. It is a difficult, complex, and often controversial job. Vigorous enforcement wins the EPA staff few friends in the regulated community while lapses in aggressive

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64. Heckler v. Chaney, 470 U.S. 821, 834-38 (1985).

65. See William L. Andreen, *Administrative Rulemaking in the United States: An Examination of the Values that Have Shaped the Process*, 66 CANBERRA BULL. OF PUB. ADMIN., Oct. 1991, at 112-18.

66. See, e.g., JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985); KEITH HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* (1984); EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); Neil A. Gunningham et al., *Motivating Management: Corporate Compliance in Environmental Protection*, 27 LAW & POL'Y 289 (2005).

enforcement bring stinging public criticism. It must seem at times to EPA staff as if they can never do the right thing. These professionals, however, are the unsung heroes of environmental law, and they are entitled to support in their efforts to enforce the law.

Before exploring this thesis at more length, the article will deal with two preliminary matters. Since many readers may not be familiar with the intricacies of the Clean Water Act, the Article first sets forth a more elaborate, but, nevertheless, brief discussion of the Act and its enforcement mechanisms. The article then examines the historical record at more length, focusing upon the sensitivity of EPA enforcement to changing political tides; the way in which discretion has been generally used in EPA enforcement; and the growing emphasis upon compliance assistance and other incentive programs that is found in both state and federal enforcement programs. After thus setting the stage, the Article will return to the problem of trying to ensure, to the extent possible, stability and continuity in the EPA's enforcement of the Clean Water Act.

## II. THE CLEAN WATER ACT

### A. Regulatory Scheme

Although comprehensive federal efforts aimed at controlling water pollution date back to 1948,<sup>67</sup> it took more than twenty years of experimentation to devise an effective regulatory scheme. The Clean Water Act completely revised the federal approach to water pollution control.<sup>68</sup> The primary control strategy of the Clean Water Act is aimed at regulating discharges from point sources—pipes, conduits, and other discernible conveyances<sup>69</sup>—through which pollutants are added to waters of the United States.<sup>70</sup> Such discharges are prohibited unless the discharger complies with a number of requirements.<sup>71</sup> Geographically, this prohibition extends to most streams in the nation because Con-

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67. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

68. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)).

69. Federal Water Pollution Control Act, 33 U.S.C. § 1362(14) (2000).

70. *Id.* § 1362(12). Although the Act speaks in terms of the discharge of pollutants to “navigable waters,” it immediately defines “navigable waters” expansively as “waters of the United States.” Compare *id.*, with *id.* § 1362(7).

71. *Id.* § 1311(a).

gress intended jurisdiction under the Act to be given the broadest possible application under the Commerce Clause of the Constitution.<sup>72</sup>

Among the requirements that apply to point source discharges are several that anticipate the promulgation of nationally-uniform effluent limitations that apply to all dischargers in particular industrial categories.<sup>73</sup> These performance limits are usually based upon the application of specific types of control technologies for particular waste streams: best conventional treatment for conventional pollutants;<sup>74</sup> best available technology for many toxics as well as non-toxic, non-conventional pollutants like ammonia;<sup>75</sup> and best available demonstrated technology for new facilities.<sup>76</sup> For sewage treatment plants, the Act calls for secondary treatment,<sup>77</sup> a standard based upon reducing the oxygen demand from organic waste and total suspended solids by 85%.<sup>78</sup> Industrial polluters who discharge into public sewage systems must comply with pretreatment standards which apply to pollutants that may either interfere with the functioning of the sewage treatment facility or pass through with inadequate treatment.<sup>79</sup> These

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72. "In defining 'navigable waters' to mean 'waters of the United States,' the House-Senate conference committee wrote that it 'fully intend[ed]' to give the term the broadest possible constitutional interpretation." William L. Andreen, *Developing a More Holistic Approach to Water Management in the United States*, 36 ENVTL. L. REP. (Envtl. Law Inst.) 10,277, 10,282 n.81 (2004) (quoting S. REP. NO. 92-1236, at 144 (1972)). In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001), the Supreme Court held, however, that the Act's jurisdiction did not extend to isolated, non-navigable, intrastate waters used by migratory birds. More recently, in *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (4-1-4 decision), the Court, in a badly fractured decision, seems to have held that non-navigable waters are subject to the Clean Water Act as long as the water in question has a "significant nexus" to waters that are or were navigable or could reasonably be so made. *Id.* at 2236 (Kennedy, J., concurring). See *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1979))).

73. By adopting uniform effluent limitations, Congress intended to eliminate any temptation that the states might otherwise have to try to attract industry by setting less stringent standards than their neighbors. *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).

74. 33 U.S.C. § 1311(b)(2)(E).

75. *Id.* § 1311(b)(2)(A), (C), (D), (F).

76. *Id.* § 1316.

77. *Id.* § 1311(b)(1)(B).

78. See 40 C.F.R. § 133.102(a)(3) (2004).

79. 33 U.S.C. § 1317(b).

pretreatment standards often prescribe the same effluent limits as would apply to a polluter discharging directly into the water body.<sup>80</sup>

The Clean Water Act also retained and expanded a system of state water quality standards.<sup>81</sup> Unlike uniform technology-based effluent limitations, water quality standards are tailored to the uses and values of specific waters. Under this system, all states are required, subject to federal approval, to first zone their waters for specific uses such as fish and wildlife protection and propagation or public water supply; the states must then set technical criteria—maximum levels of certain chemicals, minimum levels of dissolved oxygen, and perhaps a narrative description of the desired ecosystem—which are designed to meet that use.<sup>82</sup> So while effluent limitations focus on the waste stream as it flows out of a pipe, water quality standards focus on the overall quality of the receiving water. This is a vital aspect of the Act's comprehensive regulatory strategy because compliance with effluent limitations alone does not necessarily result in good, or even adequate, stream quality. This is not an unlikely scenario for streams receiving heavy discharges from many sources, streams with relatively low flows or high use classifications, or streams that suffer from a significant diversion or interruption of flow. For waters, such as these, that are unable to meet water quality standards after the application of effluent limitations, the states are to establish total maximum daily loads ("TMDLs") and allocate those pollutant loadings among the responsible sources.<sup>83</sup>

To implement and monitor compliance with the technology-based limitations and any more stringent limits that may be needed to satisfy water quality standards, every point source discharger must obtain a permit and comply with its terms.<sup>84</sup> These National Pollutant Discharge Elimination System ("NPDES") permits serve as a means for transforming general regulatory requirements into the enforceable obligations of each individual discharger. Although forty-five state programs have been granted authority to issue NPDES permits,<sup>85</sup> states must apply federal requirements and are subject to an EPA veto should they fail to do

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80. William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 548 (2004) [hereinafter Andreen, *Water Quality Today*].

81. 33 U.S.C. § 1313.

82. *Id.* § 1313(c).

83. *See id.* § 1313(d).

84. *Id.* § 1311(a).

85. Rechtschaffen, *Enforcing the Clean Water Act*, *supra* note 56, at 781.

so.<sup>86</sup> However, states may require compliance with permit conditions that are more stringent than federal law would require.<sup>87</sup>

## B. Federal Enforcement

The primary federal enforcement mechanisms provided by the Act are found in section 309.<sup>88</sup> Whenever the EPA finds that a discharger has violated the terms of a state-issued NPDES permit, section 309(a)(1) requires the agency to react in one of two ways.<sup>89</sup> One option states that the EPA “shall” notify the discharger and the state government of the alleged violation.<sup>90</sup> If the state fails to take “appropriate enforcement action” within thirty days, the EPA either “shall issue” an administrative compliance order requiring the discharger to comply or “shall” refer the case to DOJ for a civil action.<sup>91</sup> This option recognizes that states with an approved permit program possess primary enforcement responsibility with regard to their permits while the EPA serves as a back-up. The second available course of action, however, recognizes that federal enforcement power is concurrent with that of the states.<sup>92</sup> Under this alternative, the EPA is to proceed under section 309(a)(3), which provides that the EPA “shall” issue a compliance order or refer the matter to DOJ without giving notice or awaiting state enforcement.<sup>93</sup> In cases not involving the violation of a state-issued permit, the EPA is not given the option of deferring to state action. Instead, when the EPA finds a violation of a federally-issued permit or any other requirement, it is required, pursuant to section 309(a)(3), to issue a compliance order or refer the case to DOJ.<sup>94</sup>

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86. 33 U.S.C. § 1342(d).

87. *Id.* § 1370. In addition to the NPDES program, the Clean Water Act contains four other important programs. First, the Act prohibits the discharge of dredged or fill material into waters of the United States, including most wetlands, without first obtaining a section 404 permit from the U.S. Army Corps of Engineers. *Id.* §§ 1311(a), 1344. The second program attempts to abate non-point source pollution. *Id.* § 1329. The final two programs include one that deals with unanticipated or accidental spills of oil, events for which a permit system is ill-designed, and one that provides federal financial assistance for the construction of municipally owned sewage treatment facilities. See Andreen, *Water Quality Today*, *supra* note 80, at 551-52.

88. 33 U.S.C. § 1319.

89. *Id.* § 1319(a)(1), (3).

90. See *id.* § 1319 (a)(1).

91. *Id.*

92. *Id.* § 1319(a)(1), (3).

93. *Id.*

94. *Id.* § 1319(a)(3).

Although section 309(a) mandates enforcement action utilizing one of two options if the EPA finds a violation, the agency is not required to refer cases to DOJ. Instead, section 309(b) merely authorizes the EPA to refer civil cases to DOJ seeking injunctive relief as well as civil penalties.<sup>95</sup> Section 309 also authorizes criminal prosecutions for knowing or negligent violations and for violations that knowingly place individuals in imminent danger of death or serious injury.<sup>96</sup> A conviction under this provision subjects a discharger not only to fines and imprisonment<sup>97</sup> but also to debarment from federal contracting.<sup>98</sup> In addition to these remedies, in an emergency the federal government is authorized to bring immediate suit to abate any "pollution" that presents a danger to public health or the livelihood of individuals.<sup>99</sup>

Congress strengthened the Act's enforcement provisions in 1987 by also providing the EPA with the authority to impose administrative penalties for various violations.<sup>100</sup> By doing so, Congress intended to equip the EPA for "full and aggressive enforcement."<sup>101</sup> According to the Senate report, this new authority would complement a tough EPA enforcement program by increasing the total number of enforcement actions and by providing greater deterrent effect than mere compliance orders for relatively small violations.<sup>102</sup>

Although the EPA has multiple enforcement options in the event it finds a violation, monitoring the compliance of every discharger with its NPDES permit is a monumental task. In recognition of this heavy burden, the Clean Water Act authorizes the agency to impose substantial monitoring and reporting requirements upon the regulated community.<sup>103</sup> Pursuant to this authority, the EPA requires each discharger to file discharge monitoring

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95. *Id.* § 1319(b).

96. *Id.* § 1319(c)(1)-(3).

97. *Id.*

98. *Id.* § 1368.

99. *Id.* § 1364.

100. Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 101 Stat. 7, 46 (codified as amended at 33 U.S.C. § 1319(g)(2000)) (adding § 309(g) to the Clean Water Act).

101. Rechtschaffen, *Enforcing the Clean Water Act*, *supra* note 56, at 778 (quoting Senator George Mitchell).

102. S. REP. NO. 99-50, at 26 (1985). *See* Rechtschaffen, *Enforcing the Clean Water Act*, *supra* note 56, at 778-79 (amplifying the legislative history of EPA's administrative penalty power).

103. *See* 33 U.S.C. § 1318(a).

reports (“DMRs”) on a monthly or quarterly basis.<sup>104</sup> Since the DMRs set forth a discharger’s permitted levels and its actual performance, the determination of permit violations is in many cases a relatively simple matter. Realizing that tampering with the monitoring equipment or misreporting the results might prove an overwhelming temptation to some dischargers, the EPA prosecutes such violations vigorously as a deterrent to such conduct.<sup>105</sup>

The majority of the EPA’s enforcement work is done in the agency’s ten regional offices. These offices are responsible for the conduct of most administrative enforcement and the development of most civil and criminal cases for referral to DOJ.<sup>106</sup> The headquarters’ Office of Enforcement and Compliance Assurance (“OECA”) takes a larger role in some cases involving federal facilities and the Toxic Substances Control Act,<sup>107</sup> in cases involving multi-regional or company-wide enforcement projects where facilities are located in more than one EPA region; and, more generally, in cases involving issues of national significance.<sup>108</sup> OECA also develops agency enforcement guidance, sets priorities, and coordinates regulatory development with the agency’s program offices.<sup>109</sup> When cases are referred to DOJ by an EPA office, they generally go to the Environmental Enforcement Section or the Environmental Crimes Section located within DOJ’s Environment and Natural Resources Division (“ENRD”) in Washington, D.C. The U.S. Attorney’s offices in some of the nation’s largest metropolitan areas, however, will bring some civil cases.<sup>110</sup> Addition-

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104. See Andreen, *Clean Water Act Enforcement*, *supra* note 11, at 217.

105. See PERCIVAL, *supra* note 57, at 933.

106. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 934-35 (2003).

107. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2000).

108. See Memorandum from Robert I. Van Heuvelen, Dir., Office of Regulatory Enforcement, U.S. Env’tl. Prot. Agency, to Deputy Reg’l Adm’rs et al., U.S. Env’tl. Prot. Agency (Nov. 8, 1994), available at <http://www.epa.gov/compliance/resources/policies/civil/rcra/civjudadmcase-mem.pdf>; Joel Mintz, *Civil Enforcement*, in 1 ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 12.04 (Michael Gerrard ed., 2005); John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, 18 NAT. RESOURCES & ENV’T 10, 11 (2004).

109. See OFFICE OF INSPECTOR GENERAL, U.S. ENVTL. PROT. AGENCY, SPECIAL REPORT: CONGRESSIONAL REQUEST ON EPA ENFORCEMENT RESOURCES AND ACCOMPLISHMENTS 31-32 (Oct. 10, 2003).

110. See Mintz, *Enforcement During the Clinton Administration*, *supra* note 42, at 10,405-06.

ally, most criminal cases are instituted by the relevant U.S. Attorney with assistance from ENRD and the EPA.<sup>111</sup>

### C. Citizen Suit Enforcement

In order to augment government enforcement and sometimes goad the government into acting, the Clean Water Act gives private persons access to the courts to enforce the pollution control requirements of the Clean Water Act.<sup>112</sup> Section 505 of the Act authorizes any citizen to commence a civil action against a polluter who is allegedly violating a discharge permit, government-issued compliance order, or any other “effluent standard or limitation.”<sup>113</sup> Such cases may be brought in federal district courts, which possess jurisdiction to enjoin violations, impose civil penalties<sup>114</sup> (payable to the U.S. Treasury),<sup>115</sup> and award attorney’s fees to prevailing or substantially prevailing litigants.<sup>116</sup> Many citizen suits settle, however, with the entry of a consent decree, which will often stipulate the payment of funds to a local environmental activity, a compliance schedule, the payment of attorney’s fees, and a civil penalty.<sup>117</sup>

Although the Clean Water Act grants private citizens access to the courts, at least sixty days before filing suit, a private plaintiff must give notice of the violation to the EPA, the state, and the discharger.<sup>118</sup> This notification is intended to give the pollution control agencies an opportunity to enforce the law before allowing a citizen suit to proceed.<sup>119</sup> If at the end of sixty days, the EPA or

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111. See generally, Cruden & Gelber, *supra* note 108; Steven P. Solow, *Preventing an Environmental Violation from Becoming a Criminal Case*, 18 NAT. RES. & ENVT. 19 (2004).

112. See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Law Part I*, 13 ENVTL. L. REP. (Envtl. Law Inst.) 10,309, 10,310 (1983). For an exploration of the policy reasons supporting citizen suit enforcement, see May, *Trends*, *supra* note 48, at 5-8; Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107-13 (2005). For a discussion of perceived disadvantages of citizen suits, see also *id.* at 114-20.

113. Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (2000).

114. *Id.* § 1365(a).

115. *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 173 (2000).

116. 33 U.S.C. § 1365(d).

117. Duke K. McCall, *Clean Water Act*, in ENVIRONMENTAL LAW HANDBOOK 291, 353 (Thomas F. P. Sullivan ed., 2005).

118. 33 U.S.C. § 1365(b)(1)(A).

119. S. REP. NO. 92-414, at 79-80 (1971), *reprinted in* 2 LEG. HIST. 1972, *supra* note 5, at 1497-98; 118 CONG. REC. 33,699-700 (1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 179 (1973) (remarks of Senator Muskie).

a state agency is not diligently prosecuting a civil or criminal action or an administrative penalty action, the citizen may commence the suit.<sup>120</sup> While one might think that this notice provision would often shame the government into taking tough action, it has often been used, in a rather perverse fashion, “to blunt more vigorous citizen enforcement efforts.”<sup>121</sup> As Professor David Hodas has observed, many state enforcement actions are prompted by the desire of polluters, after receiving notice, to preclude imminent citizen suits by having the state enforce against them instead.<sup>122</sup> This is because they anticipate and generally receive more lenient treatment from state authorities than from courts addressing private actions.<sup>123</sup>

In addition to notice limitations and possible preclusion by government enforcement activity, private citizens may not bring suits for wholly past violations. Instead, to obtain standing, a plaintiff must base his or her suit upon a good faith allegation of continuous or intermittent violations.<sup>124</sup> If a discharger comes into compliance after the filing of the case, the granting of injunctive relief may become moot but civil penalties may still be assessed for all past violations, including those that occurred prior to the commencement of suit.<sup>125</sup>

According to Professor James May “citizen suit litigation is best suited for the intrepid.”<sup>126</sup> Dealing with the various statutory and constitutional issues such as jurisdiction, standing, preclusion and mootness can be difficult and expensive and an award of attorneys’ fees is anything but sure.<sup>127</sup>

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120. 33 U.S.C. §§ 1365(b)(1)(B), 1319(g)(6).

121. Rechtschaffen, *Promoting Pragmatic Risk Regulation*, *supra* note 21, at 1351.

122. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1621-22 (1995). *See also* Rechtschaffen, *Promoting Pragmatic Risk Regulation*, *supra* note 21, at 1351-52 (describing the same phenomenon at work in California).

123. *See* Hodas, *supra* note 122, at 1622.

124. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987).

125. *See* *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 187-88 (2000).

126. May, *Trends*, *supra* note 48, at 9.

127. *Id.* at 9, 38-39.

### III. SOME OBSERVATIONS ON THE HISTORY OF EPA ENFORCEMENT

#### A. Sensitivity to the Changing Political Scene

In a recent article, Professor Joel Mintz perceptively observed that one generally unrecognized characteristic of EPA enforcement is “its high sensitivity to staff-level perceptions and concerns.”<sup>128</sup> He quotes a former EPA regional official as saying:

The people [at the EPA] who work on enforcement are very sensitive to signals about what they are doing. Because enforcement has always been . . . controversial and contentious, it is . . . critical that the people working on it have entirely clear signals that enforcement is important, . . . and that the people who do the work will be supported. Those signals have to come from the top.<sup>129</sup>

Ambiguous signals from the top can easily be read by the staff as a kind of coded message expressing reluctance about, perhaps even hostility towards, enforcement. Hence, as a senior EPA enforcement official recently recounted:

The current [Bush] administration would typically say[:] “Oh, I want you to enforce, but can you please check in with us before you do any major new cases, e.g., concentrated animal feeding operations (CAFOs).” That was taken by the staff as a directive not to enforce. . . . [Former EPA Administrator Christine Todd] Whitman also sent her political staffers out to check on particular cases. That also chilled enforcement.<sup>130</sup>

The consequence, of course, was a severe downturn in EPA enforcement from 2002 to 2003.<sup>131</sup> While one would expect enforcement personnel to scrutinize the language and action of the agency’s political appointees, it is a little surprising that it appears so easy at times for the agency’s top brass to intentionally or even unintentionally slow down EPA enforcement.

Mixed signals produced confusion in the EPA’s ranks during the early years of the Clinton administration. Although the EPA’s new political leadership probably did not intend to interfere with

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128. Mintz, *Enforcement During the Bush II Administration*, *supra* note 47, at 10,914.

129. *Id.* (quoting David A. Ullrich).

130. *Id.* at 10,915 (quoting Sylvia Lowrance).

131. *See supra* notes 47-50 and accompanying text.

traditional enforcement work,<sup>132</sup> their emphasis on compliance assistance and various incentive programs—clearly encouraged by the anti-regulatory furor on Capitol Hill—caused many staff members to believe that the use of deterrent-based enforcement tools had suddenly fallen out of favor.<sup>133</sup> Nevertheless, traditional enforcement levels remained high during the first two years of the Clinton administration,<sup>134</sup> perhaps because the administration also sent a strong contrary signal when it initiated a reorganization in 1993 that consolidated the agency's headquarters enforcement staff into one centralized office.<sup>135</sup> The reorganization process, however, slowed the agency's enforcement momentum because the process was chaotic, damaged morale in some portions of the program, and resulted in a number of inconsistent organizational approaches at the regional level.<sup>136</sup> In the midst of this confusion came the election in 1994 of Republican majorities in both houses of Congress. Their subsequent efforts to dismantle environmental law and slice the EPA's budget were not ambiguous and had a real "chilling effect" on EPA enforcement.<sup>137</sup> A high-ranking EPA enforcement official recalls that:

People got scared that their reputation among Congress was that they were heavy handed and beat up on the little guys. This created a tough environment for [EPA] enforcement to be aggressive. The Agency's reaction was to be cautious not to do anything that would get it negative publicity.<sup>138</sup>

This caution, fear perhaps, and a steep decline in staff morale<sup>139</sup> led to the precipitous drop in traditional enforcement activity in 1995 and 1996.<sup>140</sup>

There was nothing ambiguous about the signals that EPA enforcement received during the early years of the Reagan administration. As a candidate for President, Ronald Reagan called for a

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132. See Mintz, *Enforcement During the Clinton Administration*, *supra* note 42, at 10,393.

133. See *id.* at 10,393-94.

134. See 1997 EPA ENFORCEMENT REPORT, *supra* note 44, at A-3 to A-5.

135. See *Current Developments*, 24 Env't. Rep. (BNA) 547 (July 30, 1993).

136. See Mintz, *Enforcement During the Clinton Administration*, *supra* note 42, at 10,395-98.

137. *Id.* at 10,400 (quoting Nancy Marvel, a veteran EPA regional enforcement attorney).

138. *Id.* (quoting Ann Lassiter).

139. See *id.* at 10,399-401.

140. See *supra* notes 39-46 and accompanying text.

reduction in environmental regulation.<sup>141</sup> Anne Gorsuch, his first appointee as Administrator of the EPA, quickly set out to bring about “regulatory reform” at the agency. Her new leadership team “went out of its way to suggest that the EPA bureaucracy was a large part of the agency’s problem.”<sup>142</sup> Hit lists were circulated identifying pro-environmental career employees who ought to be dismissed.<sup>143</sup> There were rumors that enforcement attorneys were about to be fired<sup>144</sup>—a rumor given credence by deep budget cuts,<sup>145</sup> a series of reorganizations that dismantled the EPA’s unified enforcement organization,<sup>146</sup> and ominous meetings that were called to present the procedures to be followed in the event of a reduction in force.<sup>147</sup> As a result, morale plummeted, and hundreds of dedicated civil servants left the agency.<sup>148</sup>

Not surprisingly, the EPA’s enforcement program fell into chaos.<sup>149</sup> The faltering program did not regain an even keel until William Ruckelshaus, who had served as the EPA’s first Administrator and was highly respected in the environmental community, took over following the resignation of the scandal-plagued Gorsuch.<sup>150</sup> Ruckelshaus was dedicated to restoring both the credibility of the agency and a strong enforcement program. During his confirmation hearings, Ruckelshaus told the Senate committee that “[t]he environmental laws of this country were passed by Congress and were meant to be taken seriously by the administering authorities . . . . We will enforce the law of this country. We

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141. See Henry C. Kenski & Margaret Corgan Kenski, *Congress Against the President: The Struggle Over the Environment*, in ENVIRONMENTAL POLICY IN THE 1980S: REAGAN’S NEW AGENDA 97 (Norman J. Vig & Michael E. Kraft eds., 1984).

142. Robert W. Crandall & Paul R. Portney, *Environmental Policy*, in NATURAL RESOURCES AND THE ENVIRONMENT: THE REAGAN APPROACH 62 (Paul R. Portney ed., 1984).

143. See *id.*; JONATHAN LASH ET AL., A SEASON OF SPOILS: THE REAGAN ADMINISTRATION’S ATTACK ON THE ENVIRONMENT 36-39 (1984); Interview with William D. Ruckelshaus, Administrator, EPA (Jan. 1993), available at <http://www.epa.gov/history/publications/print/ruck.htm>.

144. See MINTZ, ENFORCEMENT AT THE EPA, *supra* note 29, at 43.

145. See *supra* notes 31-33 and accompanying text.

146. See MINTZ, ENFORCEMENT AT THE EPA, *supra* note 29, at 43; LASH, *supra* note 143, at 45-53.

147. The author, then an Assistant Regional Counsel for the agency in its Atlanta, Georgia, office, attended such a meeting in 1982. He also attended a speech by Administrator Gorsuch where she insisted that EPA could “do more, with less.”

148. See GOODMAN & WRIGHTSON, *supra* note 31, at 130.

149. See *supra* notes 35-36 and accompanying text.

150. See Andreen, *Evolving Law of Environmental Protection*, *supra* note 13, at 103.

will be firm, and we will be fair.”<sup>151</sup> Despite this clear statement, it took Ruckelshaus over six months<sup>152</sup> and the issuance of even clearer signals before the intimidation-induced lassitude of the prior years could be replaced by a renewed sense of enforcement vigor.<sup>153</sup>

Rather than a difficult-to-control guerilla, EPA enforcement through the years has more resembled an insecure individual who seeks approval and obtains a sense of self-worth from those in positions of authority. It has, therefore, been all too easy for political appointees or a hostile Congress to side-track this enforcement program from a path of tough, but fair enforcement of the law.

### **B. The Role of Discretion in Traditional, Deterrence-Based EPA Enforcement**

Traditional EPA enforcement has been quite flexible, containing aspects not only of a traditional deterrence-based approach to enforcement but also of a more cooperative approach. The majority of water pollution violations, therefore, have been addressed through negotiation and informal processes—with most violations resulting in no formal sanctions.<sup>154</sup> In adopting this type of flexibility, EPA enforcement has taken advantage of a wide range of informal enforcement tools, including telephone calls, meetings, warning letters, and notices of violation.<sup>155</sup> One fairly recent study concluded that nearly 70% of the EPA’s enforcement responses under the Clean Water Act were informal,<sup>156</sup> clearly indicating that the agency reserved more formal tools (such as administrative orders, administrative penalties, and civil referrals) for more serious offenses. Thus, EPA enforcers have not rigidly enforced the law “in a one-size-fits-all approach.”<sup>157</sup> Rather they have generally responded in a flexible, pragmatic way and tried to tailor their approach to the nature of the problem. Addi-

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151. *Nomination of William D. Ruckelshaus: Hearings Before the Senate Comm. on Env't and Pub. Works*, 98th Cong. 191 (1983).

152. See Bud Ward, *Reflections*, ENVTL. FORUM, Apr. 1984, at 2.

153. See *Transcript of William D. Ruckelshaus' Remarks to EPA Nat'l Compliance and Enforcement Conference*, ENVTL. FORUM, Apr. 1984, at 14-15.

154. See Rechtschaffen, *Promoting Pragmatic Risk Regulation*, *supra* note 21, at 1330.

155. See *id.* at 1331.

156. See SUSAN HUNTER & RICHARD W. WATERMAN, ENFORCING THE LAW: THE CASE OF THE CLEAN WATER ACTS (BUREAUCRACIES, PUBLIC ADMINISTRATION, AND PUBLIC POLICY) 53-57, 72-73 (1996) (including such things as no action, comments, telephone calls, conferences, notice letters, warning letters, and notices of violation).

157. Rechtschaffen, *Promoting Pragmatic Risk Regulation*, *supra* note 21, at 1334.

tionally, while the agency has tried to guide the exercise of this discretion through the issuance of guidance documents, the decision about whether to enforce and how to enforce lies largely within the enforcer's discretion.<sup>158</sup>

### C. The Move Towards Even More Flexibility: Compliance Assistance and Incentives

In the early 1990s, the EPA began to recognize a more explicit role for a cooperation-based approach to compliance. In doing so, the EPA expanded its ability to provide compliance assistance to regulated entities. This type of assistance has involved such things as workshops, seminars, on-site assistance, compliance guides, the development of ten internet-based compliance assistance centers, and the launch of a compliance assistance clearinghouse.<sup>159</sup> At approximately the same time, the EPA began to initiate a number of compliance incentive programs designed to encourage dischargers to self-audit their facilities and correct violations before they are discovered by government inspectors.<sup>160</sup>

The EPA's primary compliance incentive program seems well-designed. Unlike many state audit programs, the EPA does not grant immunity from enforcement for violations reported by the regulated entity itself.<sup>161</sup> In addition, no privilege from disclosure is granted for materials generated during self-audits.<sup>162</sup> However, while such programs are appropriately administered by the agency's enforcement staff—as they involve the exercise of en-

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158. *See id.* at 1335.

159. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2001 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 13 (2002) [hereinafter 2001 EPA ENFORCEMENT REPORT].

160. The EPA may forego gravity-based penalties in cases where small businesses make a good faith effort to comply by discovering and promptly disclosing violations and then correcting them within six months. Small Business Compliance Policy, 65 Fed. Reg. 19,630, 19,632-34 (Apr. 11, 2000). Under the more generic incentives, dischargers who detect, promptly disclose and correct violations within sixty days (or as expeditiously as possible) can qualify for a waiver or significant reduction in gravity-based civil penalties. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,619-22 (Apr. 11, 2000). Dischargers, however, are still potentially liable for penalties that represent any economic gain they obtained from noncompliance. *Id.* at 19,620. The policy, moreover, does not apply to violations of administrative orders or consent decrees or to violations that cause serious harm to the environment. *Id.* at 19,623. For a more thorough discussion of EPA's compliance incentive and assistance strategies, see Markell, *supra* note 56, at 14-29.

161. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. at 19,623-24.

162. *Id.*

forcement discretion—compliance assistance programs appear out-of-place in the enforcement context.

This is not to say that the EPA should not be providing compliance assistance to small businesses and communities. That kind of effort seems entirely proper, designed as it is to encourage compliance by explaining regulatory requirements to smaller, less sophisticated entities. It also tends to build goodwill for the agency.<sup>163</sup> Nevertheless, the task should not be assigned to the enforcement program since compliance assistance by its very nature is a pre-enforcement endeavor.<sup>164</sup> Instead, these tasks should be performed by the program offices that are responsible for issuing NPDES permits, overseeing state-issued permits, and developing regulatory standards. In its current location, the task of assisting regulated entities with compliance dilutes the focus of what should be a professional law enforcement office and siphons needed resources from that effort. Indeed, it seems more than a little bizarre for an enforcement program to hold out the total number of “hits” its compliance webpage receives<sup>165</sup> as an indication of enforcement vigor. By the time a matter is sent to the enforcement office, the time for coaxing and persuasion should be over.

In addition to siphoning resources, compliance assistance programs can also lead to enforcement “timidity and inaction” if they are used to undermine or replace “a vigorous, evenhanded program of deterrent enforcement.”<sup>166</sup> Although the inauguration of such programs at the EPA caused more than a little confusion among the enforcement staff, and their operation continues to divert scarce resources, it does not appear that they have undermined traditional EPA enforcement. The situation at the state level, however, is not so clear.

Since the early 1990s, the states have also placed an emphasis upon compliance assistance and incentive programs.<sup>167</sup> They

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163. See Joel A. Mintz, *Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALS*, 30 ENVTL. L. REP. (Envtl. Law Inst.) 10,639, 10,642 (2000) [hereinafter Mintz, *AALS Enforcement Discussion*].

164. See *id.* at 10,642.

165. See, e.g., 2001 EPA ENFORCEMENT REPORT, *supra* note 159, at 13 (touting the number of times that business visited internet-based EPA compliance assistance centers).

166. Mintz, *AALS Enforcement Discussion*, *supra* note 163, at 10,642.

167. See Clifford Rechtschaffen & David L. Markell, *Improving State Environmental Enforcement Performance Through Enhanced Government Accountability and Other Strategies*, 33 ENVTL. L. REP. (Envtl. Law Inst.) 10,559 (2003).

have often gone further than the EPA, however, with environmental audit laws that grant immunity from enforcement, and statutes that render audit information privileged information, which is unavailable to law enforcers.<sup>168</sup> It also appears that many states have taken one additional step and actually replaced, to one extent or another, traditional enforcement mechanisms with some form of cooperation-based strategy. As a result, state enforcement numbers have fallen rather steadily since 1993.<sup>169</sup>

The new, more flexible approach to environmental enforcement has not improved rates of compliance with the Clean Water Act. Instead, those rates have remained stubbornly static over the last decade. In fiscal year 1994, about 17% of major dischargers were in significant noncompliance with their NPDES permits.<sup>170</sup> In fiscal year 1998, however, over 20% were in significant noncompliance.<sup>171</sup> Similarly, from fiscal years 2003 to 2005, the average was 19.7%.<sup>172</sup> Moreover, as Professor David Markell has pointed out, these major dischargers “represent only the tip of the iceberg.”<sup>173</sup> There are only about 7000 major dischargers as opposed to over 80,000 minor NPDES permit holders and some 200,000 stormwater dischargers.<sup>174</sup> Since major dischargers are inspected far more often and receive a disproportionate amount of regula-

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168. See Joel A. Mintz, *The Uncertain Future Path of Environmental Enforcement and Compliance: A Book Review Essay Regarding Clifford Rechtschaffen and David L. Markell, Reinventing Environmental Enforcement and the State-Federal Relationship*, 33 ENVTL. L. 1093, 1098 (2003). EPA minced no words when it concluded that state audit privilege and immunity statutes “are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public’s right to know of potential and existing environmental hazards.” Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,623 (Apr. 11, 2000).

169. See *supra* notes 53-56 and accompanying text.

170. See Markell, *supra* note 56, at 55. Significant noncompliance is defined to include major violations of permit limitations, violations of court orders, violations of effluent limitations established by an administrative order, failure to submit discharge monitoring reports, and unauthorized bypasses. Memorandum from Steven A. Herman, Assistant Adm’r, Office of Enforcement and Compliance Assurance, to the Water Mgmt. Div. Dirs. & Reg’l Counsels (Sept. 21, 1995) (on file with Pace Environmental Law Review).

171. See Markell, *supra* note 56, at 56.

172. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, END OF FISCAL YEAR 2005 REPORTING FOR SECTION 106 GRANT PROGRAM ANALYSIS AND RATING TOOL MEASURE: PERCENT OF MAJOR NPDES PERMITTEES IN SIGNIFICANT NONCOMPLIANCE (SNC) AT ANY TIME DURING THE FISCAL YEAR (2006), available at <http://www.epa.gov/compliance/resources/reports/nets/fy2005/nets05-npdes-snc.pdf>.

173. Markell, *supra* note 56, at 56.

174. See *id.* at 56-57.

tory attention,<sup>175</sup> one would expect their compliance rates to be much higher. It is fair to conclude, therefore, that the overall rate of significant noncompliance is quite high indeed. It is also fair to conclude that a great deal of enforcement work remains to be done.<sup>176</sup>

#### IV. MOTIVATING ENFORCEMENT THROUGH INTERNAL CULTURAL NORMS

The EPA enforcement program is comprised of men and women who are talented professionals, dedicated to their jobs and the task of environmental protection. They do their work well; yet they generally fail to receive any praise from Congress, the top political levels of the EPA, the press, or the environmental community. It is—except from the standpoint of self-satisfaction—a rather thankless job. Moreover, they are often treated as second-class citizens by at least some lawyers at the Department of Justice,<sup>177</sup> where a stronger sense of *esprit d'corps* holds sway.

The unsung heroes at the EPA also feel vulnerable to the shifting tides of political fortune since their professional role within the agency has been and will always be subject to tough criticism from industry, many state agencies, and those who hold a contrary view about the value of deterrence-based enforcement or even the value of environmental regulation. Even today, many businesses still consider significant elements of the environmental regulatory regime to be “illegitimate,”<sup>178</sup> and the enforcement program, in many cases, receives the brunt of their ire. In short, the program is a lightning rod for the anti-regulatory critique, both within and without government. It is little wonder then that enforcement personnel look to high agency officials for reassurance about the value of their role, and their insecurity appears to be greatest during the early years of a presidential administration.

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175. *See id.* at 57.

176. An EPA study has detected a correlation, albeit somewhat modest, between enforcement and compliance levels. According to the report, fourteen out of the twenty-three states with the lowest enforcement activity also had the worst levels of compliance. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, A PILOT FOR PERFORMANCE ANALYSIS OF SELECTED COMPONENTS OF THE NATIONAL ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM 27 (2003).

177. *See Mintz, Enforcement During the Bush II Administration*, *supra* note 47, at 10,924 (noting that EPA regional attorneys have the perception that some lawyers at DOJ view themselves as “superior” to EPA lawyers).

178. CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE-FEDERAL RELATIONSHIP 217 (2003).

Clear signals that a new administration or a new Congress disfavors vigorous enforcement have certainly stymied enforcement efforts in the past.<sup>179</sup> Even more ambiguous messages at such times have succeeded in slowing enforcement as staff members seek direction from the top of the agency.<sup>180</sup> The lesson for administrations that want to encourage vigorous enforcement is obvious: demonstrate in words and deeds the fact that the administration is committed to enforcing the laws of this country as written by Congress.

However, it is also clear that the EPA's enforcement program should be internally motivated to consistently uphold and enforce the law. While administrations have discretion to make some policy choices which the staff must take care to follow, those policy decisions are constrained by the rule of law. Consequently, while administrations may choose to undertake new initiatives and strategies to enforce the law, they may not use the enforcement program to undercut laws with which they disagree, for the agency's authority is predicated upon the concomitant duty to protect the beneficiaries of the nation's environmental laws, including the Clean Water Act.

The EPA enforcement program is well-positioned to be the first bulwark against any politically-motivated attempt to undermine enforcement. The EPA's enforcement lawyers and engineers are public servants whose primary role and obligation lies in the area of law enforcement. Their tradition, therefore, should reflect unfailing fidelity to the law and the ideals of professional law enforcement. The resulting ethos should include firmness, fairness in dealing with the regulated community, and responsiveness to the lawful wishes of the agency's political appointees. Good faith, high ethical values, moderation, and professional competence—all of these are additional values which should inform and guide such a professional law enforcement program.<sup>181</sup>

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179. See *supra* notes 137-49 and accompanying text.

180. See *supra* notes 128-31 and accompanying text.

181. See generally Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785, 786-95 (describing the culture of professionalism in the Civil Rights Division at the U.S. Department of Justice); Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask for Is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1300 (1993) (stating that federal courts impose special obligations on federal lawyers such as the responsibility for "fair dealing, full disclosure, and allegiance to the court system").

The professional environment of an EPA enforcement lawyer differs significantly from that of the private bar.<sup>182</sup> Although an enforcement lawyer's client is the agency, that lawyer also has an obligation to the United States and to the public interest as defined by Congress in statutes like the Clean Water Act.<sup>183</sup> So conceived, these agency lawyers have a responsibility, as does the agency—regardless of the views of the agency's current political leadership or even of the views of a current Congress—to enforce the law. Law enforcement, after all, is not an appropriate venue for the formulation of legally binding policy. The appropriate venue for making such changes is in Congress through the exercise of its lawmaking authority, or, in many instances, it may lie—as the result of a delegation of authority from Congress—within the agency's rulemaking authority. But policy-formulation in the form of choosing not to vigorously enforce the Clean Water Act does not rest within the prerogative of the EPA or any political appointee.<sup>184</sup>

I am not suggesting, however, that EPA enforcement lawyers can shed their professional duty to the agency. The EPA is, in a strict sense, their client in terms of professional responsibility and discipline.<sup>185</sup> Both the “public interest” and the concept of the entire United States government are generally too broad, too amorphous in nature to have much utility in terms of the organized

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182. As Judge Abner Mikva has written:

[G]overnment lawyers have obligations beyond those of private lawyers. A government lawyer “is the representative not of an ordinary party to a controversy,” the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, “but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.”

*Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

183. Compare the remarks of former Assistant Attorney General Roger Marzulla in *The Forum: In the Hotseat at Justice*, 11 THE ENVTL. FORUM, Jan.-Feb. 1994, at 42 (stating that while “[t]he primary role of the Justice Department is to advance the policies that are adopted by the governmental agencies. . . . the second role of the department is to protect the Constitution, the judicial system, and the rule of law”).

184. In a similar context, Professor Joel Selig has declared that: “The Department of Justice . . . is not free to decline to enforce existing law merely because of disagreement with it. Fundamental precepts of separation of powers and executive branch duty preclude any claim of discretion to ignore the law.” Selig, *supra* note 181, at 790.

185. See DISTRICT OF COLUMBIA BAR, REPORT BY THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS AND THE MODEL RULES OF PROFESSIONAL CONDUCT 6, 13-15 (1988), reprinted in PRACTISING LAW INSTITUTE, CRIMINAL LAW AND URBAN PROBLEMS COURSE HANDBOOK SERIES NUMBER C-188, 304-331 (2001) [hereinafter PRACTICING LAW INSTITUTE].

bar's regulation of an EPA lawyer's conduct.<sup>186</sup> Furthermore, a host of confidentiality and conflict issues could arise if these lawyers actually were viewed as having, at all times, concrete professional responsibilities to three different clients—the agency, the United States, and the public interest.<sup>187</sup> Nevertheless, EPA lawyers still possess the more general, ethical responsibility to enforce the law as found in the Clean Water Act, and that responsibility should inform and shape their relationship with the agency.<sup>188</sup>

Although EPA lawyers must ultimately take direction from their superiors within the EPA, they can certainly be strong advocates, within the agency, for a consistently firm approach to enforcement. They can also protest within the agency whenever an administration attempts, directly or indirectly, to stifle enforcement activity. On occasion, in egregious situations, such protests may even have to be aired publicly.<sup>189</sup> Such public protests, including resignations, are unpleasant events and should be limited to rare circumstances, but a duty to speak out exists when the public interest in law enforcement is being subverted.<sup>190</sup> I am not advocating anarchy or the violation of any professional norms of conduct.<sup>191</sup> Rather, I am arguing for a moderate but resolute form

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186. *See id.* at 10-13, reprinted in PRACTISING LAW INSTITUTE, *supra* note 185, at 316-19.

187. *See id.* at 10-12, reprinted in PRACTISING LAW INSTITUTE, *supra* note 185, at 316-18.

188. The ABA Model Rules of Professional Conduct explicitly recognize that “[t]he Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” MODEL RULES OF PROF'L CONDUCT Preamble 16 (2006) [hereinafter MODEL RULES].

189. *See Selig, supra* note 181, at 786-87 (discussing the right and duty of DOJ civil rights lawyers to protest whenever “the actions of political officials have prevented or threatened to prevent Division attorneys from performing their law enforcement function”).

190. In such a situation, one might well be able to argue that the lawyer is no longer representing the agency but is instead representing the paramount interests of the public or of the United States itself. *See MODEL RULES, supra* note 188, at R 1.13 cmt. 9 (noting that in a situation where a government lawyer knows that a head of a bureau is engaged in action or refuses to act in a way that violates a legal obligation to the organization or constitutes a legal violation that is likely to result in substantial injury to the organization, the lawyer's client may be viewed more broadly, presumably to avoid any possible problem associated with client confidentiality).

191. I would not, for example, anticipate any need to reveal confidential information or information relating to any particular case. Statistics about enforcement activity are publicly available information, the disclosure of which would not interfere with any pending or future enforcement action. Any such public disclosures, moreover, would advance significant public policy purposes pertaining to EPA's overall enforcement of federal law. *Cf.* Letter from California State Bar Trial Counsel to

of law enforcement professionalism—an approach that should garner respect from any administration that is dedicated to serving the public interest as reflected in the laws of the land.

Many EPA attorneys have been exemplars of this kind of professionalism. For instance, during the drop in enforcement activity during the early years of George W. Bush's administration, a number of frustrated EPA enforcement officials publicly criticized the administration's approach to enforcement as they resigned or retired from the agency.<sup>192</sup> I hope that this article is viewed as support for and an affirmation of that kind of professional strength and integrity within the EPA's enforcement program.

I also hope that this article serves as a starting point for a discussion of additional ways in which a strong sense of professionalism can be nurtured and sustained within the EPA's enforcement program. Certainly, the agency can provide more support for and recognition of outstanding performance through such devices as awards and bonuses. More praise can also come from the leadership at DOJ, from individual lawyers at DOJ, from the environmental community, from the organized bar, and from professional engineering societies. These kinds of actions would help foster a stronger *esprit d'corps* that would better equip the program to weather the truly adverse conditions that arise from time to time. This kind of support and recognition would also help the agency retain those experienced lawyers who serve as role models and mentors of the younger, more inexperienced lawyers who often comprise a disproportionately large segment of the federal legal workforce. Other approaches, of course, should be explored such as higher pay grades, an expansion of the ranks of senior agency litigators, the provision of more and better opportunities for continuing professional education and engagement in the activities of professional organizations, and more leave opportunities for advanced education. Finally, other commentators may want to explore whether independent agency status, and the

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Counsel for Cindy Ossias (Oct. 11, 2000), *reprinted in* RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 551 (2d ed. 2002) (finding that a government attorney's release of materials relating to the State Insurance Department's settlement of claims against insurance companies arising out of a recent earthquake did not merit discipline for a number of reasons including the advancement of public policy).

192. See Jennifer Lee, *3 Top Enforcement Officials Say They Will Leave E.P.A.*, N.Y. TIMES, Jan. 6, 2004, at A20; Jeff Johnson, *EPA's Top Cops Resign: Enforcement Division Head, Top Two Air Pollution Attorneys Leave EPA*, CHEM. & ENG'G NEWS, Jan. 12, 2004, at 8.

prestige associated with some degree of independent litigation authority which often goes with it,<sup>193</sup> would better insulate the EPA's enforcement program from future political attempts to undermine it.

## V. CONCLUSION

The success of the complex regulatory scheme created by the Clean Water Act ultimately depends upon effective enforcement. Congress was keenly aware of this fact and attempted to ease the task by creating an enforceable regulatory structure for point source discharges, a wide array of federal enforcement tools, and redundant enforcement mechanisms. Nevertheless, enforcement has faltered at critical points in the past. At the EPA, the culprit has generally been hostility, which either the political leadership at the agency or Congress has exhibited towards the regulatory program created on Capitol Hill in 1972. Until this legislative program is amended or repealed, however, it remains the law of the land and the obligation of the EPA to enforce. The task facing the EPA's enforcement professionals, therefore, is difficult. They must follow the lawful policy initiatives that are launched by the agency's political appointees. However, they also have an obligation to honor the rule of law and the highest traditions of a professional law enforcement program. The internalization of those traditions and the fundamental values they represent should serve both the agency and the nation well as we seek to ensure continuity and consistency in the EPA's enforcement of the Clean Water Act.

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193. See OFFICE OF THE CHAIRMAN, ADMIN. CONF. OF THE U.S., MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES: A PRELIMINARY SURVEY OF THEIR ORGANIZATION 3, app. at 2-5, 7-13, 15-16, 19, 21 (May 1992); Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255, 278-80 (1994).