

## CHAPTER 1

# The Structure of Environmental Enforcement

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**§ 1.01 Introduction**

Environmental enforcement in the United States is an extraordinarily complex matter, rendered all the more complicated by overlapping layers of authority. Enforcement can come in the form of civil actions for recovery, penalty, or injunctive relief; it can also take the form of criminal prosecution resulting in heavy fines for corporations and prison sentences for individuals. Indeed, perhaps the most important current aspect of environmental enforcement is its increasing criminalization. Enforcement can be imposed by federal agencies, state and local offices, and by a wide range of environmental organizations and individual citizens empowered by private attorneys general or citizen suit provisions in most of the environmental statutes.

Environmental enforcement has, for the most part, been structured in a manner that draws sharp boundaries between different kinds of pollution, with different enforcement personnel responsible for overseeing compliance with statutes and regulations covering water, air, solid waste, hazardous waste, and toxic substances. However, this structure is changing, and may eventually be replaced by a “multimedia” approach.

In addition to the many levels of statutory and regulatory enforcement authority, there is a “political”<sup>1</sup> factor that affects the intensity with which enforcement is pursued and the severity of the penalties that noncompliance can bring. Moreover, political pressure and major changes in administrative policy can, have, and most likely will in the future, affect the efficiency of enforcement activities. Thus, it is not always easy to predict where enforcement efforts will originate and the direction they will take.

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<sup>1</sup> The phrase “political” is not intended to refer to political parties, but to the perceptions of popular feelings by politicians and politically appointed and career bureaucrats.

### § 1.02 Absence of a Comprehensive Approach

Perhaps the most difficult concept for members of the regulated community, and for that matter, the courts, to grasp is that no one is really in charge. Despite periodic claims by various bureaucrats that they have finally developed some comprehensive scheme for a fair allocation of enforcement efforts, environmental enforcement is still primarily generated by competing governmental offices and agencies utilizing different enforcement approaches and motivated by different considerations.

The widespread view of environmental enforcement is that the United States Environmental Protection Agency (EPA)<sup>1</sup> assigns enforcement priorities in some systematic manner, investigates environmental derelictions, attempts to enforce the law administratively, and if that approach fails, turns the matter over to the Department of Justice. Maybe this scenario does occur in some cases, but more often it would appear that the Agency is reacting to shifting political climates and adjusting its course to meet congressional criticism. Its approach to enforcement, and administrative law generally, may be well grounded in the democratic process.

Examples of this phenomenon abound. For instance, an administration which was not known for its vigorous civil environmental enforcement demonstrated an apparent eagerness to institute criminal proceedings.<sup>2</sup> As the Wall Street Journal noted in its January 7, 1985 lead article: “[p]lans to develop a criminal arm at EPA began in 1980 [*sic*], sparked by congressional charges of lack of regulatory enforcement during the tenure of former EPA Administrator Anne Gorsuch Burford.”<sup>3</sup> One EPA criminal enforcement official laconically told the Journal: “Some people thought the agency would look strong if it got a criminal program going.”<sup>4</sup> Indeed, resources dedicated to criminal enforcement have grown steadily in recent years. The Office of Enforcement and Compliance Assurance’s (OECA) Criminal Enforcement Program has increased the number of environmental crimes charged from 305 in 2006 to 319 in 2008 and 387 in 2010.<sup>5</sup>

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<sup>1</sup> The United States Environmental Protection Agency, established December 2, 1970 by Reorganization Plan No. 3 of 1970, 40 C.F.R. § 1.1 (1991), reprinted in 5 U.S.C. App. at 109 (1992), and in 84 Stat. 2086 (1970).

<sup>2</sup> Meir, “Dirty Job, Against Heavy Odds, the EPA Tries to Convict Polluters and Dumpers,” Wall St. J. at 1, col. 4 (Jan. 7, 1985). See also, Welks, “Criminal RICO and Illegal Dumping,” 9 Chem. & Rad. Waste Lit. Rep. 468 (1985) (creative federal prosecutors have suggested that Title 9 of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961 *et seq.*, commonly known as RICO, and its nineteen state counterparts, might be used to combat illegal toxic waste disposal practices).

<sup>3</sup> Meir, “Dirty Job, Against Heavy Odds, the EPA Tries to Convict Polluters and Dumpers,” Wall. St. J., p. 18 (Jan. 7, 1985).

<sup>4</sup> *Id.*

<sup>5</sup> EPA OECA, “FY 2006 OECA Accomplishments Report,” 18 (2007) <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy06accomplishment.pdf> (last visited Feb. 25, 2013); EPA OECA, “Compliance and Enforcement Annual Results FY2008,” (2009) <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2008/2008numbers.html> (last visited Feb. 25, 2013); EPA OECA, “Compliance and Enforcement Annual Results 2010 Fiscal Year” (2011) <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/index.html> (last visited Feb. 25, 2013).

Adding to the unpredictability of enforcement actions, enforcement initiatives sometimes start with various Washington-based Assistant Administrators or EPA bureaus, and at other times spring to life full blown at one or more of the Agency's eleven regional offices. Enforcement takes on significantly different forms depending on the entity carrying out the investigation. Thus, many investigations die of their own weight when enforcement personnel are burdened with other program or enforcement responsibilities. On the other hand, when the matter is assigned to personnel with ample time, resources and skills, the matter, more often than not, reaches fruition.

The greatest confounders of environmental enforcement symmetry are the various states and their subdivisions. Although some states have been reluctant to shoulder the full burden of environmental regulation, it is difficult to imagine a long-lived state administration that has demonstrated an unwillingness or inability to prosecute nefarious environmental transgressors.

It is difficult to generalize on state enforcement programs. However, the large industrial states have fairly mature enforcement staffs often fielding as many investigators as the EPA does for comparable programs on a nationwide basis. Other states have extremely anemic enforcement capacities, and enforcement in those states is problematic and often left to the "feds." Similarly, the relationship between state environmental agencies and their "trial attorneys," most often the state Attorney General, vary greatly from state to state. Whatever that relationship might be, it often fluctuates depending on the political structure that places the Attorney General in office. Indeed, obvious problems are involved in the situation where the Governor and his appointed environmental commissioners are from a different party than the elected Attorney General.

State enforcement involves other problems such as the failure to meaningfully separate the civil from the criminal function in many enforcement offices. Conversely, many states are afflicted with competing offices, in that local authorities are vested sometimes with environmental enforcement authority, or perceive that they are. Thus, county and state attorneys often bring civil cases based on local ordinances or state statutes that vest enforcement authority in county or regional health offices. Similarly, District Attorneys have founded their own environmental crimes unit that may operate independently from state level prosecutors in the state environmental agency or Attorney General's office.

All of these investigators and prosecutors are near the heartbeat of their public, and are usually quick to hear complaints relating to the lack of prosecutorial vigor. There is a sensitivity to public criticism at all levels of government, but that sensitivity is most acute at the local level. Accordingly, it takes a small amount of such stimuli to unleash local and state enforcement personnel. State and local officials also embark on various enforcement initiatives, sometimes following the federal lead and sometimes in reaction to conditions particular to their state or a region within that state. More often than not, however, local complaints from aggrieved citizens motivate state enforcement authorities to pursue particular enforcement objectives.

In addition to providing for enforcement by sources of authority that are familiar to most practitioners, the major federal environmental statutes have private Attorney General provisions, conferring standing to sue for enforcement upon a wide range of individuals and environmental organizations. Such citizen suits usually are initiated in response to data provided by the regulated parties themselves, in fulfillment of statutory obligations to file information regarding releases and permit exceedances.

Fortunately for members of the regulated community, it is not terribly difficult to fathom which way the enforcement wind is blowing. A reasonable sensitivity to public perception of environmental grievances will direct members of the regulated community to the soon-to-be sensitive area of their operations. Moreover, there are certain areas of concern that should be obvious as a general rule. The handling of carcinogenic material, the discharge of waste water to sole source aquifers, the emission of visible or malodorous vapors, or the accumulation of waste are some of the more obvious telltales of forthcoming enforcement activity.

## § 1.03 The EPA's Enforcement Structure

**[1]—Historical Underpinnings: From Fragmentation to “De-Balkanization”**

The EPA implements the federal environmental agenda, and through the state delegation programs, it significantly influences the enforcement activities of the states. Prior to the Reagan Administration, all EPA enforcement was centered in the Office of Enforcement. That office was decentralized during the Reagan years, under EPA Administrator Anne Gorsuch Burford.<sup>1</sup> The 1981 restructuring split technical enforcement staff (inspectors and technical policy staff) from legal enforcement staff, with the reassignment of technical staff to the individual program offices.

Additionally, the EPA's program offices are largely independent, with roots in the separate federal agencies that were consolidated in 1970 with EPA's creation.<sup>2</sup> As a result, after the 1981 restructuring, “although some cross-program coordination occur[red] during the process of developing regulations and standards, the implementation and enforcement of regulations by the EPA's separate regulatory programs [was] uncoordinated.”<sup>3</sup>

The restructuring engendered criticism and spurred proposals to reinvigorate the Enforcement Office with much of its original power.<sup>4</sup>

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<sup>1</sup> Administrator Burford served from 1981-1983, resigning under fire during a scandal concerning EPA's alleged mishandling of the Superfund.

<sup>2</sup> These agencies included the Federal Water Quality Administration in the Interior Department, the National Air Pollution Control Administration in the Department of Health, Education and Welfare (HEW), the Pesticides Regulation Division in the Department of Agriculture, the Bureau of Radiological Health in HEW, and the Office of Pesticides Research, also in HEW.

As one commenter has noted,

“To a large extent, the culture and attitudes of these formerly discrete regulatory agencies have been preserved in the separate program offices within the EPA. Lacking an organic statute imbuing it with the authority to achieve a single fundamental mission, the EPA's functional authority is derived from the various authorities contained in the individual statutes that it administers. The EPA program offices, therefore, derive their authority and purposes from the individual statutes they implement.” Fontaine, “EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle,” 18 *Columbia J. Env'tl. L.* 31, 49 (1983).

The relative insularity of the EPA's program offices was further reinforced, over time, by the passage of new media-specific statutes that required media-specific expertise to meet specific goals by certain deadlines. See Geltman and Skroback, “Reinventing EPA to Conform with the New American Environmentality,” 23 *Colum. J. Env'tl. L.* 1, 10 (1998). The “command and control” approach of environmental regulatory statutes requires the EPA and its state-level counterparts to set and enforce standards governing the amount of pollution each source can release into each environmental medium.

<sup>3</sup> See, e.g., Fontaine, N. 2 *supra*, 18 *Columbia J. Env'tl. L.* at 48.

<sup>4</sup> See, e.g., Fontaine, N. 2 *supra*, 18 *Columbia J. Env'tl. L.* at 31. At the same time, actors at various levels of EPA opposed such calls for reorganization. See “EPA Considers Major Reorganization of Enforcement Authorities,” 14 *Inside EPA* 1 (July 1, 1993). The intra-agency resistance to consolidation seemed to have come from the fact that each program has its own agenda and focuses on the single environmental medium or statute for which it is responsible.

Accordingly during the Clinton years, under the leadership of EPA Administrator Carol Browner, the Agency embarked on a reorganization, intended to reverse the decentralization that has been called “the Reagan administration’s most visible anti-environmental gambit.”<sup>5</sup> A 1993 memo from Administrator Browner to staffers outlined a plan under which the offices of criminal enforcement, regulatory enforcement, compliance, site remediation, and federal facilities, as well as the existing National Enforcement Investigation Center would form the skeleton of a reorganized agency.<sup>6</sup>

The resultant Office of Enforcement and Compliance Assurance (OECA) was given “the lead role in enforcement planning, inspection targeting, data management, compliance monitoring, and compliance assistance.”<sup>7</sup> Within OECA, the Office of Regulatory Enforcement (now called the Office of Civil Enforcement) was given the lead role in enforcement case development.

It is difficult to discern the effects of this reorganization, as distinct from the effects of a presidential administration’s regulatory approach, on enforcement performance, since critics tend to focus on political influences at the expense of discussions regarding the repercussions of reorganization.<sup>8</sup> One commenter has asserted that the 1993 reorganization had a role in the decline in federal contributions to state enforcement spending from the mid-1980’s through the mid-1990’s “because it separated the EPA enforcement office from the office that gives grant money to the states.”<sup>9</sup>

## [2]—EPA’s Present Enforcement Structures

Pursuant to Administrator Browner’s reorganization, technical and legal staff were reunited within EPA’s Office of Enforcement and Compliance Assurance. The Office of Civil Enforcement, OECA’s main enforcement arm, sets national enforcement policies, prosecutes administrative and civil judicial cases, directly enforces federal programs where no state program exists, and supports the enforcement efforts of the EPA’s regional office.<sup>10</sup> Although it includes a separate division focusing on multimedia enforcement (the Special Litigation and Projects division), the Office of Civil Enforcement for

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<sup>5</sup> Lavelle, “Reuniting the EPA’s Watchdogs,” *The National Law Journal* p. 1 (Oct. 18, 1993).

<sup>6</sup> “Compliance, Regulatory Offices Created Under Env’tl. Reorganization of EPA Enforcement,” 24 *Env’tl. Rptr. (BNA)* 1137 (Oct. 13, 1993).

<sup>7</sup> *Id.*

<sup>8</sup> Environmental Integrity Project, “Paying Less to Pollute: Environmental Enforcement Under the Bush Administration” (2007), available at [http://www.environmentalintegrity.org/publications/Press\\_Release\\_PayingLess.php](http://www.environmentalintegrity.org/publications/Press_Release_PayingLess.php) (last visited Feb. 12, 2012). The Environmental Integrity Project is a nonprofit organization that was established in March of 2002 by former EPA enforcement attorneys to advocate for more effective enforcement of environmental laws; Weiland and Vos, “Reforming EPA’s Organizational Structure: Establishing an Adaptable Agency Through Eco-Regions,” 42 *Nat. Res. J.* 91 (2002).

<sup>9</sup> Markell, “The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality,” 24 *Harv. Env’tl. L. Rev.* 1, 34 (2000).

<sup>10</sup> See EPA Website for information about EPA’s Office of Civil Enforcement, available at <http://www.epa.gov/compliance/basics/index.html> (last visited Feb. 12, 2012).

the most part administers enforcement efforts along separate media lines, focusing on programs covering wastes and chemicals, air, and water.<sup>11</sup>

The bulk of EPA's enforcement work is accomplished by its ten regional offices.<sup>12</sup> The regional offices "monito[r] regulated facilities' compliance, tak[e] direct enforcement action, and provid[e] compliance assistance and incentives to regulated facilities."<sup>13</sup> The regional offices also delegate certain enforcement activities (e.g., under CAA, CWA and RCRA) to the states.<sup>14</sup>

The regional offices, like EPA headquarters, comprise separate divisions arranged along both functional lines (e.g., Public Affairs, Regional Counsel) and programmatic lines (e.g., concerning different environmental media or different holistic environmental issues). Although each regional office is organized differently, the program offices of the regional offices generally participate in the enforcement of environmental statutes, regulations, and policies. This arrangement can present certain problems in the resolution of administrative enforcement cases brought by the regional offices. Because the technical program staff may be substantially involved in both the development and presentation of a complaint, the staff may later have difficulty remaining completely objective in assessing an offer to settle for less than originally sought.

### [3]—Consolidated Approach to Enforcement: Multimedia

A chronic weakness of environmental enforcement is that the statutory approach to environmental problems in the United States has been a patchwork of legislative efforts, each aimed at a specific environmental "medium"—one for air, one for water, one for solid waste, one for land contamination, etc. Inspections and enforcement efforts have been largely aimed at securing compliance with each such statutory program individually. Thus, a facility that has emissions going up the smokestack, effluents running out a waste pipe, and barrels of toxic waste buried in its "backyard" is subject to enforcement efforts under separate statutes. Such separate efforts, requiring separate inspections, separate teams of investigators, and separate technical personnel, can easily lead to wasted enforcement resources.

Moreover, such separate inspections and enforcement can be problematic for an industrial facility that needs to get about its productive business. In an effort to counteract inefficiencies born of single-program enforcement efforts, the EPA in 1992 embarked upon a four-year strategic plan "to focus the EPA's enforcement resources on the achievement of environmental results

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<sup>11</sup> *Id.*

<sup>12</sup> Government Accountability Office, "EPA's Execution of its Fiscal Year 2007 New Budget Authority for the Enforcement and Compliance Assurance Program in the Regional Offices." GAO-08-1109R (Sept. 26, 2008), available at <http://www.gao.gov/products/GAO-08-1109R> (last visited Feb. 12, 2012) (noting that OECA "provides overall direction on enforcement policies and sometimes takes direct enforcement action," but that the regional offices "are responsible for carrying out much of EPA's enforcement activities.")

<sup>13</sup> *Id.*

<sup>14</sup> See Geltman and Skroback, N. 2 *supra*, 23 Colum. J. Envtl. L. at 12.

through the implementation of a more holistic enforcement program.”<sup>15</sup> Multimedia enforcement has since become an established component of the EPA’s enforcement toolbox.<sup>15.1</sup>

The EPA has documented significant success in its use of the multimedia enforcement approach. Notably, in 2002, EPA developed a multimedia chemical targeting approach that uses public health and to identify chemicals to target. Since then, EPA has used this approach to pursue enforcement actions against the manufacturers of polyvinyl chloride (PVC), which emit significant quantities of vinyl chloride, an ozone precursor and known carcinogen.

According to the EPA, such efforts resulted in five civil enforcement settlements with major PVC manufacturers between 2004 and 2007, “reduc[ing] vinyl chloride air emissions by approximately 140,000 pounds per year and resolv[ing] alleged violations under the CAA, RCRA, and other environmental laws.”<sup>16</sup> In conjunction with its multimedia enforcement efforts, EPA, in partnership with industry, academia, environmental groups, and other agency, sponsors Compliance Assistance Centers, which provide online information about multimedia environmental requirements on an industry-by-industry basis.<sup>17</sup>

An important component of EPA’s multimedia enforcement efforts is data integration, the bringing together of information from different media. Technology is key to such consolidation. EPA’s Integrated Data and Enforcement Analysis (IDEA) system, a software program, provides environmental performance data on air, water, and hazardous waste issues for EPA-regulated facilities. Such information includes historical profiles of inspections, enforcement actions, penalties assessed, and toxic chemicals released.<sup>18</sup> The data is available to federal and state enforcement personnel and, in a limited form, to the general public.<sup>19</sup>

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<sup>15</sup> See Fontaine N. 2 *supra*, 18 Columbia J. Env’tl. L. at 55, n.127. See also, Fontaine, N. 2 *supra*, 18 Columbia J. Env’tl. L. at 38-46, for a graphic description of how unintegrated enforcement efforts allowed an industrial polluter to contaminate land, air, water, and the workplace without effective enforcement until it was too late to do anything about it.

<sup>15.1</sup> See EPA, “Multimedia Data Systems/Tools,” (2012), available at <http://www.epa.gov/compliance/data/systems/multimedia/index.html> (last visited March 15, 2013).

<sup>16</sup> EPA, “Settlements with Major PVC Manufacturers Substantially Reduce Emissions of Carcinogen Vinyl Chloride and Increase Compliance,” available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2008/2008enfcrossmediahighlights.html> (last visited Feb. 25, 2013). See also, EPA News Release, “EPA Increases Environmental Enforcement Actions in Pacific Islands by 40 percent in 2005,” (Nov. 15, 2005) (on file with author) (predicting the benefits of multimedia settlements).

<sup>17</sup> See “Settlements with Major PVC Manufacturers,” N. 16 *supra*.

<sup>18</sup> See EPA, “Integrated Data for Enforcement Analysis,” available at <http://www.epa.gov/compliance/data/systems/multimedia/idea/> (last visited Oct. 12, 2011).

<sup>19</sup> *Id.* See also, Flatt and Collins, “Environmental Enforcement in Dire Straits: There is No Protection for Nothing and No Data for Free,” 85 Notre Dame L. Rev. 55, 68-70 (2009) (discussing limitations in the data available through the publicly-accessible system, the Enforcement and Compliance System Online (ECHO)).

The EPA also uses the Internet to facilitate the general public's ability to report environmental violations. In January 2006, the agency revised its Web site's home page to include a link enabling users to report suspected violations.<sup>20</sup> This technology-based method is intended to reduce EPA's reliance on discovering violations through resource-intensive inspections, and instead leverage the public's interest in improving the environment.<sup>21</sup> By mid-November 2006, the Web site had received approximately 4,000 tips addressing potential civil violations, and 500 tips addressing potential criminal violations.<sup>22</sup> Tips are purportedly reviewed by EPA's criminal enforcement program within forty-eight hours and, if deemed credible, an inspection may be conducted or a request for documents may be issued to the potential violator.<sup>23</sup>

In addition to using the Internet to receive reports and tips from the public about environmental violations, EPA has also begun to use its website to raise public awareness of possible environmental violations and to pressure enforcement action by state and local agencies. For instance, beginning in November 2011, the EPA has made publicly available its monthly internal "Watch List" of environmental violators.<sup>24</sup> The list includes hundreds of facilities nationwide, grouped by suspected CAA, CWA and RCRA violations.

In order to be placed on the list, a facility must be flagged for significant noncompliance (SNC) under either CWA or RCRA, or for high priority violations (HPV) under CAA. EPA's enforcement response policies (ERP) categorize which types of violations are significant and establish a specified amount of time for a violation to be corrected.<sup>25</sup> Once the stop-watch hits the time limit set by the applicable ERP, the facility is automatically added to the Watch List.<sup>26</sup>

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<sup>20</sup> See EPA Home Page, available at [www.epa.gov](http://www.epa.gov) (last visited Oct. 12, 2011). The link for reporting violations is located at the upper right corner of the web page. When the link was first added in 2006, it was identified more prominently by a gold badge icon. The icon still exists on the EPA's Compliance and Enforcement website, available at <http://www.epa.gov/compliance/index.html> (last visited Oct. 12, 2011).

<sup>21</sup> "New EPA Website to Report Violations Will Strengthen Program, Nakayama Says," BNA Daily Environment, p. A-4 (Dec. 4, 2006).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See EPA Facility Watch List, available at [http://www.epa-echo.gov/echo/echo\\_watch\\_list.html](http://www.epa-echo.gov/echo/echo_watch_list.html) (last visited Feb. 15, 2012). Although EPA began keeping watch list for internal use in 2004, it remained confidential until after a June 2010 Freedom of Information Act request by National Public Radio and the Center for Public Integrity. See Shogren, "Secret 'Watch List' Reveals Failure to Curb Toxic Air," National Public Radio (Nov. 7, 2011), available at <http://www.npr.org/2011/11/07/142035420/secret-watch-list-reveals-failure-to-curb-toxic-air> (last visited Feb. 15, 2012).

<sup>25</sup> See EPA, "Fact Sheet: Watch List Management Tool," (Nov. 2, 2011), available at [http://www.epa-echo.gov/echo/docs/watch\\_list\\_fact\\_sheet.pdf](http://www.epa-echo.gov/echo/docs/watch_list_fact_sheet.pdf) (last visited Feb. 25, 2013).

<sup>26</sup> The watch list does not specify the reason that a facility has been added to the list, and EPA cautions that the appearance of a facility on the list does not mean that a violation has been proven, only that EPA or a state or local environmental agency has alleged a violation.

Because the list is so newly public, it remains to be seen how the public “outing” of suspected environmental violators will impact enforcement measures by state and local agencies and potential suits by citizen groups, and whether the public availability of the EPA Watch List will aid EPA enforcement efforts.

#### [4]—EPA’s Trial Attorneys—The Department of Justice

The EPA, as a general rule, cannot and does not try its own judicial proceedings. The EPA’s trial attorneys are from the Department of Justice in most civil cases and in all criminal matters. EPA enforcement lawyers do handle all administrative enforcement matters.

The Department of Justice (DOJ) functions primarily through “Main Justice,” the centralized group of trial lawyers in Washington D.C., and the ninety-three United States Attorneys and their staffs. The primary division charged with civil environmental enforcement is the Environmental Enforcement Section of the Environmental and Natural Resources Division of Main Justice. In 2012, the Environmental Enforcement Section had approximately 155 attorneys, making it “one of the largest litigation offices in the Department of Justice.”<sup>27</sup> The Environmental and Natural Resources Division also has a smaller Environmental Crimes Section, with over forty lawyers.<sup>28</sup> However, environmental criminal prosecution is greatly enhanced by the various United States Attorneys, and their staffs who traditionally function as criminal prosecutors of all federal crimes.

To say that DOJ is EPA’s trial lawyer is not to say that EPA is always a client in control of its counsel. While in theory DOJ is the “outside” trial counsel for EPA, and will dutifully follow its client’s instructions, the Justice Department has traditionally viewed itself as more than a group of publicly funded trial lawyers. The views of the Attorney General or, more precisely, those of his subordinates in the Environmental and Natural Resources Division, influence environmental enforcement issues far more significantly than would the views of an attorney in private practice.

This phenomenon exists because DOJ believes it has a higher duty than merely to represent a client in a contested judicial matter.<sup>29</sup> To complicate

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<sup>27</sup> U.S. Department of Justice, Environmental and Natural Resources Division, “The Organization of EES,” available at <http://www.justice.gov/enrd/4623.htm> (last visited Feb. 25, 2013).

<sup>28</sup> U.S. Department of Justice, Environmental and Natural Resources Division, “Creation of the Environmental Crimes Section,” available at <http://www.justice.gov/enrd/3384.htm> (last visited Feb. 12, 2012).

<sup>29</sup> See Environmental Law Institute, “Remarks of Former Assistant Attorney General Roger Marzulla,” 11 Environmental Forum 42 (Jan.-Feb. 1994):

“There is a built-in tension between the Justice Department and the agencies it represents. The primary role of the Justice Department is to advance the policies that are adopted by the governmental agencies. But the second role of the Department is to protect the Constitution, the judicial system, and the rule of law. It is in that role that I sometimes found myself at odds with the governmental agencies that we sometimes represented at clients, including EPA.”

matters further, Main Justice is only part of the enforcement scenario. The Attorney General discharges much of his actual litigation duties through the ninety-three United States Attorneys, who exercise varying degrees of independence, especially in the criminal justice arena.<sup>30</sup> Furthermore, “referrals” to DOJ involving environmental enforcement matters can originate from federal agencies other than EPA. Thus, other agencies, such as the Coast Guard in the Department of Transportation, the Army Corps of Engineers and the Department of the Interior, all of which have environmental mandates, will look to DOJ to prosecute their cases, often without much regard for EPA priorities.

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<sup>30</sup> “[R]eflecting one of the recurrent but still quaint charms of our political and legal system, the executive comes disunited to the courthouse...” *Harlem Valley Transportation Ass’n v. Stafford*, 360 F. Supp. 1057, 1062 (S.D.N.Y. 1973).

## § 1.04 The Federal/State Relationship

### [1]—Overview

In addition to the programmatic structure of the EPA, the environmental enforcement system is shaped by the nature of the federal/state relationship with respect to the enforcement of environmental laws. The enforcement of pollution standards in the United States is primarily conducted by the states. Most environmental protection statutes allow the EPA to authorize the states to enforce federal environmental laws if their programs are equally stringent.

The authorization of states to enforce the laws serves at least two purposes, however: (1) it conserves scant federal resources; and (2) it allows the states, which are often in a better position to assess environmental compliance, to function as the primary enforcers of the law. However, even in authorized states, the EPA retains its enforcement authority. The states' enforcement authority, therefore, is shared with the EPA, creating the potential for conflict over enforcement responsibilities and priorities.

### [2]—The Delegation Process

Most federal environmental statutes authorize the EPA to delegate its enforcement authority to the states, provided that state programs are at least equally demanding.<sup>1</sup> Ultimately, final responsibility for enforcement remains with the federal government, to be administered by the EPA.<sup>2</sup> Thus, in the event that states delegated to enforce federal standards fail to do so, the authority can be reclaimed by the EPA.<sup>3</sup>

Generally, before the EPA delegates a state to administer a federal environmental statutory program, it publishes the proposed promulgation of a regulation and a notice of public hearings in the Federal Register. Hearings are generally held by the EPA<sup>4</sup> in the capital of the state in question, although they often are held in other cities as well. After the EPA is satisfied through the hearing process that the state has legislated the regulatory infrastructure necessary to administer the federal statute properly, it promulgates final

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<sup>1</sup> See, e.g., Resource Conservation and Recovery Act (RCRA) § 3006, 42 U.S.C. § 6926; Clean Water Act § 402(b), 33 U.S.C. § 1342(b); Clean Air Act § 110, 42 U.S.C. 7410 (covering State Implementation Plans (SIPs)); Clean Air Act § 111, 42 U.S.C. § 7411 (covering New Source Performance Standards (NSPS)); and Clean Air Act § 112, 41 U.S.C. § 7412 (covering hazardous air pollutants).

Under the Clean Water Act, forty-five states and the Virgin Islands are delegated to administer the National Pollution Discharge Elimination System (NPDES) permit program. The first state to gain approval for such a permit program was California, in 1973. The most recent state to gain approval was Alaska, in 2008. U.S. EPA, "State and Tribal Program Authorization Status," <http://cfpub.epa.gov/npdcs/statestribes/astatus.cfm> (last visited Feb. 25, 2013).

<sup>2</sup> See, e.g., Clean Air Act § 113, 42 U.S.C. § 7413, providing that if states fail to enforce federal requirements, the power to do so reverts to the EPA.

<sup>3</sup> See, e.g., *United States v. ITT Ravonier, Inc.*, 627 F.2d 996, 1001 (9th Cir. 1980).

<sup>4</sup> In the case of the Clean Air Act, hearings on State Implementation Plans (SIPs) are conducted by the states, rather than by the EPA.

regulations delegating the authority to do so, and publishes them in the Federal Register and ultimately in the Code of Federal Regulations.

State enforcement of a federal environmental statute is authorized through the use of an agreement, variously called a Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU).<sup>5</sup>

In the final analysis, the purpose of the MOU is to establish that the state will use the same standards that the EPA would in the oversight of a regulated party's operations and enforcement of the relevant federal environmental statutes, regulations and standards. To this end, the typical MOU deals with five areas of national importance, identified as (1) oversight criteria and measures for defining good performance, (2) oversight procedures and protocols, (3) criteria for direct EPA enforcement, (4) procedures for advance notification and consultation, and (5) reporting requirements.<sup>6</sup>

The agreement calls for the state agency to follow specific federal guidelines drawn up by the EPA to assure compliance with federal policies and regulations.<sup>7</sup> Generally, the guidance documents are included in the agreement itself as attachments.

The Policy Framework for State/EPA Enforcement Agreements (the "Policy Framework")<sup>8</sup> defines the general approach for EPA supervision of delegated or approved state programs. Seven criteria are set forth in the Policy Framework to serve as the basis for assessing good program performance: (1) clear identification of priorities for the regulated community; (2) clear and enforceable requirements; (3) accurate and reliable compliance monitoring; (4) high or improving rates of continuing compliance; (5) timely and appropriate enforcement response; (6) accurate recordkeeping and reporting; and (7) sound overall program management.<sup>9</sup>

Each national program is required to develop guidance documents that assist the EPA regional offices and the states in determining what constitutes a timely and appropriate enforcement response to significant violations. Enforcement may take a variety of forms, ranging from informal actions, such as oral discussions with the owner or operator of the source, warning letters, and notices of violation, to more formal actions including administrative compliance orders, field citations, administrative penalty orders, civil

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<sup>5</sup> Such federal-state agreements are based upon two EPA guidance documents— "Policy Framework for State/Federal Enforcement Agreements (revised Aug. 25, 1986) and "Guidance for the FY 1993 State/EPA Enforcement Agreements Process" (July 10, 1992).

<sup>6</sup> See, e.g., Draft Memorandum of Understanding Between Louisiana Department of Environmental Quality and U.S. Environmental Protection Agency, p. 1 (Mar. 10, 1993).

<sup>7</sup> See generally, *id.*

<sup>8</sup> See Memorandum from Alvin Alm, Deputy Administrator, U.S. EPA, to Assistant Administrators, Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements, Attachment I (U.S. EPA, Policy Framework for State/EPA Enforcement "Agreements") (June 26, 1984) (hereafter referred to as "Policy Framework"). See also, Lee. A. Deihns, III (Deputy Regional Administrator for EPA Region 4) Defining and Implementing Elective Federal, State, Local Relationships: The U.S. Experience in Proceedings, International Enforcement Workshop 157 (1990).

<sup>9</sup> Policy Framework, N. 8 *supra*.

judicial actions, and criminal actions.<sup>10</sup> Alternative enforcement mechanisms also exist, including contractor delisting under the Clean Air Act<sup>11</sup> and the Clean Water Act,<sup>12</sup> and debarment<sup>13</sup> or suspension from federal contracts pursuant to the federal procurement regulations.

Only specified categories of noncompliance are considered to be so “significant” as to demand formal enforcement action. For example, the NPDES Program considers the following violations to be significant: (1) violations of interim or final effluent limits of a defined duration and magnitude; (2) violation of construction schedules; (3) violation of reporting requirements and noncompliance with pretreatment implementation standards; and (4) violation of compliance schedules.<sup>14</sup>

In theory, each program’s definition of significant noncompliance effectively ensures that the most serious noncompliance is the first to be addressed.

The division of specific enforcement responsibilities between the EPA regional offices and the states having authority to enforce the law is effectuated by annual enforcement agreements between state environmental protection agencies and regional EPA offices. Under these agreements, the EPA regional offices and the states negotiate enforcement commitments consistent with the priorities mutually identified by the EPA program offices and the states.

States that have been authorized by the EPA to enforce the federal programs possess primary responsibility to resolve noncompliance and to take enforcement action when necessary. The EPA will, however, undertake enforcement action, even in an authorized or delegated state, under a number of circumstances, such as where: (1) the state has failed to act in a timely and appropriate manner; (2) issues of national scope or importance are raised by the enforcement action; (3) political sensitivities impair the state’s ability to enforce adequately; or, (4) inadequate enforcement authority (e.g., penalty authority) impairs the state’s ability to deal with repeat violators. For example, in an action challenged in one case,<sup>14.1</sup> the EPA issued orders to prevent the Alaska Department of Environmental Conservation from issuing a Prevention of Significant Deterioration permit under the Clean Air Act, as well as to stop the applicant’s construction of the plant. These activities were upheld by the Supreme Court as proper exercises of EPA’s oversight and enforcement authority under the Clean Air Act.<sup>14.2</sup>

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<sup>10</sup> See generally, EPA, *Principles of Environmental Enforcement* (1992).

<sup>11</sup> Clean Air Act § 306(a); 42 U.S.C. § 7606(a).

<sup>12</sup> Clean Water Act § 508(a); 33 U.S.C. § 1368(a).

<sup>13</sup> In contrast to contractor delisting, debarment or suspension from federal contracts is not limited to instances of noncompliance with the Clean Air Act or the Clean Water Act, but may be triggered by a conviction or civil judgment for a variety of offenses which are relevant to protecting the public interest. See 40 C.F.R. § 32.305(a).

<sup>14</sup> U.S. EPA, “Enforcement in the 1990’s Project: Recommendations of the Analytical Workgroups,” at pp. 1-25 to 1-26 (1991).

<sup>14.1</sup> *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004).

<sup>14.2</sup> In that case, EPA issued the contested orders on the grounds that the Alaska Department of Environmental Conservation failed to justify adequately its determination

In those instances when a state fails to respond to noncompliance in a timely and appropriate manner, or when a state enforcement response is unsatisfactory (e.g., the state penalty is grossly inadequate), the federal government may undertake its own action to enforce the law. This is referred to as “overfiling.” Such instances are extremely rare.<sup>15</sup>

The EPA’s strict programmatic structure is a major reason for the similar fragmentation experienced at the state level. The system for allocating resources to the states, including the negotiation and tracking of grant commitments, is generally perceived to be a barrier to multimedia approaches. Federal program funds to state air, water, and solid waste programs are administratively and legally separate. Funding cycles, accounting procedures, planning and information requirements, and other administrative aspects of these programs are also separate and distinct. Even the states that actively pursued environmental program integration in the 1970s were frustrated by the EPA’s programmatic structure. State agencies differ immensely in the intensity of, and philosophical approach to, environmental enforcement efforts, in large part because frequent internal changes in the leadership of state governments and extensive turnover among professional staffs create volatility. These administrative changes often have important impacts on the direction and scope of state environmental enforcement programs, which makes the programs’ organizations exceedingly important to facilitate smooth transitions during times of administrative change.<sup>15.1</sup>

In recognition of the benefits of greater organizational integration, several states, including Massachusetts, Virginia and California, have begun to consolidate previously disparate environmental agencies. California, in particular, faces a formidable challenge in consolidating thirty-four local air pollution control districts and air quality management districts and 120 local solid and hazardous waste management agencies.<sup>16</sup> To assist in light of this task the California EPA established the Cross-Media Enforcement Coordination Group in 2000, consisting of representatives of each California EPA board and department and chaired by the Deputy Secretary for Law

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of the Best Available Control Technology (BACT), and thus its action was arbitrary and capricious. *Id.*, 540 U.S. at 491. The Supreme Court upheld EPA’s actions, concluding that “EPA has supervisory authority over the reasonableness of state permitting authorities’ BACT and may issue a stop construction order.” *Id.*, 540 U.S. at 502.

<sup>15</sup> See U.S. EPA, “Enforcement in the 1990’s Project: Recommendations of the Analytical Workgroups,” at p. 2-1 (1991). But see, *Esso Standard Oil v. Lopez-Freytes*, 522 F.3d 136 (1st Cir. 2008) (where the Court of Appeals upheld an order permanently enjoining the Puerto Rico Environmental Quality Board from imposing a \$76 million fine on an oil company because of a demonstrated and prevalent bias on the part of the Commonwealth environmental agency).

<sup>15.1</sup> Mintz, “Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALS,” 17 *J. Land Use and Envtl. L.* 127, 131 (2001).

<sup>16</sup> See Strock, “Integrated Pollution Prevention: CAL-EPA’s Perspective,” 22 *Envtl. L.* 311 (1992); Strock and Carter, “CAL-EPA’s Integrated Enforcement Programs: State, Federal, and Local Coordination,” 2 *Cal. Envtl. L. & Reg. Rptr.* 221 (Dec. 1992).

Enforcement and Counsel.<sup>16.1</sup> This group continues to meet and hold annual Cross-Media Enforcement Symposiums to build partnerships and share enforcement techniques.<sup>16.2</sup>

### **[3]—Parallel Proceedings, Overfiling and Judicial Abstention**

The relationship between the federal government and the states can generate considerable enforcement problems for members of the regulated community. These problems can emerge as a result of two different kinds of multiple proceedings—parallel proceedings and overfiling. Whenever multiple proceedings result from both state and federal enforcement activity, it raises the question of whether the federal court should abstain from hearing the matter until the state proceeding is complete as well as the constitutional question of double jeopardy.

#### **[a]—Parallel Proceedings**

Parallel proceedings can take several different forms. For example, federal and state enforcement authorities often work together on matters that are considered to be important to both sovereigns. Thus, a facility may be inspected or searched by teams of both state and federal investigators, or litigation may be commenced by both a state Attorney General and the Department of Justice. Similarly, the EPA often makes a considerable effort to encompass state hazardous waste claims in its CERCLA settlements. However, it is not uncommon for a civil action by one sovereign to be followed by a criminal proceeding involving essentially the same misdeeds by the other sovereign. Indeed, any number of combinations of enforcement efforts can arise. Another example, not infrequently seen, is a criminal prosecution by a state under its own air act for the unpermitted discharge of a toxic substance and an EPA effort to extract civil penalties for the failure to report that same discharge under EPCRA.<sup>17</sup> This phenomenon is known as “parallel proceedings,” and occurs frequently enough to represent a problem in most enforcement scenarios. Certainly, no case should be settled without serious consideration of this problem.<sup>18</sup>

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<sup>16.1</sup> Office of the Secretary Deputy Secretary for Law Enforcement and Counsel, “California Environmental Protection Agency Enforcement Progress Report 1999-2002” (2002) <http://www.calepa.ca.gov/Enforcement/documents/2002ProgRpt.pdf> (last visited Feb. 12, 2012).

<sup>16.2</sup> Air Resources Board, 11th Annual Cal/EPA Environmental Cross Media Enforcement Symposium June 2005, available at [www.arb.ca.gov/enf/reports/04enfrpt.pdf](http://www.arb.ca.gov/enf/reports/04enfrpt.pdf) (last visited April 14, 2011).

<sup>17</sup> See EPCRA § 304, 42 U.S.C. § 11004, which requires the owner or operator of a facility from which there has been a release of a hazardous substance to “immediately provide notice” to state and local emergency officials.

<sup>18</sup> Parallel proceedings can take several different forms. For example, a state and the federal government might at the same time be pursuing a regulated party for the violation of identical or nearly identical state and federal statutory provisions. In another scenario, either the state or the federal government, or both, might be suing or prosecuting a party for the violation of separate statutory provisions pursuant to different acts, arising from the same violative behavior.

**[b]—Overfiling**

The concept of overfiling differs from that of a parallel proceeding. It stems from authority written into the major federal environmental statutes permitting the federal government to proceed against a target that has already been the subject of a state enforcement effort under a delegated program. The Resource Conservation and Recovery Act, the Clean Air Act, and the Clean Water Act all allow the EPA to delegate enforcement authority to the states. However, they also reserve to the EPA the right to federally enforce environmental laws in states with such delegation agreements. “Overfiling” occurs when the EPA takes enforcement action in a delegated state. Overfiling occurs relatively infrequently but because of its dramatic impact on the regulated community it deserves to be carefully considered.

Limitations on the EPA’s power to overfile vary from statute to statute. For example, RCRA is quite broad. It allows the EPA to assess civil penalties and/or require compliance with the federal statute, or commence a civil action in the appropriate federal district court. If a violation occurs in a delegated state, the EPA must provide notice to the state before proceeding against the violator.<sup>19</sup> In contrast, the EPA’s power to overfile under the Clean Water Act is considerably more limited. Under the Clean Water Act, the EPA may not take action for thirty days after notifying the relevant state.<sup>20</sup> Moreover, the EPA’s authority to enforce the Act in delegated states appears to be limited by statutory language to those situations in which violations “are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively. . . .”<sup>21</sup>

Under the Clean Air Act, state delegation is not a matter of voluntary participation; states are required to have approved State Implementation Plans (SIPs) detailing compliance with and enforcement of primary and secondary National Ambient Air Quality Standards (NAAQS).<sup>22</sup> The EPA’s power to enforce SIPs in the absence of state enforcement is limited pursuant to statutory language requiring thirty days notice in the case of a violation of a SIP or ninety days in the case of a violation of a permit program.<sup>23</sup> However, a federal criminal case can be brought at any time.<sup>24</sup> If a state fails to enforce under the Clean Air Act, federal enforcement can take the form of an order requiring compliance, an administrative penalty order, a federal civil action, or a federal criminal action.<sup>25</sup>

The relationship established between the EPA and the state agencies as a result of delegation agreements raises a number of important questions. For example, if a delegated state has issued a compliance order in a case, but the EPA thinks that an administrative penalty is called for, can the EPA

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<sup>19</sup> RCRA § 3008(a); 42 U.S.C. § 6928(a).

<sup>20</sup> Clean Water Act § 309(a); 33 U.S.C. § 1319(a).

<sup>21</sup> Clean Water Act § 309(a)(2); 33 U.S.C. § 1319(a)(2).

<sup>22</sup> Clean Air Act § 110; 42 U.S.C. § 7410.

<sup>23</sup> Clean Air Act § 113(a)(2); 42 U.S.C. § 7413(a)(2).

<sup>24</sup> Clean Air Act § 113(a); 42 U.S.C. § 7413(a).

<sup>25</sup> Clean Air Act § 113(a); 42 U.S.C. § 7413(a).

ignore the state enforcement efforts and initiate its own? If a state has levied a wrist-slap penalty on a polluter, can the EPA seek a greater penalty for the same violations? What if a state has sought an insignificant criminal penalty against a regulated party; can the EPA subsequently seek a greater penalty for the same violation? Issues of collateral estoppel and double jeopardy are implicated in such questions.

Not surprisingly, the EPA has long taken the position that it is free to overfile at its discretion, regardless of whether a state has taken no enforcement action, inadequate enforcement action, or even vigorous enforcement action.<sup>26</sup> In a 1986 memo on the subject, General Counsel Francis S. Blake agreed with EPA staff that under RCRA, while “EPA should generally not take civil enforcement action if a state has taken timely and appropriate action, . . . this was a policy matter, not a requirement of statutory or case law.”<sup>27</sup> In reaching this conclusion, the General Counsel relied on statutory language,<sup>28</sup> a somewhat inconsistent legislative history,<sup>29</sup> and case law in the context of the Clean Water Act<sup>30</sup> and the Clean Air Act.<sup>31</sup>

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<sup>26</sup> See EPA General Counsel’s Memorandum to Administrator, Effect on EPA Enforcement of Enforcement Action Taken by State with Approved RCRA Program (May 9, 1986).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* “On the face of the statute, the only prerequisite to an EPA enforcement action in an authorized state is finding that a violation of the authorized state program has occurred or is occurring and that notice of EPA’s intent to take action has been provided to the state.”

<sup>29</sup> *Id.* “The House Report states that ‘the Administrator is not prohibited from acting in those states where the states fail to act...’ House Committee on Interstate and Foreign Commerce Report 94 U.S. Code Cong. and Admin. News, 94th Cong. 2d Sess. (1976) at 6261. This language certainly suggests some sort of limitation on federal enforcement power when a state has acted. \*\*\*The Senate Report, by contrast, indicates an intent to draw ‘on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972’ in allocating responsibilities between the EPA and the states under Section 3008. S. Rep. No. 988, 94th Cong. 2d Sess. 17 (1976).”

<sup>30</sup> *Id.*, citing *United States v. ITT Ravonier, Inc.*, 627 F.2d 966, 1001 (9th Cir. 1980) (EPA may bring a Clean Water Act enforcement action notwithstanding the existence of state enforcement proceeding).

<sup>31</sup> EPA General Counsel’s Memorandum to Administrator, Effect on EPA Enforcement of Enforcement Action Taken by State with Approved RCRA Program (May 9, 1986), citing *United States v. SCM Corp.*, 615 F. Supp. 411, 416 (D. Md. 1985) (existence of state administrative consent order did not bar EPA action seeking civil penalties and injunctive relief for Clean Air Act SIP violations).

See also:

*Fourth Circuit*: *United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983) (state agreement on compliance schedule does not bar federal action under Clean Air Act).

*Fifth Circuit*: *United States v. Chevron, U.S.A., Inc.*, 19 E.R.C. (BNA) 1462 (W.D. Tex. June 10, 1983) (pending state lawsuit that had imposed temporary injunction for SIP violation did not bar EPA suit for permanent injunction and civil penalties).

*Eighth Circuit*: *United States v. Lehigh Portland Cement Co.*, C 84-3030, 1984 WL 2853 (N.D. Iowa Dec. 12, 1984) (state consent order did not preclude subsequent EPA action for Clean Air Act SIP violation).

In a Clean Air Act case,<sup>32</sup> the Maryland District Court held that under the Act the EPA has the right to initiate a federal court action regardless of the existence of state enforcement action, reasoning that if a state enforcement action were to preclude federal action to enjoin or punish the same violation, a “state could nullify federal enforcement simply by adopting and using a state enforcement scheme which provided for minimal penalties.”<sup>33</sup>

In another Clean Air Act case,<sup>34</sup> a Pennsylvania federal district court rejected the defendant’s assertion that because EPA had delegated enforcement power to the Philadelphia Department of Health, the federal agency was precluded from enforcement activities subsequent to a settlement agreement between the defendant and the delegated city agency. Language in the agreement between the defendant and the city purporting to make the agreement binding on the delegator of the city agency was of no effect, the court held: “[I]t was unreasonable for Chevron to think that because the General Release contained the language that it was binding on the ‘delegators’ of the [city agency’s] power, that the EPA could be so bound without its own clear affirmation of such intent.”<sup>35</sup>

In another case involving the same defendant,<sup>36</sup> the state of Texas and the city of El Paso sued in state court to enjoin Chevron from violating the state’s Clean Air Act. While a temporary injunction was in place and the state case was pending, the EPA overfiled in federal court, seeking a permanent injunction and civil penalties of \$25,000 for each day the violations had occurred. Chevron moved to dismiss the EPA action on the grounds that a state suit was still pending, but the court denied the motion, stating: “The statute here . . . does not require any ‘exhaustion’ of state remedies. The only prerequisites to suit mentioned in the statute itself are (1) notice to the alleged violator, and (2) a lapse of 30 days. The Administrator has complied with these two prerequisites in this case. Therefore, the motion to dismiss should be denied.”<sup>37</sup>

The Texas case also dealt with a related issue, that is, whether a federal court is required to “abstain” from hearing a case that is pending before a state forum. As the court pointed out,<sup>38</sup> the Supreme Court held<sup>39</sup> that federal court abstention is appropriate where a constitutional issue raised by the case would be mooted or reframed by state court action, where federal court jurisdiction would interfere with state efforts to regulate matters of purely state interest, and where federal courts are asked to restrain state criminal proceedings, certain nuisance actions, or suits to collect state taxes. However, the Texas District Court also took note of the later decision<sup>40</sup> in which

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<sup>32</sup> United States v. SCM Corp., 615 F. Supp. 411, 418-419 (D. Md. 1985).

<sup>33</sup> *Id.*, 615 F. Supp. at 419.

<sup>34</sup> United States v. Chevron U.S.A., Inc., 757 F. Supp. 512 (E.D. Pa. 1990).

<sup>35</sup> *Id.*, 757 F. Supp. at 514.

<sup>36</sup> United States v. Chevron U.S.A., Inc., 19 E.R.C. (BNA) 1462 (W.D. Tex. 1983).

<sup>37</sup> *Id.*, 19 E.R.C. (BNA) at 1463.

<sup>38</sup> *Id.*, 19 E.R.C. (BNA) at 1463-1464.

<sup>39</sup> Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

the Supreme Court “stressed that the pendency of a parallel state action is no bar to proceedings in a federal court having jurisdiction, and that abdication of its jurisdiction by the federal court is appropriate only in exceptional circumstances.”<sup>41</sup> Thus, any argument that a federal court should decline to hear a suit brought by the EPA while a state action is pending is likely to fall on unsympathetic judicial ears.

An Iowa federal district court<sup>42</sup> dealt with the question of whether a state environmental agency’s action to enforce the terms of a State Implementation Plan (SIP) precludes the EPA from suing to enforce the same SIP. The court held:

“In its reading of the statute, which gives to both federal and state court jurisdiction to enforce provisions of the state SIP, this Court finds no limitation on the EPA (or any other federal government agencies) in bringing an action when there is or was already a parallel state proceeding.”<sup>43</sup>

Thus, it is clear that, at least with respect to the Clean Air Act, the courts generally have not thus far found there to be a statutory bar to overfiling by the federal government, whether or not there has been a state enforcement effort, and regardless of the magnitude of any state enforcement effort that may have been made.

However, there may now be some limitations on the EPA’s ability to overfile under other statutes. In an issue of first impression under RCRA, a Missouri federal district court reversed the EPA Environmental Appeals Board (EAB), holding that EPA may not maintain an enforcement action against a respondent if an authorized state has already taken and completed enforcement for violations based on the same facts.<sup>44</sup> The Eighth Circuit Court of Appeals affirmed this decision.<sup>45</sup>

The Tenth Circuit Court of Appeals, though, in a more recent ruling, affirmed a Colorado district court decision rejecting the Eighth Circuit’s view of EPA’s overfiling power under RCRA, creating a split between the circuits on this question.<sup>46</sup> Thus, while the Eighth Circuit has rejected EPA’s

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<sup>40</sup> *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 15, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (“[T]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.”).

<sup>41</sup> *United States v. Chevron U.S.A., Inc.*, N. 36 *supra*, 19 E.R.C. (BNA) at 1464, paraphrasing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 15-16, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

<sup>42</sup> *United States v. Lehigh Portland Cement Co.*, C 84-3030, 1984 WL 2853 (N.D. Iowa Dec. 12, 1984).

<sup>43</sup> *Id.*, 24 E.R.C. (BNA) at 1700.

<sup>44</sup> *Harmon Industries, Inc. v. Browner*, 19 F. Supp.2d 988 (W.D. Mo. 1998), *aff’d* *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), *rehearing denied* (Jan. 24, 2000).

<sup>45</sup> *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 29 E.L.R. 21 (8th Cir. 1999), *rehearing denied* (Jan. 24, 2000).

position that it retains the power to overfile in cases in which it finds state enforcement efforts inadequate, the Tenth Circuit decision has bolstered EPA's contention that RCRA, and analogous statutes that allow delegation to states of EPA's power to administer and enforce them, authorize its practice of overfiling.

The Eighth Circuit case arose as a result of a company's improper disposal of thousands of gallons of hazardous solvents at its facility in Missouri. During a routine safety inspection, company management discovered the disposal, halted the practice, and ordered a Phase I investigation of soils and ground water. Shortly thereafter, the company notified the state agency authorized to administer the RCRA program and eventually entered into a consent decree with the state of Missouri. In the decree, the state specifically waived any claim for monetary penalties in recognition of the company's voluntary self-reporting and cooperation.<sup>47</sup> The EPA, however, had overfiled and, at the conclusion of that action, ordered the company to pay civil penalties in excess of \$586,000. On appeal, the EAB affirmed.<sup>48</sup>

The district court reversed, basing its holding on the plain language of RCRA and, alternatively, the principle of *res judicata*. RCRA Section 3006(b) provides that the delegated state authority operates "in lieu of" the federal program. In addition, Section 3006(d) provides that a state action shall have "the same force and effect" as a federal enforcement action. According to the court, these provisions establish a "cooperative effort" for enforcement, necessary to avoid duplication and inefficiency. Under the statute, if EPA disapproves of a state action, it may withdraw administrative authority, but may not correct or supplement the state agency's actions on an "incident-by-incident" basis.<sup>49</sup> The court found support for its reading of RCRA in the legislative history.

On appeal, the Eighth Circuit affirmed the district court's decision.<sup>50</sup> The circuit court found that, under RCRA Section 3006, EPA may initiate an enforcement action in a previously authorized state if it first deems the state's action to be inadequate.<sup>51</sup> Before initiating such an action, EPA must allow the state an opportunity to cure the inadequacy and must withdraw authorization of the state hazardous waste program.<sup>52</sup> Under RCRA Section 3008, EPA also may initiate an enforcement action when an authorized state fails to take any action upon written notice to the state.<sup>53</sup> The circuit court concluded, however, that there is no authority in the text of the statute or in legislative history to support the proposition that EPA is authorized to

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<sup>46</sup> *United States v. Power Engineering Co.*, 125 F. Supp.2d 1050, 1061 (D. Col. 2000), *aff'd* *United States v. Power Engineering Co.*, 303 F.3d 1232, 54 E.R.C. (BNA) 1993 (10th Cir. 2002), *cert. denied* 538 U.S. 1012 (2003).

<sup>47</sup> See *Harmon Industries, Inc. v. Browner*, N. 44 *supra*, 19 F. Supp.2d at 989-990.

<sup>48</sup> *In re Harmon Electronics, Inc.*, RCRA (3008) 7 E.A.D. 1 (March 24, 1997).

<sup>49</sup> *Harmon Industries, Inc. v. Browner*, N. 44 *supra*, 19 F. Supp.2d at 995-997.

<sup>50</sup> *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999).

<sup>51</sup> *Id.*, 191 F.3d at 901.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

duplicate a state's enforcement action with its own.<sup>54</sup>

To reach this conclusion, the Eighth Circuit relied on its reading of two sections of RCRA, Section 6926(b) and Section 6926(d), as establishing that the state program completely supplants the federal program, with administration and enforcement inextricably intertwined.<sup>55</sup> Section 6926(b) provides that “[s]uch State is authorized to carry out such program in lieu of the federal program under this subchapter in such State and to issue and enforce permits . . . .”<sup>55.1</sup>

Section 6926(d), appearing under the heading “Effect of State Permits,” provides that “[a]ny action taken by a State under a hazardous waste program authorized under [RCRA] has the same force and effect as action taken by the [EPA] under this subchapter.”<sup>55.2</sup> Interpreting the language of the section and disregarding its heading, the court found additional support for its holding that Congress intended the section to preclude EPA from taking enforcement action when it disagrees with enforcement action taken by a state.<sup>56</sup>

In contrast, the Court of Appeals for the Tenth Circuit declined to follow the Eighth Circuit's lead and held that RCRA does allow EPA to overfile.<sup>57</sup> The court upheld a Colorado district court decision that harshly criticized the Eighth Circuit's reasoning as an erroneous interpretation of RCRA and an unsupported expansion of the doctrine of *res judicata*. In this case, EPA sued under RCRA to obtain financial assurances from a metal refinishing business that failed over several years to adhere to Compliance and Administrative penalty orders of the Colorado Department of Public Health and the Environment pertaining to the company's improper treatment, storage and disposal of hazardous wastes.<sup>58</sup> Colorado had, contrary to EPA's request, not sought financial assurances from the company's owner.<sup>59</sup> The district court rejected defendants' arguments, based on the Eighth Circuit's decision for the award of summary judgment. Using the Eighth Circuit's definition of overfiling as “duplicating enforcement actions,” the district court ruled the Eighth Circuit's decision inapposite, because, although Missouri had released the company that had mishandled hazardous solvents from financial penalties in its settlement order, Colorado had never sought financial assurances from, nor released the metal refinishing company from, providing financial assurances. Thus, the Colorado district court held that the EPA enforcement action was not overfiling.<sup>60</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, 191 F.3d at 899.

<sup>55.1</sup> 42 U.S.C.A. § 6926(b).

<sup>55.2</sup> 42 U.S.C.A. § 6926(d).

<sup>56</sup> *Id.*, 191 F.3d at 901.

<sup>57</sup> *United States v. Power Engineering Co.*, 303 F.3d 1232, 54 E.R.C. (BNA) 1993 (10th Cir. 2002).

<sup>58</sup> *United States v. Power Engineering Co.*, 125 F. Supp.2d 1050 (D. Col. 2000), *aff'd* *United States v. Power Engineering Co.*, 303 F.3d 1232, 54 E.R.C. (BNA) 1993 (10th Cir. 2002), *cert. denied* 538 U.S. 1012 (2003).

<sup>59</sup> See N. 58 *supra*, 125 F. Supp.2d at 1052-1053.

<sup>60</sup> *Id.*, 125 F. Supp.2d at 1057.

The Tenth Circuit Court of Appeals upheld the district court's finding that the Eighth Circuit's decision was erroneous statutory construction. Reasoning that, where a statute is ambiguous, courts must defer to the interpretation of the agency charged with administering the statute as long as it is based on a permissible construction of the statute, the Tenth Circuit found that RCRA is ambiguous and that EPA's interpretation of its power to overfile under RCRA is not unreasonable.<sup>61</sup> The Tenth Circuit criticized the Eighth Circuit's finding that the administration and the enforcement of the statute were inextricably intertwined, saying it failed to account for the fact that the words "enforcement" and "in lieu of" appear in separate clauses of Section 6926(b): the Eighth Circuit's interpretation, that enforcement is part of carrying out the state's program, renders the second clause of the sentence, which separately addresses enforcement, superfluous.<sup>62</sup> It also fails to take account of the statute's structure, in which the states' administration and enforcement of state regulations appears in one section and federal enforcement is addressed in another.<sup>63</sup> Even assuming the Eighth Circuit were correct in finding enforcement and administration inexorably intertwined, the Tenth Circuit held that its attempt to harmonize Sections 6926 and 6928 "goes well beyond the plain language of the statute." The court rejected the Eighth Circuit's contention that Congress intended to give EPA a secondary enforcement right only if the state has failed to initiate any enforcement action, or has rescinded a state program's authorization, saying nothing in RCRA suggests that EPA must resort to the drastic remedy of withdrawing authorization for a state's entire program before it may overfile in a specific case, or as the only remedy for inadequate state enforcement. The only explicit limitation on EPA's right to bring an enforcement suit, the Tenth Circuit held, is that it must provide prior notice to authorized states.<sup>64</sup>

Possibly the more significant and controversial basis for the Eighth Circuit's ruling is its conclusion that principles of *res judicata* prohibited the overfiling. The court held that, because RCRA provides that the actions of Missouri have the same force and effect as actions by the EPA, "the two parties stand in the same relationship to one another" and therefore satisfied the identity test under Missouri law, which requires that the parties must represent the same legal right.<sup>65</sup> The Eighth Circuit applied the "laboring oar" test established by the Supreme Court<sup>66</sup> to determine when the federal government may be bound by litigation to which it is not a party. Under Montana law, courts generally require that a non-party be represented by counsel or direct the litigation in order to be found to have had a "laboring oar" in it sufficient to bind the non-party to the outcome of a litigation to which it is not a party.

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<sup>61</sup> *United States v. Power Engineering Co.*, 303 F.3d 1232 at 1237 (10th Cir. 2002).

<sup>62</sup> *Id.*, 303 F.3d at 1238.

<sup>63</sup> *Id.*, 303 F.3d at 1239-1240.

<sup>64</sup> *Id.*, 303 F.3d at 1238.

<sup>65</sup> *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 903 (8th Cir. 1999).

<sup>66</sup> *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

The Eighth Circuit, however, found that “[t]he laboring oar is pulled much earlier in the process. It occurs at the authorization stage when the EPA grants the state permission to enforce the EPA’s interests through the state’s own hazardous waste program.”<sup>67</sup> Thus, EPA was bound by the litigation long before it began. The Eighth Circuit’s holding was based on the operation of the Missouri program “in lieu of” EPA’s program and the fact that Missouri thereby operates as if it were the EPA. The holding that the authorization of state programs is sufficient to establish identity of interests for *res judicata* purposes, however, if extended to other federal statutes, has the potential to undermine EPA enforcement authority under all statutes whereby it has authorized state implementation and enforcement.

The Court of Appeals for the Tenth Circuit also rejected this part of the Eighth Circuit’s analysis, upholding the Colorado district court’s decision that the Eighth Circuit’s finding represented an unsupported expansion of the doctrine of *res judicata*.<sup>68</sup> The Tenth Circuit affirmed the finding that Colorado was not in privity with EPA, and appeared to reject the Eighth Circuit’s application of the “laboring oar” test as for binding different sovereigns.<sup>69</sup>

In so doing, the Tenth Circuit affirmed criticism the Western District of Wisconsin has leveled at the Eighth Circuit’s *res judicata* analysis. The Wisconsin district court held that it was “not persuaded by the reasoning of [the Eighth Circuit] that the structure of acts such as the Clean Air Act and the Resource Conservation and Recovery Act bring the federal government and the state into such a close working relationship as to make them equivalent to the same party for purposes of *res judicata* . . . to require such a conclusion in this instance would require ignoring the language, structure and purpose of the Clean Air Act.”<sup>70</sup>

Since the Eighth Circuit decision, several courts have been presented with, but have declined, the opportunity to extend this holding to enforcement proceedings based on other environmental laws. Because the RCRA “in lieu of” language relied on by the Eighth Circuit does not appear in the Clean Water Act or the Clean Air Act, courts have rejected arguments that this case bars enforcement proceedings under these statutes.<sup>71</sup> Courts have also rebuffed defendants’ attempts to extend the reasoning of the Eighth Circuit to shield them from federal criminal prosecutions under RCRA.<sup>72</sup>

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<sup>67</sup> *Harmon Industries, Inc. v. Browner*, N. 65 *supra*, 191 F.3d at 904.

<sup>68</sup> *United States v. Power Engineering Co.*, 125 F. Supp.2d 1050, 1065 (D. Col. 2000), *aff’d* 303 F.3d 1232 (10th Cir. 2002), *cert. denied* 538 U.S. 1012 (2003).

<sup>69</sup> *United States v. Power Engineering Co.*, 303 F.3d 1240 (10th Cir. 2002).

<sup>70</sup> *United States v. Murphy Oil, USA, Inc.*, 143 F. Supp.2d 1054, 1092 (W.D. Wis. 2001).

<sup>71</sup> *Sixth Circuit*: *United States v. LTV Steel Co., Inc.*, 118 F. Supp.2d 827, 833 (N.D. Ohio 2000); *United States v. Youngstown*, 109 F. Supp.2d 739 (N.D. Ohio 2000).

*Seventh Circuit*: *United States v. Murphy Oil USA, Inc.*, 143 F. Supp.2d 1054, 1091 (W.D. Wis. 2001) (*Harmon* inapplicable to Clean Air Act enforcement actions because of different statutory language); *United States v. City of Rock Island, Ill.*, 182 F. Supp.2d 690, 694 (C.D. Ill. 2001) (*Harmon* inapposite because Clean Water Act contains different language).

Hence, while this case provides fodder for future challenges to the practice of overfiling, it seems likely that EPA will continue to assert its viability outside of the Eighth Circuit.

### [c]—Abstention

Under a very narrow range of circumstances, it is appropriate for a federal court to abstain from its consideration of a case while an essentially similar state case is pending. Cases in which abstention is appropriate are limited to three categories: (1) the type in which a constitutional issue might be mooted or presented in a different light as a result of the outcome of a pending state case;<sup>73</sup> (2) the type in which the interposition of federal jurisdiction would severely hamper a state's efforts to enforce a coherent system of purely state regulation bearing upon matters of significant importance to the state;<sup>74</sup> and (3) the type in which the federal government is attempting to restrain state criminal proceedings (or nuisance proceedings that are akin to criminal proceedings) without a showing that the state proceedings are based on bad faith, harassment or a patently invalid state statute.<sup>75</sup>

Aside from these three situations, there is no ground for demanding that a federal court abstain from hearing a case simply because a substantially similar case is already being considered by a state court. However, this should not dissuade an attorney from asking a federal court to abstain on equitable grounds or in the interest of efficient judicial administration. In this regard, a Delaware district court case<sup>76</sup> is instructive. The defendant in this case was the subject of parallel air and water enforcement actions brought by the state environmental agency in Delaware. The air violations stemmed from persistent foul odors emanating from sludge lagoons filled with waste from the defendant's processing operation, and the water violations stemmed from NPDES permit exceedances. The defendant and the state negotiated a settlement whereby the company was to pay a fine of \$5,000 for the air violations and embark on an abatement program requiring it to spend more than \$1.8 million for sludge removal and the installation of new equipment.<sup>77</sup> If the abatement efforts were successful, the agreement called for the state to limit its penalty for the water violations to \$5,000. In the midst of the settlement activity, the EPA brought a federal court suit seeking injunctive relief requiring the measures the defendant had already agreed

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<sup>72</sup> *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001); *United States v. Flanagan*, 126 F. Supp.2d 1284 (C.D. Cal. 2000). These cases, however, involved defendants attempting to use *Harmon* as a shield from federal prosecution where no state prosecution had occurred.

<sup>73</sup> See *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

<sup>74</sup> See *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 669 (1971).

<sup>75</sup> See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

<sup>76</sup> *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D. Del. 1981).

<sup>77</sup> The EPA was aware of these proposals and had provided input during their development. See *United States v. Cargill, N. 76 supra*, 508 F. Supp. at 744.

to implement, and to enforce penalties totaling \$405,000 for the water violations. The defendant sought (and was denied) federal court abstention on the three traditional grounds noted above. However, the defendant also asked the court to exercise its discretion to grant a stay of the federal enforcement action. The court agreed to grant a stay pending the completion of the abatement measures agreed to by the defendant and the state. In granting the stay, the court noted that the factors favoring a stay outweighed those against it.<sup>78</sup>

The factors enumerated by the court in its decision to grant a stay of the federal enforcement activity are worth listing as a road map to defensive argument: “(a) the avoidance of federal/state friction, (b) the greater familiarity on the part of the state with the factual background of the case, (c) the state’s interest in the enforcement of its air pollution laws and regulations, (d) the presence of parallel state litigation and the existence of adequate statutory and regulatory authority at the state level to protect the public interest, (e) the need to conserve judicial resources, (f) congressional intent that primary responsibility for the enforcement of the NPDES program rests with the state, and (g) the fact that, as a practical matter, the United States by seeking injunctive relief in the present suit has brought [defendant’s] construction efforts to a halt and thus is thwarting the principal goal of the Clean Water Act—the prevention of water pollution.”<sup>79</sup>

Important though it may be to understand the factors that weigh in favor of a federal court’s exercising discretion to stay federal enforcement, it is equally necessary to be aware of the powerful factors militating against the grant of such a stay. The Delaware court listed them: “(a) this Court’s heavy obligation to exercise the jurisdiction granted it, (b) the fact that, as a practical matter, the injunctive relief sought by EPA does not differ from that sought by the state and agreed to by [defendant] and hence, there does not appear to be a serious possibility of conflicting obligations placed upon [defendant], (c) the fact that there are no enforceable requirements that [defendant] install pollution control equipment, (d) congressional intent that there be some cases where dual state/federal enforcement actions be brought, (e) the congressional grant of discretion to the Administrator as to when such suits should be brought, (f) the EPA’s interest in overseeing enforcement at the state level and ensuring uniformity, (g) the fact that the EPA is not a party to the state litigation and it is seeking a different remedy from the one the state will settle for, and (h) the EPA’s interest in ensuring that adequate and uniform penalties be sought under its penalty policy.”<sup>80</sup> Thus it is important for the attorney to consider carefully the facts and equitable considerations of a particular case before concluding the conclusion that a federal court will decline to abstain from exercising jurisdiction.

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<sup>78</sup> *Id.*, 508 F. Supp. at 750. It is important to note that while factors (b) and (c) cited by the *Cargill* court are idiosyncratic to the case, the other factors will weigh heavily in any federal court’s consideration of a case brought to it by the EPA.

<sup>79</sup> *Id.*, 508 F. Supp. at 751.

<sup>80</sup> *Id.*, 508 F. Supp. at 750.

**[4]—Double Jeopardy**

The exercise of overfiling by federal agencies raises serious double jeopardy issues, not only in the criminal context, but also in situations where the government is seeking heavy civil penalties. It should be understood at the outset that because of the power generally enjoyed by separate sovereigns to mount separate prosecutions for the same criminal behavior, claims of double jeopardy will generally not be well received.

The issue arises in several contexts:

(1) If the state pollution control agency has already dealt with a problem in a criminal context, can the EPA file federal criminal charges against the polluter for the same activities?

(2) Can the federal government prosecute a polluter civilly, seeking penalties that most people would regard as punitive, if the state agency has already prosecuted the same activities?

(3) If the federal and state governments have a delegation agreement, in which the state has been delegated the power to enforce federal environmental statutes through state equivalents, is the state-federal identity so intertwined that dual sovereignty does not apply?

(4) If two separate statutes are implicated by the same offensive activity, can the government prosecute the polluter under the enforcement sections of both statutes, thus penalizing twice for the same behavior?

As shall be shown, the answers to these questions provide little comfort to members of the regulated community. In short, courts are loath to find either that a second prosecution by a federal agency is prohibited, or that civil penalties, no matter how severe, are tantamount to criminal prosecution.

The starting place for this discussion is the Double Jeopardy Clause of the Fifth Amendment, which offers protection against two prosecutions for the same offense.<sup>81</sup> However, this is by no means the ending point. It is well settled that the federal government and a state are separate sovereigns, each with a separate source of prosecutorial power. Therefore, it is not a violation of the Double Jeopardy Clause for the federal government to prosecute the same behavior that has led to a prior state prosecution.

The Supreme Court has held that the separate sovereignty doctrine does not apply when a state or local agency is *not* acting as a separate entity, but rather is acting as a “tool” for federal enforcement.<sup>82</sup> In other words, where the efforts of the federal and state governments are inextricably linked, the separate sovereignty principle can be lost to the government, and the defendant can claim protection against double jeopardy. Unfortunately for members of the regulated community, however, there is no indication that courts will be willing to find such an inextricable link in environmental cases, even when the federal and state agencies are both enforcing the same federal law pursuant to a delegation agreement between the EPA and the state environmental protection agency.

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<sup>81</sup> U.S. Const. Amend. V states, in relevant part: “. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .”

<sup>82</sup> *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1958).

This case seems to be a custom-made description of the relationship forged by enforcement agreements between the EPA and state environmental protection agencies. Courts have rejected attempts by lawyers to find in such agreements so great an identity of interests that federal and state agencies can be seen to be acting as a single unit, however. For example, in one case,<sup>83</sup> a defendant argued that because the EPA and the Nevada Department of Environmental Protection (NDEP) both drew their enforcement authority from the federal Clean Air Act, they could not be termed “separate sovereigns” for purposes of avoiding the effect of the Double Jeopardy Clause. The court declined to accept the argument, pointing out that the NDEP was not a creation of Congress and that its adjudicative authority was not exerted solely by authority of the federal government. Consequently, there could be no effective double jeopardy claim in such a case.

Moreover, even if the federal government had brought a criminal prosecution against a defendant after a prior state criminal prosecution, the bar against double jeopardy would not be implicated, as a result of the impact of the separate sovereign principle.<sup>84</sup>

In *United States v. Halper* in 1989, the Supreme Court held that the Double Jeopardy Clause may be invoked in situations in which a subsequent civil prosecution results in penalties that are so extreme as to be retributive in nature, rather than compensatory or satisfying a regulatory purpose.<sup>85</sup> Such a consideration may seem relevant in environmental cases, where statutory civil penalties can accrue at the rate of \$25,000 per day for each violation.<sup>86</sup>

However, in 1997, the Supreme Court abrogated the *Halper* rule in *Hudson v. United States*<sup>86.1</sup> In *Hudson*, the Court declared that *Halper* represented a “deviation” from longstanding Double Jeopardy precedent that was “ill considered.”<sup>86.2</sup> The court reasoned that “all civil penalties have some deterrent effect,” and that “[i]f a sanction must be ‘solely’ remedial (i.e., entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause.”<sup>86.3</sup>

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<sup>83</sup> *United States v. Nevada Power Co.*, 1990 WL 149660 \*5 (D. Nev. 1990). The case involved a situation in which the defendant was fined a total of \$8,000 for a series of unpermitted soot control bypass incidents. The EPA then initiated an action for civil penalties of \$25,000 per day for the same violations.

<sup>84</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82, 88, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985).

<sup>85</sup> *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). *Halper* involved a defendant who submitted sixty-five false claims for Medicare reimbursement, causing a total loss to the government of \$585. He was sentenced to two years in prison and fined \$5,000 in a criminal case. The government subsequently brought a civil action under the False Claims Statute, 31 U.S.C. §§ 3729-3731, and a civil penalty of more than \$130,000 was imposed as well. On appeal, the court found that the civil fine was so severe that it violated the double jeopardy prohibition against additional punishment for the same conduct on which the earlier prosecution was based.

<sup>86</sup> See, e.g.: Clean Water Act § 309(d), 33 U.S.C. § 1319(d); Clean Air Act § 113(d), 42 U.S.C. § 7413(d).

<sup>86.1</sup> *Hudson v. United States*, 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

<sup>86.2</sup> *Id.*

Indeed, even prior to *Hudson*, in environmental actions, courts have not been very sympathetic to claims that such civil fines evidence an intent to punish the perpetrator criminally and thus implicate the prohibition against double jeopardy. For example, the Sixth Circuit affirmed a district court decision<sup>87</sup> that a prior state civil recovery totaling \$224,000 was not so severe as to amount to a criminal prosecution. Consequently, the civil penalty did not serve to bar subsequent federal prosecution on a criminal indictment.

The Sixth Circuit case also stands for the proposition that the Double Jeopardy Clause may not be implicated by criminal prosecution seeking separate penalties under separate statutes for what appears to be the same behavior. The case involved the demolition of a factory building, which caused friable asbestos to be released into the air. The government prosecuted under both the Clean Air Act and the Comprehensive Environmental Responsibility and Cleanup Act (CERCLA), seeking separate penalties under each statute. The court pointed to the different elements of the offense under each statute,<sup>88</sup> and concluded that even though the same behavior was involved, the offenses were different.<sup>89</sup>

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<sup>86.3</sup> *Id.* at 102.

<sup>87</sup> *United States v. Louisville Edible Oil Products, Inc.*, 926 F.2d 584 (6th Cir. 1991), *aff'g* 773 F. Supp. 15 (W.D. Ky. 1990).

<sup>88</sup> The Clean Air Act required the government to show that the defendants emitted asbestos into the atmosphere, and CERCLA demanded proof that the defendants were in charge of a facility from which a hazardous substance was released and that they failed to provide immediate notification to an appropriate agency as soon as they had knowledge of the release.

<sup>89</sup> *Louisville Edible* is also important because it points out that protection against double jeopardy is of a personal nature, and does not apply to prosecution of corporations. The defense tried to get around that problem by claiming that since compensation for the corporation's executives was based on profits, any fine the corporation had to pay would cause a reduction in profits, hence in compensation. Therefore, the defense argued, individual executives would be penalized, thus satisfying the personal protection requirement of double jeopardy. The district court reacted: "Except for applauding the ingenuity of counsel, we reject [the] argument."

**§ 1.05 The Government's Pre-Litigation Enforcement Authority**

The enforcement battle is often over before the shooting starts because of the government's powerful pre-litigation techniques, which include discovery devices such as interrogatories, civil searches and inspections, and reporting requirements,<sup>1</sup> as well as, in some instances, administrative compliance orders.<sup>2</sup>

The government's powerful pre-litigation discovery resources are backed by the threat of crippling statutory penalties and civil contempt imposed by the courts. The ability of an investigation target to resist ultimate enforcement often depends on the responses and reactions to the investigating agency's administrative interrogatories, inspections, and review of required records and reports. However, a party seeking to resist enforcement must walk a careful line between overresponding and noncompliance, for failure to respond scrupulously to administrative discovery efforts can give rise to civil and administrative proceedings that eclipse the original substantive inquiry.<sup>3</sup>

In addition to discovery demands, members of the regulated community often face agency enforcement threats in the form of notices of violation, compliance orders, warning letters, or the probability of an existing agency rule being applied to their actions. In these instances where formal enforcement has not been commenced and penalties have not been assessed, members of the regulated community often face a "Hobson's Choice" either to desist from an activity or to risk civil and even criminal penalties if they persist. The doctrine prohibiting pre-enforcement review of agency action is often associated with the concepts of "final agency action" and or "ripeness." In addition, the prohibition may be established by statute; judicial review may be deferred where Congress has clearly spoken on the need to defer such review and the delay does not raise Constitutional deprivations.<sup>4</sup> Whatever the doctrine, the limbo into which parties can be thrust in the absence of pre-enforcement review may be one of the most significant problems created in the administrative state, one that raises Constitutional concerns, because it has a potential to coerce while denying citizens access to reviewing courts.

This issue was addressed in the 2011-2012 Supreme Court term. The Court declined to review a case challenging the validity of administrative cleanup

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<sup>1</sup> See, e.g., CERCLA § 104(e)(2), 42 U.S.C. § 9604(e)(2), which states, in relevant part: "Any officer, employee, or representative [of the President] . . . may require any person who has information . . . to furnish, upon reasonable notice, information or documents. . . ."

<sup>2</sup> See, e.g., Section 113(h) of CERCLA, denying federal courts jurisdiction to hear challenges to an administrative order relating to the implementation of a remedy. See also, *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 2959 (June 6, 2011) (holding that such denial was not a violation of due process).

<sup>3</sup> The government's pre-litigation enforcement authority is discussed more fully in Chapter 5 *infra*.

<sup>4</sup> See, e.g., Section 113(h) of CERCLA, denying federal courts jurisdiction to hear challenges to an administrative order relating to the implementation of a remedy. See also, *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 2959 (2011) (holding that such denial was not a violation of due process).

orders under CERCLA § 106, when judicial review was not available to challenge such orders.<sup>5</sup> However, the Court did grant *certiorari* to and decide a case raising similar arguments, *Sackett v. U.S. Environmental Protection Agency*.<sup>6</sup>

The Sacketts sought to develop their land by filling a wetland that they claimed was not subject to Section 404 of the Clean Water Act.<sup>7</sup> The government differed with this assessment and issued a compliance order that forbade any filling and threatened to impose civil and/or criminal sanctions if the Sacketts failed to adhere to the remediation instructions contained in the order. The order, issued without a hearing of any sort, did not impose penalties, since the government would have had to institute formal enforcement in order to impose penalties.

The Ninth Circuit held that the Sacketts could not obtain review of the compliance order because 1) judicial review would be available upon the institution of an enforcement actions, 2) under the Clean Water Act, as well as under similar provisions in other environmental statutes, compliance orders “are meant to ‘allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation,’” and 3) the legislative history of the Clean Water Act included the deletion of a provision explicitly providing for pre-enforcement review.<sup>8</sup>

However, the Supreme Court reversed, holding that the compliance order issued by EPA constituted a “final agency action” subject to judicial review under the Administrative Procedure Act.<sup>9</sup> The Court concluded that that the order had “all the hallmarks of APA finality” under the test for finality the Court had laid out in *Bennett v. Spear*: 1) it “determined rights and obligations,” 2) “legal consequences” flowed from the order, and 3) the order marked the “consummation” of EPA’s decisionmaking process with respect to the issue.<sup>10</sup>

The Court also observed that the APA requires that a party seeking judicial review under the APA have “no other adequate remedy in a court.”<sup>11</sup> Although it is true that judicial review would available if the EPA initiated an enforcement action, the Sacketts were not able to initiate the process of judicial review.<sup>12</sup> Additionally, with each day that passed until such an enforcement action, potential liability in terms of fines increased.<sup>13</sup>

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<sup>5</sup> *General Electric Co. v. Jackson*, 131 S. Ct. 2959 (2011).

<sup>6</sup> 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 131 S.Ct. 3092 (2011) *rev’d* 566 U.S. \_\_\_ (2012).

<sup>7</sup> 33 U.S.C. § 1344.

<sup>8</sup> *Sackett v. U.S. Environmental Protection Agency*, N. 6 *supra*, 622 F.3d at 1144. The Supreme Court’s denial of *certiorari* in *General Electric Co. v. Jackson* in the same term may mean that the Court’s opinion in *Sackett* will only decide the narrow statutory issue of whether Congress intended to preclude the pre-enforcement review under the Clean Water Act. As of the most recent revisions to this chapter, the Court’s opinion in *Sackett* has yet to be published.

<sup>9</sup> *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372, 182 L.Ed.2d 367 (2012).

<sup>10</sup> *Id.* at 1371-1372.

<sup>11</sup> *Id.*, citing 5 U.S.C. 704.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (“[E]ach day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability.”)

Finally, the Court noted that although the APA provides that judicial review under the APA is barred “to the extent that [other] statutes preclude judicial review,” the Clean Water Act neither expressly nor implicitly precludes judicial review under the APA.<sup>14</sup>

The full implications of the *Sackett* decision, have not yet been mapped out in litigation. At least one commentator has suggested that “the ruling may be more broadly applicable...there are similar provisions to the Resource Conservation and Recovery Act and many other environmental statutes.”<sup>15</sup> As another commentator concludes, perhaps optimistically, “[t]he primary impact of the *Sackett* decision is, arguably, that it will give EPA the incentive to ensure evidence in the record that supports [an administrative compliance order] is sufficient to withstand judicial review, thereby reducing the potential for issuing orders not supported by the facts.”<sup>16</sup>

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<sup>14</sup> *Id.* at 1372.

<sup>15</sup> See Maurer, “Staying in Compliance with Today’s Environmental Law Regulations,” *The Impact of Environmental Issues on Business Transactions* (2012).

<sup>16</sup> See Glaze Jr., “A Detailed Look at the Effects of *Sackett v. EPA* on Administrative Enforcement Orders,” 42 *Envtl. L. Rep. News & Analysis* 11030, 11036 (2012).

### § 1.05A Agency Decisions and Rule Making

Environmental enforcement increasingly turns on agency promulgation of rules, interpretations and “guidance.” These “actions,” often produced without public input, can dictate the initiation or even the outcome of enforcement proceedings. Moreover, government agencies have been quick to assert that many of these pronouncements are not subject to judicial scrutiny because they are internal guidance and therefore not final agency action reviewable by a court.<sup>1</sup> When agency actions are subject to judicial review, the agency often demands and receives “substantial deference” from the reviewing court.

In addition, agency action is reviewed “on the record,” that is, on the papers before the agency at the time it made its decision. Examples of agency efforts to avoid review or to cloak their decisions in “deferential” armor abound.<sup>2</sup> Indeed, one reviewing court noted that this attempt at insulation from scrutiny has led to a “let them eat cake” attitude among some regulators.<sup>3</sup> Courts, however, have attempted to place limitations on administrative agencies’ attempts to frustrate meaningful judicial review.

The Administrative Procedure Act and its state counterparts provide that legislative or substantive rules must be preceded by public notice and an opportunity for public comment. Hence, an agency’s “legislative” or “substantive” actions tend to furnish both an opportunity for the public to shape the ultimate agency decision and a fairly identifiable record for judicial review. Substantive rule-making occurs when the agency is carrying out the statutory mandate to make rules to implement the statute.<sup>4</sup> A familiar example of such rule-making is the congressional directive to EPA to promulgate rules implementing the broad mandates of the flagship environmental statutes enacted in the 1970s.<sup>5</sup> Administrative agencies, however, particularly

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<sup>1</sup> The Administrative Procedure Act or “APA,” 5 U.S.C. §§ 553, requires that courts may only review “final agency actions,” whether they be quasi-judicial or legislative. See generally, *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008).

<sup>2</sup> Compare *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000), with *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. Dec. 11, 2002).

<sup>3</sup> *Chemical Manufacturers Ass’n v. Environmental Protection Agency*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (“And, we may add, it bespeaks a ‘let them eat cake’ attitude that ill-becomes an administrative agency whose obligation to the public it serves is discharged if only it avoids being arbitrary and capricious.”).

<sup>4</sup> *Fifth Circuit: Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995).

*District of Columbia Circuit: American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993).

<sup>5</sup> The scope of judicial review of an agency rule making under Section 706 of the APA depends upon whether the challenged rule was promulgated “formally,” in which case the standard of review is substantial evidence, or “informally,” in which case the reviewing court applies the less rigorous arbitrary and capricious standard. *Phillips Petroleum Co. v. Federal Energy Regulatory Commission*, 786 F.2d 370, 374 (10th Cir. 1986); 5 U.S.C. § 706(2)(A) and (E). Formal rule making occurs according to the procedural requirements set forth at 5 U.S.C. §§ 556 and 557, providing

the EPA, have been prone to publish “guidance” and “interpretative” decisions that are not preceded by an opportunity for public comment. The EPA has argued that such decisions not only do not require prior public comment, but also are not subject to judicial review.

Generally, given the limitations on judicial review, members of the regulated community must attempt to shape administrative decisions during the administrative process. Absent that ability, there are a few basic principles that can be used to make judicial review more meaningful.

### [1]—The Administrative Record

A readily identifiable record can be developed in a rule making proceeding or in trial-type administrative adjudications. Unfortunately, more and more agency decisions are made pursuant to an informal process. Upon judicial review, the agency should file with the reviewing court what it believes to be the administrative record, which should consist of all the relevant papers that were directly or indirectly before the decision-maker.<sup>6</sup> Unfortunately, this is a subjective process often involving the lawyers of the agency whose decisions or work product is under attack in the judicial process. Not surprisingly, critical documents may be left out of the submitted record, or documents justifying the agency’s decisions that were not actually considered, added to the record. Omitted documents can be particularly important to a successful challenge because they might well reveal criticism of the agency’s decision by independent experts.

Barriers to insuring the development of an accurate record in these circumstances include deference that is accorded to the agency’s compilation of an appropriate record,<sup>7</sup> as well as the general rule that judicial review of agency action does not involve pre-trial discovery. However, in appropriate instances, limited discovery to establish the record will be allowed, and

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for public trial-type hearings, and is necessitated only when specifically directed by an agency’s organic statute. See *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 410 S.Ct. 224, 35 L.Ed.2d 223 (1973). An “informal rule” is promulgated pursuant to the notice and comment provisions of Section 553 of the APA. See:

*Fourth Circuit:* *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998).

*Tenth Circuit:* *Phillips Petroleum Co. v. Federal Energy Regulatory Commission*, 786 F.2d 370, 374 (10th Cir. 1986).

However, courts have held that where the issue in dispute is whether facts in the record support the agency decision, the standards are effectively the same:

*Third Circuit:* *Borough of Columbia v. Surface Transportation Board*, 342 F.3d 222, 241, n.2 (3d Cir. 2003).

*Tenth Circuit:* *Pennaco Energy, Inc. v. United States Department of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004).

But see, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214, n.13 (5th Cir. 1991) (holding that the substantial evidence standard is “generally considered to be more rigorous” and “afford[s] a considerably more generous judicial review”).

<sup>6</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

<sup>7</sup> *Fund for Animals v Williams*, 245 F. Supp.2d 49, 55 (D.D.C. 2003), vacated on other grounds, 428 F.3d 1089 (D.C. Cir. 2005).

courts have permitted discovery of an administrative agency to determine the adequacy of the record submitted by the agency.<sup>8</sup> Indeed, there appears to be a fairly low threshold to allow discovery for the limited purpose of ascertaining the adequacy of the record.<sup>9</sup> A party need only show that there is a reasonable basis to believe that materials before the agency in making its determination are not in the record.<sup>10-11</sup>

A useful technique is to keep track of the agency's documents prior to the commencement of litigation through use of the Freedom of Information Act (FOIA).<sup>12</sup> In response to FOIA requests, the agency must file a "Vaughn Index," listing the documents withheld under claims of privilege.<sup>13</sup> The government's liberal interpretation of the work product and attorney-client privileges as a basis for withholding documents has received critical scrutiny from the courts.<sup>14</sup>

The "record" has been defined by the courts as "all the documents and materials that were directly or indirectly considered by the decision-makers at the time the decisions were rendered."<sup>15</sup> The scope of the complete administrative record, as described in the case law, is necessarily highly inclusive.

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<sup>8</sup> The seminal authority is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), as modified by *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). These cases and their progeny establish that a reviewing court may go beyond the administrative record provided by the agency when (1) the record is not complete; (2) there is a strong showing of bad faith or impropriety; or (3) the reviewing court is not able to understand the basis for the agency's decision from the record certified to it by the agency. See also: *Ohio Valley Environmental Coalition v. Whitman*, 2003 WL 43377 (S.D.W.Va. 2003); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp.2d 134 (D.D.C. 2002).

<sup>9</sup> *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) ("a strong suggestion that the record before the court was not complete"); *Pension Benefit Guaranty Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 342 (S.D.N.Y. 1988) ("there are compelling reasons to allow limited discovery to proceed at this stage . . . the absence of both a formal agency proceeding and formal administrative findings suggest that some limited discovery will be useful to ensure that all matters considered by the [agency] are brought before the court").

See also, *Public Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982) ("a showing that need for discovery was not "insubstantial or frivolous").

<sup>10-11</sup> *Ammex, Inc. v. United States* ("Ammex"), 62 F. Supp.2d 1148, 1156 (Int. Trade 1999).

<sup>12</sup> 5 U.S.C. § 551.

<sup>13</sup> *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

<sup>14</sup> See, e.g., *Mead Data Central Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977). In *State of Maine v. U.S. Department of Interior*, 285 F.3d 126 (1st Cir. 2002), the court held that such claims made for documents generated during periods when both rule making and litigation are ongoing must have Vaughn Index documentation that the work product privilege is claimed with respect to a specific litigation and establish that the document was prepared "primarily" for litigation purposes. Similarly, to warrant application of the attorney-client privilege, the agency must establish that the attorney-generated document would reveal a confidential client communication.

<sup>15</sup> *Third Circuit: Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299 (D. Del. 1979).

*Seventh Circuit: Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, (N.D. Ind. 1996); *Lloyd v. Illinois Regional Transportation Authority*, 548 F. Supp. 575, 590-591 (N.D. Ill. 1982).

“[T]o the extent the agency’s final decision was in fact based on a compendium of materials, documents, submissions and initial staff decisions and opinions, these constitute the whole record.”<sup>16</sup> Courts will presume that agency decision-makers referred to a “variety of internal memoranda” in reaching their conclusions, which materials should therefore be included in the record before a reviewing court.<sup>17</sup> The complete record may also include “notes, personal logs, and working papers” that document the collection of information by agency personnel involved in the decision-making process.<sup>18</sup> Necessary elements of the administrative record are not limited to those materials supporting the conclusion that the agency ultimately adopted.<sup>19</sup> Moreover, the record must include materials relevant to all levels of decision-making leading up to the final agency action; “[a] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record.”<sup>20</sup> Upon a showing that the defendant agency considered materials not included in the record submitted to the court, the record should be completed by order of the court.<sup>21</sup>

When a party wishes to supplement the administrative record with materials not considered by the agency, however, it must overcome a heavier burden. Courts may consider requests to supplement the record with extra-record materials in limited circumstances: when the record does not support the agency action, when the agency has not considered all relevant factors, or when the reviewing court simply cannot evaluate the challenged action on the basis of the record before it.<sup>22</sup> An extra-record investigation by a reviewing court may also be deemed appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part

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<sup>16</sup> *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 36 (N.D. Tex. 1981).

<sup>17</sup> *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979). See also:

*Seventh Circuit*: *Lloyd v. Illinois Regional Transportation Authority*, 548 F. Supp. 575, 590 (N.D. Ill. 1982).

*Court of International Trade*: *Ammex, Inc. v. United States*, 62 F. Supp.2d 1148, 1156 (Int. Trade 1999).

<sup>18</sup> *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996). As discussed *infra*, the delineation of materials to be included in the administrative record before the reviewing court can be complicated by agency invocation of the “deliberative process privilege.” See, e.g., *id.*, 979 F. Supp. at 777-779.

<sup>19</sup> *Woodhill Corp. v. Federal Emergency Management Agency*, 1997 U.S. Dist. LEXIS 13311 \*5 (N.D. Ill. Sept. 3, 1997) (ordering the inclusion in the administrative record of notes of a meeting at which the unsuccessful applicant advocated its position to the defendant agency).

<sup>20</sup> *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996).

<sup>21</sup> *Woodhill Corp. v. Federal Emergency Management Agency*, 1997 U.S. Dist. LEXIS 13311 \*3 (N.D. Ill. Sept. 3, 1997) (“[T]he presumption disappears and the record is supplemented if the plaintiff affirmatively demonstrates that the agency relied on materials not included in the record submitted to the court.”). See *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996).

<sup>22</sup> *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). See also: *Supreme Court*: *Camp v. Pitts*, 411 U.S. 138, 142-143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

of an agency or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice.<sup>23</sup> Courts may also supplement the record with extra-record materials when effective review of agency action requires an explanation or clarification of technical terms.<sup>24</sup>

The granting of requests to supplement the record for these purposes is relatively rare. Courts have found that effective judicial review is not frustrated merely because a more detailed or more precise statement of an agency's rationale could be helpful to a reviewing court.<sup>25</sup> Therefore, the so-called "record rule" provides another reason in addition to exhaustion requirements, that opponents to an agency action are advised to submit all relevant information to the agency during the decisionmaking process; "post-decision information 'may not be advanced as a new rationalization . . . for attacking an agency's decision.'"<sup>26</sup> Deviation from the record rule occurs more commonly in cases brought under the National Environmental Policy Act (NEPA) because that statute imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of the proposed action.<sup>27</sup> For this reason, in the NEPA context, a court's consideration of extra-record materials "to determine whether the agency has considered all relevant factors and has explained its decision," can often come

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*Seventh Circuit:* Bethlehem Steel Corp. v. EPA, 638 F.2d 994 (7th Cir. 1980).

*District of Columbia Circuit:* Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 997-998 (D.C. Cir. 1990); Fund for Animals v. Williams, 245 F. Supp.2d 49, 57 (D.D.C. 2003).

<sup>23</sup> See: Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 819, 28 L.Ed.2d 136 (1971).

<sup>24</sup> *District of Columbia Circuit:* In Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989), the District of Columbia Circuit explained in dicta that there may be as many as eight exceptions to the general rule limiting judicial review to the administrative record, including, apart from those enumerated above, cases where evidence arising after the agency action shows whether the decision was correct or not, cases where agencies are sued for failure to take action, and cases arising under NEPA. However, neither other courts nor the District of Columbia Circuit itself have taken up this expansive view, as noted in Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1380 (Fed. Cir. 2009). See also, American Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008), in which the District of Columbia Circuit noted three instances in which it had recognized exceptions to the record rule: "(1) '[T]he agency deliberately or negligently excluded documents that may have been adverse to its decision'; (2) 'the district court needed to supplement the record with "background information" in order to determine whether the agency considered all the relevant factors'; or (3) 'the agency failed to explain administrative action so as to frustrate judicial review'" (Citations omitted.).

*United States Court of International Trade:* Ammex, Inc. v. United States, 62 F. Supp.2d 1148, 1157 (Int. Trade 1999).

<sup>25</sup> Madison County Building and Loan v. FHLBB, 622 F.2d 393, 397 (8th Cir. 1980).

<sup>26</sup> Center for Biological Diversity v. United States Fish & Wildlife Service, 450 F.3d 930 (9th Cir. 2006).

<sup>27</sup> *Second Circuit:* National Audubon Society v. Hoffman, 132 F.3d 7, 14-15 (2d Cir. 1997).

*Ninth Circuit:* Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526-527 (9th Cir. 1997).

into play.<sup>28</sup> For example, in one case, the Ninth Circuit relied largely upon an extra-record expert affidavit submitted by the plaintiff which drew into question scientific conclusions reached in the challenged NEPA documents.<sup>29</sup> Even in NEPA actions, however, courts will conduct plenary review only when the administrative record is “so inadequate as to prevent the reviewing court from effectively determining whether the agency considered all environmental consequences of its proposed action.”<sup>30</sup>

The “all relevant factors” exception was illustrated in a case in which citizens challenged the Fish and Wildlife Services’ denial of their petition to remove sucker fishes from the endangered species list.<sup>31</sup> The court granted the plaintiffs’ motion to supplement the record with an early biological opinion suggesting that the fish were adaptable to drought conditions, which conditions were a cause of the fishes’ decline, according to FWS. The court also ordered to be included in the record four documents predating the original listing of the species, which it found “relevant to the issue of whether the suckers populations have recovered.”<sup>32</sup>

Two District of Columbia Circuit Court cases illustrate some of the problems in attempting to ensure the production of a “full” record. In one,<sup>33</sup> the court refused to include in the record relating to the listing of a site on the Superfund National Priorities List (NPL) certain data that the plaintiff had submitted to a regional office, as opposed to the Washington decision-maker, because the material was not “before” agency decision-makers. According to the court’s reasoning, to hold that the documents should be included “would effectively require EPA to comb all regional files for potentially relevant data before listing a site on the NPL, and would be inconsistent with our prior decisions emphasizing the necessarily abbreviated nature of the listing process and tolerating somewhat cursory agency actions and explanations in that context.”<sup>34</sup>

A year later, however, the same court expanded the scope of an administrative record to include internal documents relevant to the agency’s decision despite the fact that these documents had not actually been considered by agency decision-makers. While stopping short of finding bad faith, the court concluded that the administrative record was incomplete because the EPA negligently failed to discover readily available documents relevant to its decision to use certain testing methods and relied instead on a single memorandum from another program.<sup>35</sup>

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<sup>28</sup> See *Earth Island Institute v. United States Forest Service*, 442 F.3d 1147 (9th Cir. 2006), *abrogated on other grounds by* *Winter v. Natural Resources Defense Council, Inc.* 555 U.S. 7 (2008).

<sup>29</sup> *Id.* But see, *Wild West Institute v. Bull*, 547 F.3d 1162, 1176 (9th Cir. 2008) (declining to consider extra-record expert affidavit responding to Forest Service memorandum justifying its NEPA conclusions).

<sup>30</sup> *National Audubon Society v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997).

<sup>31</sup> *Moden v. United States Fish and Wildlife Service*, 281 F. Supp.2d 1193 (D. Ore. 2003).

<sup>32</sup> *Id.*, 281 F. Supp.2d at 1206.

<sup>33</sup> *LinemasterSwitch Corp. v. EPA*, 938 F.2d 1299 (D.C. Cir. 1991).

<sup>34</sup> *Id.*, 938 F.2d at 1306.

<sup>35</sup> *Kent County, Delaware Levy Court v. EPA*, 963 F.2d 391, 396 (D.C. Cir 1992). (Rel. 32)

Recently, the United States District Court for the District of Columbia carefully reviewed the administrative record in two separate cases and required supplementation in limited instances.<sup>35.1</sup>

A complication may arise when the agency seeks to preclude review of documents that were before the agency under the “deliberative process privilege” doctrine. To establish the deliberative process privilege, a federal agency must demonstrate that the deliberations the agency wishes to withhold satisfy two requirements. First, the communication must be predecisional.<sup>36</sup> Second, the communication must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”<sup>37</sup> Under the deliberative process privilege, discovery cannot be had of intra-governmental documents reflecting advisory opinions, recommendations and deliberations constituting part of a process by which governmental decisions and policies are formulated.<sup>38</sup> In addition, the privilege applies to factual materials that would reveal the deliberative process.<sup>39</sup>

A United States District Court for the District of Columbia case<sup>40</sup> illustrates judicial reluctance to probe too deeply the internals of the administrative mind. In this case, the court refused to include internal agency e-mails in the administrative record, stating that “judicial review of agency action should be based on an agency’s stated justifications, not the pre-decisional process that led up to the final, articulated decision.”<sup>40.1</sup> The court reasoned that inclusion of such deliberative materials “could hinder candid and creative exchanges regarding proposed decisions and alternatives,” creating a chilling effect on open discussion.<sup>40.2</sup>

Materials that are properly included in the administrative record may turn out to fit within the privilege, but only if this privilege has not been waived and the agency invoking the privilege has made the necessary affirmative showings. Some courts have required the agency submitting an administrative record to identify and describe those privileged documents that were considered by the agency in reaching its decision, akin to the “Vaughn Index” required for FOIA responses.<sup>41</sup>

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<sup>35.1</sup> *Franks v. Salazar*, 751 F. Supp.2d 62 (D.D.C. 2010). But see, *Marcum v. Salazar*, 751 F. Supp.2d 74 (D.D.C. 2010).

<sup>36</sup> *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

<sup>37</sup> *Vaughn v. Rosen*, 523 F.2d 1136, 1143-1144 (D.C. Cir. 1975).

<sup>38</sup> *First Circuit: Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992).

*District of Columbia Circuit: Carl Zeiss Stiftung v. V.E.B.*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d* 348 F.2d 979 (D.C. Cir.), *cert. denied* 389 U.S. 952 (1967).

<sup>39</sup> *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1116-1118 (9th Cir. 1988).

<sup>40</sup> *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp.2d 134 (D.D.C. 2002).

<sup>40.1</sup> *Id.* at 142.

<sup>40.2</sup> *Id.*

<sup>41</sup> *Seventh Circuit: Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 779 (N.D. Ind. 1996).

*Ninth Circuit: People of the State of California v. United States Department of Agriculture*, 2006 WL 708914 (N.D. Cal. March 16, 2006).

Unlike certain other privileges (e.g., attorney-client), the deliberative process privilege is not absolute.<sup>42</sup> After concluding that the privilege has been properly invoked, the court must balance the agency's interest in nondisclosure with the litigant's need for the information as evidence. The factors to be weighed include: (1) the degree to which the proffered evidence is relevant; (2) the extent to which it may be cumulative; and (3) the opportunity of the party seeking disclosure to prove the particular facts by other means. To compel disclosure, the claimant must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender."<sup>43</sup>

E-mails have become a common part of the administrative record in the same manner as any other type of correspondence, indicating that the standard for including e-mails in the administrative record is simply whether they were part of the full record before the agency decision-maker.<sup>44</sup> Moreover, there are several cases in which the administrative record included e-mails exchanged between different agencies.<sup>45</sup>

The only cases in which e-mails have been contested as outside the scope of the administrative record were instances in which it was questionable whether the decision-maker ever considered the e-mail in question during the course of the decision-making process. Where it is demonstrated that an

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*Tenth Circuit:* Utah Medical Products v. McLellan, 2004 WL 988877 (D. Utah March 31, 2004).

<sup>42</sup> *First Circuit:* Gomez v. City of Nashua, N.H., 126 F.R.D. 432 (D.N.H. 1989).

*District of Columbia Circuit:* Carl Zeiss Stiftung v. V.E.B., 40 F.R.D. 318, 328-329 (D.D.C. 1966).

<sup>43</sup> Gomez v. City of Nashua, N.H., 126 F.R.D. 432, 435 (D.N.H. 1989).

<sup>44</sup> See e.g.:

*Third Circuit:* Citizens for Health v. Thompson, 2004 WL 765356 \*7 (E.D. Pa. April 2, 2004) (public comments to proposed agency rule submitted via e-mail included in the administrative record).

*Sixth Circuit:* Stone v. West, 133 F. Supp.2d 972, 975 (E.D. Mich. 2001) (e-mail correspondence between plaintiff employee and her supervisor).

*Ninth Circuit:* Hayward Area Planning Ass'n v. Norton, 2004 WL 724950 \*6 (N.D. Cal. March 29, 2004) (Internal Fish and Wildlife Service e-mail correspondence).

*Tenth Circuit:* Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1236 (10th Cir. 2001) (e-mail correspondence between Bureau of Indian Affairs staff).

*District of Columbia Circuit:* City of Roseville v. Norton, 219 F. Supp.2d 130, 166 (D.D.C. 2002) (e-mail correspondence between Bureau of Indian Affairs staff); Defenders of Wildlife v. Norton, 239 F. Supp.2d 9, n.10 (D.D.C. 2002) (e-mails sent to or from Fish and Wildlife Service biologist who wrote final rule).

<sup>45</sup> See:

*Ninth Circuit:* Center for Biological Diversity v. Federal Highway Administration, 2002 WL 32307826 \*3 (S.D. Cal. Nov. 19, 2002) (e-mail correspondence between Federal Highway Administration and California Transportation Ventures, Inc.); Fort Funston Dog Walkers v. Babbitt, 96 F. Supp.2d 1021, 1026 (N.D. Cal. April 26, 2000) (e-mail correspondence between Defendant National Park Service and the California Department of Fish and Game).

*Court of International Trade:* Defenders of Wildlife v. Dalton, 2000 WL 1562928 \*6 (Int. Trade Oct. 12, 2000) (e-mail correspondence between the Commerce Department and the State Department).

e-mail, like any other material, was not considered by the decision-maker, the e-mail is excluded from the record.<sup>46</sup>

## [2]—Threshold Barriers to Review

### [a]—Standing

Environmental litigants asserting claims for relief against federal agencies, when they are not yet the direct target of agency action, are often faced with the threshold problem of standing. Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies.<sup>47</sup> These prerequisites reflect the “common understanding of what it takes to make a justifiable case.”<sup>48</sup> Consequently, “a showing of standing is an essential and unchanging predicate to any exercise of a court’s jurisdiction.”<sup>49</sup> Put slightly differently, “Article III standing must be resolved as threshold matter.”<sup>50</sup>

#### [i]—Procedural Aspects of Standing

As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing.<sup>51</sup> The extent of the plaintiff’s burden varies according to the procedural posture of the case.<sup>52</sup> At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct will suffice.<sup>53</sup> On a motion for summary judgment, however, the “plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts which for purposes of this summary judgment motion will be taken to be true.”<sup>54</sup> Because standing is a jurisdictional element, it can be raised at any time, including during an appeal.<sup>55</sup>

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<sup>46</sup> See *Schneider v. Board of School Trustees, Ft. Wayne Community Schools*, 255 F. Supp.2d 891, 893-894 (N.D. Ind. Jan. 3, 2003) (e-mail correspondence between third parties excluded from the record because it was never considered by defendant).

<sup>47</sup> U.S. Const. art. III, § 2, cl. 1. However, Judge Posner has observed that “[s]ome of the most frequently mentioned grounds for the constitutional doctrine of standing are tenuous, such as that it is derived from Article III’s limitation of the federal jurisdiction power to ‘Cases’ and ‘Controversies’.” *American Bottom Conservancy v. U.S. Army Corps Of Engineers*, 650 F.3d 652, 655 (7th Cir. 2011).

<sup>48</sup> *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

<sup>49</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

<sup>50</sup> *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 453 (D.C. Cir. 2004) (citing *Steel Co.*, N. 48 *supra*, 523 U.S. at 96-102).

<sup>51</sup> *Defenders of Wildlife*, N. 49 *supra*, 504 U.S. at 561; *Steel Co.*, N. 48 *supra*, 523 U.S. at 104.

<sup>52</sup> *Sierra Club v. EPA*, 292 F.3d 895, 898-899 (D.C. Cir. 2002).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 899 (citing FED.R.CIV.P. 56). *Accord Florida Audubon Society et al. v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 1996).

<sup>55</sup> *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995).

*[ii]—Proof of Standing*

To demonstrate standing, a plaintiff must satisfy a three-pronged test.<sup>56</sup> First, the plaintiff must have suffered an injury in fact, defined as a harm that is concrete and actual or imminent, not conjectural or hypothetical.<sup>57</sup> Second, the injury must be fairly traceable to the governmental conduct alleged.<sup>58</sup> Finally, it must be likely that the requested relief will redress the alleged injury.<sup>59</sup> The courts of appeal have made clear that no standing exists if the plaintiff's allegations are "purely speculative[, which is] the ultimate label for injuries too implausible to support standing."<sup>60</sup> Nor is there standing where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct]."<sup>61</sup> The Supreme Court has held that a fear of exposure to a polluted natural resource can be an injury in fact, when such fear causes a plaintiff to stop or reduce use that resource for aesthetic and recreational enjoyment.<sup>62</sup>

*[iii]—Organizational Standing*

If the plaintiff is an association, it may sue in its own right or on behalf of its constituents. To sue in its own right, the plaintiff "must demonstrate that [it] has suffered injury in fact, including such concrete and demonstrable injury to [its] activities-with [a] consequent drain on [its] resources-constituting . . . more than simply a setback to [its] abstract social interests."<sup>63</sup> An organization's expenditure of resources to advocate its position with respect to government action it opposes is not recognized as injury in fact.<sup>64</sup> To sue on behalf of its members, an association may demonstrate standing as long as "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the

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<sup>56</sup> *Monsanto Co. v. Geertson Seed Farms*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2743, 2752, 177 L.Ed.2d 461 (2010); *Sierra Club*, N. 52 *supra*, 292 F.3d at 898 (citing *Defenders of Wildlife*, N. 49 *supra*, 504 U.S. at 560).

<sup>57</sup> *Byrd v. EPA*, 174 F.3d 239, 243 (D.C. Cir. 1999) (citing *Steel Co.*, N. 48 *supra*, 523 U.S. at 103).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* See also, *Natural Resources Defense Council, Inc. v. County of Dickson, Tennessee*, 2011 U.S. Dist. LEXIS 294 (M.D. Tenn. Jan 3, 2011).

<sup>60</sup> *Tozzi v. Department of Health and Human Services*, 271 F.3d 301, 307 (D.C. Cir. 2001).

<sup>61</sup> *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

<sup>62</sup> *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). See also, *Natural Resources Defense Council, Inc. v. County of Dickson, Tennessee*, 2011 U.S. Dist. LEXIS 294 (M.D. Tenn. Jan. 3, 2011).

<sup>63</sup> *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (Quotations and citations omitted.).

<sup>64</sup> *National Association of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011).

lawsuit.”<sup>65</sup> Thus, if the organization cannot show that the contested government action caused or will cause injury to its individual members, the organization lacks standing.<sup>66</sup>

Like individuals, organizations suing on behalf of their members must take care to make specific allegations of injury, traceability, and redressability. Recently, the Sixth Circuit found a lack of standing where an organization’s individual members failed to aver with specificity how they would be affected by an agency action, despite their clear articulation of their interest in the proceeding.<sup>67-68</sup> In that case, the court opined that “[Plaintiff]’s standing affidavits are too general in their identification of ‘site-specific activities [that] diminish[ ] or threaten to diminish their members’ enjoyment of the designated’ forest sub-sections, so [Plaintiff] does not have standing to maintain this action.”<sup>69</sup> Similarly, the D.C. Circuit found that the National Association of Homebuilders lacked standing to challenge the designation of two reaches of an Arizona river as a “traditional navigable water” (and thus subject to Clean Water Act jurisdiction) because the organization failed to allege that this designation caused any specific parcel of land controlled by a member to fall under Clean Water Act jurisdiction.<sup>70</sup>

*[iv]—Standing in Climate Change Cases*

The Supreme Court’s decision in *Massachusetts v. EPA*<sup>71</sup> is an important standing precedent that reaches a broad range of standing issues, including redressability.<sup>72</sup> The Court held that the State of Massachusetts had standing to challenge EPA’s failure to regulate CO<sub>2</sub> emissions from automobiles, notwithstanding the government’s argument that greenhouse gas emissions inflict widespread harms not suffered in a concrete manner by any particular individual or entity. The Court emphasized the special status of Massachusetts as a sovereign state that would try to enact laws to protect its citizens from the global warming effects of greenhouse gas emissions if it could do

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<sup>65</sup> *Consumer Federation of America v. FCC*, 348 F.3d 1009, 1011 (D.C. Cir. 2003) (quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

<sup>66</sup> *Commuter Rail Division of the Regional Transportation Authority v. Surface Transportation Board*, 608 F.3d 24, 30-31 (D.C. Cir. 2010) (environmental organization lacked standing because it did not demonstrate that the individual members on whose behalf it brought suit suffered or would suffer concrete injury as a result of the contested government action); see also, *Vietnam Veterans of America v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010) (veterans groups lacked standing because they had not demonstrated how any individual member was injured by the disability benefits processing system of the Department of Veterans Affairs).

<sup>67-68</sup> *Heartwood, Inc. v. Agpaoa*, 628 F.3d 261 (6th Cir. 2010).

<sup>69</sup> *Id.* at 268 (citing *Center For Biological Diversity v. Lueckel*, 417 F.3d 532, 537 (6th Cir. 2005)).

<sup>70</sup> *National Association of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011).

<sup>71</sup> 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

<sup>72</sup> See e.g., *American Bottom Conservancy v. U.S. Army Corps Of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011). However, another view is that the impact of *Massachusetts v. EPA* is confined to the Court’s “special solicitude” for states.

so.<sup>72.1</sup> However, the injury it cited, the effects of flooding on coastal property induced by climate change, and the Court's emphasis on the fact that Massachusetts owned a great deal of potentially affected property, would suggest that Massachusetts' statehood need not necessarily be viewed as the deciding factor. Furthermore, the Court clearly held that the fact that an injury is "widely shared" does not mean that it is not sufficiently concrete to form a basis for standing.<sup>72.2</sup>

With respect to redressability, EPA argued that the harms of global climate change had an insufficient causal relationship with EPA's failure to regulate CO2 emissions from cars because the incremental greenhouse gas emissions resulting from such a failure were insignificant in comparison with total global greenhouse gas emissions.<sup>72.3</sup> The Court rejected this argument, noting that such logic would doom most challenges to administrative action or inaction, which by their nature have only incremental effects.<sup>72.4</sup>

The Second Circuit cited *Massachusetts v. EPA* in holding that several states and land trusts had standing to sue electrical power companies for public nuisance due to the effects of global warming, because the plaintiffs' property interests would be impacted by increased flooding.<sup>73</sup> The Supreme Court holding that the federal common law of nuisance was "displaced," vacated the decision below and remanded on the issue of whether there could be a greenhouse gas nuisance suit under state common law.<sup>74</sup> Notably, the Second Circuit's standing decision was affirmed, albeit by an equally divided Supreme Court.<sup>74.1</sup>

### [b]—Exhaustion

Parties opposing a proposed agency rulemaking or other action are well advised to use opportunities for public comment to put their objections on the record with as much specificity as possible. Objections that have not been expressed to the agency prior to its final decision may be deemed waived, and the party precluded from asserting them, in a judicial challenge

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<sup>72.1</sup> *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("We stress here... the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.")

<sup>72.2</sup> *Id.* at 522.

<sup>72.3</sup> *Id.*

<sup>72.4</sup> *Id.*

<sup>73</sup> *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009).

<sup>74</sup> *American Electric Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011).

<sup>74.1</sup> *Id.* at 2535 ("Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions, and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.") (Citations omitted.).

to the agency decision. Under the doctrine requiring exhaustion of administrative remedies prior to bringing suit, courts have barred plaintiffs from asserting claims under the APA where they had not been presented before the agency.<sup>75</sup> With respect to NEPA challenges in particular, the Supreme Court has held that “[p]ersons challenging an agency’s compliance with NEPA must structure their participation so that it . . . alerts the agency to the parties’ position and contentions, in order to allow the agency to give the issue meaningful consideration.”<sup>76</sup>

Moreover, some statutes, including the Clean Air Act, include provisions for judicial review of agency action, which expressly impose such requirements on potential litigants.<sup>77</sup> In the Ninth Circuit,<sup>78</sup> a plaintiff challenged the definition, in an EPA rulemaking, of “natural event”, which under the rule would trigger exceptions to Clean Air Act reporting requirements. The Ninth Circuit held that under the Act’s statutory bar on judicial review of issues not raised during the rulemaking process, the challenge was precluded. The plaintiff had, in its comments on the proposed rule, questioned the inclusion of clean-up associated with natural disasters in the category of “natural event”, but it had not objected to the rule’s definition of the phrase itself.

### [c]—Ripeness

A related doctrine limiting judicial review is the ripeness doctrine, which aims to prevent premature judicial review. In making ripeness determinations, courts consider both the “fitness of the issues for judicial decision” and the “hardship to the parties of withholding court consideration.”<sup>79</sup> This analysis typically involves the consideration of “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.”<sup>80</sup>

As in the standing inquiry, disputes over ripeness can revolve around the question of whether an agency’s action has caused concrete harm to the plaintiff such that judicial review is warranted. Thus, the Supreme Court considered whether a forest management plan which set logging goals for a national forest, but which did not specifically authorize or prescribe the cutting of any trees (such actions would require further administrative review),

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<sup>75</sup> See *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (“The plaintiffs have exhausted their administrative remedies if the [administrative] appeal, taken as a whole, provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged.”) (Citations omitted.).

<sup>76</sup> *Department of Transportation v. Public Citizen*, 541 U.S. 752, 764, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004).

<sup>77</sup> See 42 U.S.C. § 7607(d)(7)(B).

<sup>78</sup> *Natural Resources Defense Council v. EPA*, 559 F.3d 561 (9th Cir. 2009).

<sup>79</sup> *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 140 L.Ed.2d 921 (1998) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967)).

<sup>80</sup> *Id.*

was ripe for review. The Court acknowledged that “the Plan’s promulgation . . . makes logging more likely in that it is a logging precondition; in its absence logging could not take place.”<sup>81</sup> However, the Court found that the absence of any concrete consequences for the plaintiffs at that time, coupled with the possibility that the Forest Service could later refine the plan through wholesale revision or in its application, rendered the debate premature.

Although the ripeness analysis can be affected by the possibility of future agency modification of the challenged action, or of future factual developments,<sup>82</sup> there may be occasions when certain harm to the plaintiff outweighs other uncertainties about the future. The Supreme Court has noted by analogy that “[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.”<sup>83</sup>

Often, the second prong of the ripeness test—whether judicial intervention would inappropriately interfere with further administrative action—overlaps with an analysis of whether an agency has taken the “final agency action” necessary for review under the APA.<sup>84</sup> Two interesting cases decided recently by the Court of Appeals for the D.C. Circuit illustrate this overlap. In the first, the court held that an advisory opinion of the Federal Election Commission was final agency action, and ripe for review, because the statute authorizing the advisory opinion provides that the opinion may be relied upon.<sup>85</sup> Thus, “[t]he fact that the advisory opinion procedure is complete and deprives the plaintiff of a legal right - 2 U.S.C. § 437f(c)’s reliance defense, which it could enjoy if had obtained a favorable resolution of the advisory opinion process - denies a right with consequences sufficient to warrant review.”<sup>86</sup> In the second, the court found that EPA’s interpretation of its authority under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), under which interpretation the agency could bring an enforcement proceeding for “misbranding” instead of, or prior to, bringing a “cancellation” proceeding, was a final action that was ripe for review.<sup>87</sup> The court found that EPA’s statements to the plaintiff that the latter was not entitled to a cancellation proceeding were “unambiguous”, “definitive”, and “unequivocal.”<sup>88</sup>

Thus, for a plaintiff challenging agency action that faces a ripeness challenge, it is crucial to make a clear factual showing that the challenged action creates a concrete injury that requires immediate judicial attention, and that

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<sup>81</sup> *Id.*, 523 U.S. at 730.

<sup>82</sup> See *Flint Hills Resources Alaska, LLC v. FERC*, 627 F.3d 881, 889-890 (D.C. Cir. 2010) (controversy over refund requirements was not ripe because it was not yet clear whether a refund obligation would ever materialize).

<sup>83</sup> *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 1767 n.2, 176 L.Ed.2d 605 (2010) (Citations and internal quotation marks omitted).

<sup>84</sup> 5 U.S.C. § 704.

<sup>85</sup> *Unity08 v. Federal Election Commission*, 596 F.3d 861 (D.C. Cir. 2010).

<sup>86</sup> *Id.*, 596 F.3d at 865.

<sup>87</sup> *Reckitt Benkiser, Inc. v. EPA*, 613 F.3d 1131, 1138-1139 (D.C. Cir. 2010).

<sup>88</sup> *Id.*, 613 F.3d at 1139.

the passage of time would neither give rise to factual developments that would remove the plaintiff's injury, nor cause the agency to mitigate the harm or change its policy.

### [3]—The Final Agency Action Requirement

Agencies, especially the EPA, have created new legal regimes or announced agency interpretations in the form of “guidance” and argued that such internal guidance is not subject to judicial review. However, a series of federal court decisions has made it clear that when an agency promulgates a decision that changes the legal regime or standard that the public has to adhere to or meet, it has engaged in final agency action. In one case,<sup>89</sup> the Fish and Wildlife Service had issued a Biological Opinion letter to the Bureau of Reclamation, asserting that particular minimum water levels should be maintained in reservoirs relied upon by the petitioners, in order to avoid endangerment to a particular species of fish. The Supreme Court held that the Opinion was a reviewable final agency action because it had direct and immediate legal consequences, as it altered the legal regime controlling the Bureau of Reclamation's decision-making (the Bureau would be subject to legal penalties if the reservoir levels were not enforced). In another case, EPA released a “guidance” on state implementation of the Clean Air Act that required states to enforce periodic monitoring by state permit holders.<sup>90</sup> The court in that case held that the guidance in and of itself constituted final agency action with direct legal consequences in the form of the obligations it imposed on states to implement the requirements. In yet another case,<sup>91</sup> EPA issued a guidance stating that chemicals in waste rock were ineligible for the regulatory *de minimis* exception to reporting requirements of the Emergency Planning and Community Right-to-Know Act. The court held that the guidance, in concert with a regulatory preamble applying the reporting requirements to the mining industry, served to “crystallize an agency position into final agency action.”<sup>92</sup> The District of Columbia Circuit also held a new EPA policy, according to which the agency was not to

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<sup>89</sup> *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

<sup>90</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

<sup>91</sup> *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000).

<sup>92</sup> *Id.* Similarly, in *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002), the court held that EPA's guidance document specifying risk assessment procedure for PCBs that would be used to determine the level of cleanup was an unlawful promulgation of a legislative rule because it did not comply with the APA's notice and comment requirements. See also, *Tozzi v. U.S. Department of Health and Human Services*, 271 F.3d 301 (D.C. Cir. 2001) (report upgrading dioxin from a “reasonably anticipated” to a “known” human carcinogen constituted final agency action because it triggered obligations under Occupational Safety and Health Administration, Department of Labor, and state regulations). In contrast, in *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002), the Fourth Circuit held that an EPA report classifying second-hand smoke as a known human carcinogen was not a reviewable final agency action because the report (at least theoretically) carried no legally binding authority and imposed no rights or obligations. In 2009, the D.C. Circuit held that examples of a rulemaking's application to certain circumstances,

consider any third-party human studies when assessing pesticides for regulatory treatment, where the existing practice had been to consider such studies on a case-by-case basis, to be to be “final agency action.”<sup>93</sup> Having held that the so-called policy statement actually constituted a regulation subject to judicial review, the court went on to nullify it on the basis that EPA had failed to observe APA public notice-and-comment requirements.

Accordingly, private litigants are not bound by the now usual agency boilerplate characterizing its pronouncement as merely guidance; courts apply a functional test.<sup>94</sup> Moreover, the agency’s action should be reviewed carefully to ascertain if it essentially promulgates a legislative or interpretive rule because the former requires an opportunity for public comment.<sup>95</sup>

The federal courts have shown a willingness to reject agencies’ arguments that APA procedural rule-making requirements, such as opportunities for public notice and comment, do not apply to determinations simply because they are denominated “guidance” or “policy statements.” As the Second Circuit noted thirty years ago “the label that the particular agency puts upon its given exercise of administrative power is not . . . conclusive, rather it is what the agency does in fact.”<sup>96</sup> For example, the District of Columbia Circuit held that the Food and Drug Administration’s establishment of an “action level” for a contaminant in corn required notice and comment although the agency characterized it as an interim standard used prior to the establishment of formal tolerances.<sup>97</sup> The court was persuaded by “the fact that FDA considers it necessary for food producers to secure *exceptions* to the action levels. . . . If, as the agency would have it, action levels did ‘not bind courts, food producers or FDA,’ it would scarcely be necessary to require that ‘exceptions’ be obtained.”<sup>98</sup> Also, the language FDA used in establishing action levels indicated that they were presently effective rather

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which were provided in the preamble to the final rule, did not constitute final agency action because they were not legally binding. *Natural Resources Defense Council v. EPA*, 559 F.3d 561 (D.C. Cir. 2009). The rule allowed states to exclude air-monitoring data following “exceptional events” from reports to EPA used to determine their attainment status under the Clean Air Act. The preamble provided examples of events that EPA stated, “may be” exceptional under the rule. The court relied on such equivocal language, and the fact that the examples were not included in the published rule itself, in holding that they were not subject judicial review.

<sup>93</sup> *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003).

<sup>94</sup> See, e.g., *Natural Resources Defense Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (vacating a guidance document that was held to be a legislative rule not preceded by the required opportunity for notice and comment because it “announced a binding change in the law” and authorized agency actions that had not been provided for in the relevant statute, prior regulations, or case law). See also, *National Mining Ass’n v. Jackson*, 768 F. Supp.2d 34, 43-45 (D.D.C. 2011) (holding that guidance documents purporting to add additional steps to the permitting process for mountaintop removal mining represented final agency action subject to judicial review).

<sup>95</sup> 5 U.S.C. § 553.

<sup>96</sup> *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-482 (2d Cir. 1972).

<sup>97</sup> *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987).

<sup>98</sup> *Id.*, 818 F.2d at 947. (Citation omitted).

than “musings about what the FDA might do in the future.”<sup>99</sup> The District of Columbia Circuit took a similar view of an EPA “PCB Risk Assessment Review Guidance Document,” holding that the guidance document was a “legislative rule” within the meaning of the APA.<sup>100</sup>

The temptation of agencies to promulgate standards without the delay and public scrutiny inherent in the “notice and comment” procedure is reflected in two litigations. The first litigation involved an agreement between the EPA and the U.S. Army Corps of Engineers (ACOE) to set new standards for PCB levels in dredged material to be disposed in designated dumping grounds.<sup>100.1</sup> The plaintiff needed a permit from the ACOE to dredge sediment from a channel adjoining one of its plants and to dump it in the ocean. The sediment was contaminated with PCBs, but below the 400 parts per billion (ppb) bioaccumulation level that had been deemed the maximum acceptable by ACOE and EPA. A few days before the permit was to be granted, however, the Corps entered into a Memorandum of Agreement (MOA) with the EPA, lowering the permissible level to 113 ppb. Neither agency had subjected the new ocean disposal standard to the rigors of the Administrative Procedure Act’s notice and comment requirement. The MOA provided for an immediate adoption of an “interim” standard. With that, it became apparent that the Corps would deny the permit, and the plaintiff sued EPA and the Corps.

The federal agencies moved to dismiss on the grounds that the adoption of the lower PCB standard was merely guidance and therefore did not amount to final agency action. The District Court for the Southern District of New York denied this motion, finding that “as a practical matter, the new PCB standard . . . was binding and resulted in tangible legal consequences for plaintiff.”<sup>100.2</sup> The MOA declared that it was “intended exclusively for the internal management of the Executive Branch, and does not establish or create any enforceable rights, legal or equitable, on behalf of any person not a signatory to this agreement,” but the district court declared that “such boilerplate cannot render an otherwise final and binding agency action non-final and non-binding.”<sup>100.3</sup> Similarly, the district court disregarded the MOA’s recitation that the new PCB number would be subject to revision, noting that all standards are subject to revision.

The plaintiff then moved for summary judgment. In July 2002, the district court again ruled for the plaintiff, finding that the new standard, “being binding and outcome-determinative, was a ‘rule,’ subject to the notice and

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<sup>99</sup> *Id.*, 818 F.2d at 948.

<sup>100</sup> *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002). Another rubric used by an agency to circumvent the APA’s notice and comment provision is to argue that notice is not required because the promulgation is merely an “interpretive rule” under 5 U.S.C. § 551(4). See, e.g.: *General Electric Co. v. EPA*, *supra*; *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987).

<sup>100.1</sup> *United States Gypsum Co. v. Muszynski*, 161 F. Supp.2d 289, 290-292 (S.D.N.Y. 2001).

<sup>100.2</sup> *Id.* at 292.

<sup>100.3</sup> *Id.*

comment requirements of the Administrative Procedure Act.”<sup>100.4</sup> However, the district court did not order that the permit be granted, because the Corps had never finished considering the public comments it had received prior to the agreement with EPA; the court directed the Corps to reconsider the permit application applying the prior PCB standard but taking into account the comments it had received.<sup>100.5</sup>

In the second litigation,<sup>101</sup> the Plaintiff was informed that its intended conversion of cropland to a non-agricultural use would require an application for a Clean Water Act Section 404 permit to fill wetlands under a new interpretation of ACOE regulations exempting prior converted croplands from Section 404 requirements. The District Engineer’s “issue paper” setting forth the new interpretation, was subsequently approved by ACOE Headquarters as an agency-wide interpretation of existing regulations. That doctrine was subsequently approved by a District Court action alleging a violation of the APA’s notice and comment requirements. The ACOE, rounding up the usual defenses, argued that the litigation was precluded by the ban on pre-enforcement litigation, that the guidance did not change any rule, that no legal consequences flowed from the guidance, and that there was no final agency action. The District Court disagreed, distinguished cases that challenged the application of a rule as opposed to its deficient promulgation, and held that ACOE Headquarters had given the District Engineers “their marching orders” which improperly changed the regulations relating to prior converted croplands.<sup>102</sup> Additionally, as noted earlier, the Supreme Court has clarified that administrative consent orders issued by the EPA pursuant to the Clean Water Act constitute final agency action subject to judicial review.<sup>102.1</sup>

#### [4]—Judicial Deference to Agency Action

Members of the regulated community face two additional hurdles in obtaining relief through judicial review. Judicial review seldom involves plenary litigation, and the standard of review normally involves some formulation of the now familiar doctrine that agency decisions will not be overturned unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to statute.<sup>103</sup> In addition, agencies lay claim to judicial “deference” to their actions. Historically, deference appears as a recognition of the agency’s primary role in administering a legislative mandate. Under what has been called the *Hearst* doctrine, the reviewing court must accept a reasonable agency interpretation even if it would reach a different one if not

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<sup>100.4</sup> *United States Gypsum Co. v. Muszynski*, 209 F. Supp. 2d 308, 310 (S.D.N.Y. 2002).

<sup>100.5</sup> *Id.* at 310.

<sup>101</sup> *New Hope Power Company v. United States Army Corps of Engineers*, 746 F. Supp.2d 1272 (S.D. Fla. 2010).

<sup>102</sup> *Id.*, 746 F. Supp.2d at 1279.

<sup>102.1</sup> See *Sackett v. EPA*, 132 S.Ct. 1367, 1372, 182 L.Ed.2d 367 (2012).

<sup>103</sup> *United States v. Morton*, 467 U.S. 822, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984).

acting as a reviewing court.<sup>104</sup> In addition, the courts have developed the *Skidmore*<sup>105</sup> deference doctrine, wherein a reviewing court will give respectful consideration to the agency's views in light of the agency's experience and informed judgment.

It is the *Chevron* doctrine, however, that has dominated judicial review of agency action since 1984.<sup>106</sup> While *Chevron* arose in the context of rule-making, agencies have tended to invoke it in a wide variety of circumstances,<sup>107</sup> most typically in defending published regulations.<sup>108</sup> The *Chevron* doctrine provides for a two-step judicial analysis. The first step is to determine whether the statute is clear and unambiguous; if it is, then deference to an agency interpretation is not appropriate. Where the statute is silent or "ambiguous," then the second step of the *Chevron* deference doctrine mandates that the court must accept the agency's interpretation of the statute so long as it is reasonable.<sup>109</sup>

In 2011, the Supreme Court revisited the *Chevron* doctrine, in *Mayo Foundation for Medical Education and Research v. United States*.<sup>110</sup> The Court appeared to acknowledge that while conventional modes of statutory construction should be applied in the first *Chevron* step, the agency deserves broader deference in the second step. Acknowledging that under other doctrines, the consistency of an agency's interpretation over time, and whether the regulation was promulgated contemporaneously with the statute it interprets, can effect the amount of deference accorded to the agency, the Court noted that:

[u]nder *Chevron*, in contrast, deference to an agency's interpretation of an ambiguous statute does not turn on such considerations. We have repeatedly held that [a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. . . . We have instructed that neither antiquity nor contemporaneity with [a] statute is a condition of [a regulation's] validity. . . . And we have found it immaterial to our analysis that a regulation was prompted by litigation."<sup>111</sup>

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<sup>104</sup> *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944).

<sup>105</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

<sup>106</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

<sup>107</sup> See, e.g.:

*Third Circuit*: *Bamidele v. Immigration and Naturalization Service*, 99 F.3d 557 (3d Cir. 1996) (Board of Immigration Appeals determination to deport the plaintiff).

*Ninth Circuit*: *Pyramid Lake Paiute Tribe of Indians v. United States Department of Navy*, 898 F.2d 1410 (9th Cir. 1990) (Navy practices of leasing acreage and contiguous water rights to local farmers).

*District of Columbia Circuit*: *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998) (distribution of royalties collected from cable television systems).

<sup>108</sup> See *American Chemistry Council v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003).

<sup>109</sup> *Id.*, 467 U.S. at 842-843.

<sup>110</sup> 131 S.Ct. 704, 178 L.Ed.2d 588 (2011).

<sup>111</sup> *Id.*, 131 S.Ct. at 712-713 (Internal quotation marks and citations omitted.).

This opinion appears to echo a 2002 U.S. Supreme Court decision in which *Chevron* deference to formal regulations was applied, despite petitioner's argument that the regulation did not qualify for *Chevron* deference due to its recent enactment.<sup>112</sup> The Court rejected this argument, noting that the agency's interpretation was one of long standing, "[a]nd the fact that the Agency previously reached its interpretation through [less formal means] does not automatically deprive that interpretation of the judicial deference otherwise its due."<sup>113</sup>

Notwithstanding *Mayo Foundation's* declaration of broad deference at the second step of the *Chevron* analysis, certain limitations on deference, which have developed over the years, remain in place. First, in *Christensen v. Harris County*, the Supreme Court has established that an agency interpretation of a statute is not entitled to "Chevron-style deference" if it takes a form, such as an opinion letter, policy statement, or agency manual, or enforcement guideline, which "lacks the force of law."<sup>114</sup>

Second, it has been established that a more constrained form of deference may apply to some agency interpretations. In *United States v. Mead Corp.*, the Court addressed a case in which the plaintiff had challenged a tariff-ruling letter by the Secretary of the Treasury.<sup>115</sup> While the Court held that the ruling letter lacked the force of law and thus did not merit consideration under the *Chevron* doctrine, it invoked the *Skidmore* doctrine of respect for an agency interpretation "in proportion to its power to persuade."<sup>116</sup> Subsequent cases have illustrated the use of the *Skidmore* doctrine.<sup>117</sup>

The interplay of the *Christensen* and *Mead* doctrines was demonstrated in a 2001 decision by the Second Circuit, in which the plaintiff alleged that the City had violated the Clean Water Act with an unpermitted discharge from a dam.<sup>118</sup> The City argued that no permit was required, relying on an EPA policy, articulated in opinion letters, reports to Congress, and litigation positions over the years, that the Act's discharge permit requirement did not apply to discharges from dams. The Second Circuit, following *Mead* and *Christensen*, held that because the EPA policy was never formalized in a

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<sup>112</sup> *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

<sup>113</sup> *Id.* 535 U.S. at 221 (Citations omitted.).

<sup>114</sup> 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

<sup>115</sup> 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

<sup>116</sup> *Id.*, 533 U.S. at 235.

<sup>117</sup> See, e.g., *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 123 S. Ct. 1017, 154 L.Ed.2d 972 (2003) (applying some deference to an informal Social Security Administration interpretation contained in an operating manual, because the interpretation was reasonable and adhered to general principles of statutory construction). See also, *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 124 S. Ct. 983, 157 L.Ed.2d 967 (2004) (applying *Skidmore* deference in upholding an EPA interpretation of the Clean Air Act, contained in internal guidance memoranda, that allowed the agency to find deficient designations of Best Available Control Technology by state agencies with delegated authority to enforce the Act).

<sup>118</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

notice-and-comment rulemaking or formal adjudication under the APA, it was not due *Chevron* deference, and did not need to be adopted by the court unless it was “persuasive.”<sup>119</sup> Accordingly, the court engaged in its own interpretation of the statute and rejected the EPA position as applied to discharges from a more polluted body of water into a less polluted one.<sup>120</sup>

These cases may simply stand for the propositions that reasonable agency interpretations, vetted by some public process that vouches for their reasonableness, will likely be sustained.<sup>121</sup> However, that is not uniformly true. In *Massachusetts v. EPA*,<sup>122</sup> the Court, nullifying EPA’s denial of a petition to regulate greenhouse gases under the Clean Air Act, took a muddled position with respect to deference. The opinion, authored by Justice Stevens, cited *Chevron* in holding that the scope of the Court’s review was narrow, but proceeded to forgo deference in its assessment of whether the denial of a petition for rulemaking was “arbitrary and capricious” pursuant to the judicial review standard that the Clean Air Act shares with the APA.<sup>123</sup> Furthermore, Justice Stevens took it upon himself to educate EPA’s Administrator on the phenomenon of global warming.<sup>124</sup> Such a use of the judicial opinion would seem incongruous. Here, the Court was reviewing an administrative decision, obviously made by the head of an agency charged with administering a complex statute with an extremely broad delegation of discretion. How, then, could the Justice Stevens’ lecture on global warming to the EPA be rationalized with *Chevron*’s teachings?

Justice Breyer later provided an explanation:

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<sup>119</sup> *Id.* 273 F.3d at 489-491.

<sup>120</sup> *Id.* 273 F.3d at 491-494. See also, *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 580-581, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007) (declining to accord any deference to an agency official’s opinion letter and memorandum, finding them unpersuasive and noting that “an isolated opinion of an agency official does not authorize a court to read a regulation inconsistently with its language.”).

<sup>121</sup> See *Mayo Foundation for Medical Education and Research v. United States*, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011). See also:

*Second Circuit*: *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002) (holding that *Skidmore* deference is appropriate where the Secretary of Labor’s position on citation pardons was only expressed in a litigation document).

*Eighth Circuit*: *TeamBank, N.A. v. McClure*, 279 F.3d 614 (8th Cir. 2002) (holding that an Office of the Comptroller of the Currency (“OCC”) opinion letter was entitled to *Chevron* deference because, under *Mead*, OCC decisions are deferred to even in the absence of formality);

*Eleventh Circuit*: *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002) (holding that *Chevron* deference applied to a HUD statement of policy because Congress expressly delegated authority to make and interpret rules, and thereby gave the statement the full force of law);

*Federal Circuit*: *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126 (Fed. Cir. 2001) (holding that Customs classification rulings are not given *Chevron* deference under *Mead*, however this particular case did merit *Skidmore* deference due to its persuasiveness).

<sup>122</sup> 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

<sup>123</sup> See 42 U.S.C. § 7607(d)(9)(a); 5 U.S.C. § 706.

<sup>124</sup> *Id.*, 549 U.S. at 507-509.

“In [Massachusetts v. EPA] the breadth and importance of the legal question at issue seemed to be more significant than the fact of greater EPA technical expertise in respect to carbon dioxide. The Court could reasonably think that the relevant expertise needed to answer the question was primarily legal, not administrative, and that the agency ruling misinterpreted Congress’s intent. The Court was (relatively) better positioned to consider the purposes of the statute and the related consequences of excluding or including greenhouse gases.”<sup>125</sup>

In other words, some technical decisions are too laden with public policy to allow agency deference to be invoked. Courts, however, generally have not vigorously parsed administrative decisions to separate out general policy issues from the claim of environmental expertise in which they are often clad. Indeed, *Chevron* and its progeny suggest that such a review may be inappropriate. Nevertheless, meaningful judicial review, especially in environmental cases, actually requires a hard look at the science and facts that underlie administrative decisions. Rigorous record review and the corresponding degree of deference are mandated in environmental matters by two practical considerations: avoidance of political factors and the promotion of administrative efficiency. Thus, a practical argument in favor of strict review of agency rationality in combined questions of law, fact, and judgment is that such review might help prevent politicization of agency expertise. Political pressures, from direct meddling by the executive, to more mundane issues of fear of public embarrassment at having an error exposed, or insufficient resources and staffing, might lead to an agency’s failure to meet the required standard of rationality.<sup>126</sup>

All of the foregoing leads to the ineluctable conclusion that the real fight concerning an agency action should be held before the agency as opposed to a reviewing court. However, when the dispute has progressed to the courts, careful attention should be paid to whether the contested action requires an opportunity for public comment and whether the record docketed by the agency’s lawyers reflects what the agency actually considered.

Furthermore, the issues should be framed in a manner that avoids implicating the broad technical discretion of the agency, for example, by couching issues in terms of legal questions relating to statutory interpretation and

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<sup>125</sup> Breyer, *Making Our Democracy Work, A Judge’s View*, p. 119 (2010).

<sup>126</sup> Freeman and Vermeule, “Massachusetts v. EPA: From Politics to Expertise,” 2007 Sup. Ct. Rev. 51, 52 (“If the problem is the politicization of expertise, the majority’s solution in *Massachusetts v. EPA* was a kind of *expertise-forcing*, or so we will claim. Expertise-forcing is the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies. Expertise-forcing is in tension with one leading rationale of the *Chevron* doctrine, a rationale that emphasizes the executive’s democratic accountability and that sees nothing wrong with politically inflected presidential administration of executive-branch agencies. Whereas the *Chevron* worldview sees democratic politics and expertise as complementary, expertise-forcing has its roots in an older vision of administrative law, one in which politics and expertise are fundamentally antagonistic.”) (Citations omitted.).

the effectuation of Congress' intent. Claims of deference should be carefully reviewed to ascertain their entitlement under the Supreme Court's teachings in *United States v. Mead Corp.*,<sup>127</sup> and *Alaska Department of Environmental Conservation v. EPA*,<sup>128</sup> and similar cases.

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<sup>127</sup> 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

<sup>128</sup> 540 U.S. 461, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004).

### § 1.06 Citizen Suits

The major substantive environmental statutes enacted during the last two decades provide for citizen suits to help achieve environmental compliance and penalize noncompliance. Not only do these statutory provisions encourage individuals and organizations to act as “private attorneys general,” but they allow lawyers in citizen suits to collect reasonable fees for their work.<sup>1</sup> Accordingly, no discussion of environmental enforcement can be meaningful without a thorough analysis of this interesting, and potentially powerful statutory provision.

In the 1970s, citizen suits were most effective as a device to compel a reluctant administrator to perform his or her duty as mandated by the environmental statutes.<sup>2</sup> However, more recent years have seen a dramatic increase in the number of suits filed against alleged polluters directly, generally by environmental organizations with either state or regional bases. The reason advanced by knowledgeable commentators for this increase is the perception that the Reagan and former Bush Administrations were not adequately enforcing environmental laws. At one point during the mid-1980s, it is estimated that there were approximately 200 such suits pending in the various district courts. Most of those suits involved alleged wastewater excursions as reflected in the dischargers’ own monitoring reports.<sup>3</sup> Today, the number of water cases appears to be diminishing, and parallel with EPA and state enforcement focus, shifting toward pretreatment violations and various violations of other statutes. Citizen suits seeking redress of air pollution and remediation of hazardous substances are increasing,<sup>4</sup> although there is as yet no increase in reported decisions.

It is difficult to evaluate the overall effect of the private attorneys general type of citizen suit. However, such suits have caused an increased sensitivity to enforcement by the various state environmental agencies. Moreover, these suits have clearly had an effect on the relatively few marginal dischargers who had escaped effective prosecution in earlier times. Significantly, the Clean Air Act has begun to generate cases; under the 1990 Clean Air Act Amendments this trend will likely continue. The enactment of a citizen suit provision for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) may be the harbinger of a new wave of citizen suit litigation.

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<sup>1</sup> For a good background discussion of the topic of citizens’ suits, see generally, Miller, “Private Enforcement of Federal Pollution Control Laws, Part I,” 13 *Envtl. L. Rep.* 10309 (Oct. 1983). For an outline of issues of more current interest, see generally: Citizen Suits, *13B Fed. Prac. & Proc. Juris.* § 3531.10 (3d ed.); Reisinger et. al., “Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?,” 20 *Duke Env’tl. L. & Pol’y F.* 1 (2010).

<sup>2</sup> See, e.g., *New England Legal Foundation v. Costle*, 475 F. Supp. 425 (D. Conn. 1979) *aff’d in part*, 632 F.2d 936 (2d Cir. 1980) and *aff’d in part*, 666 F.2d 30 (2d Cir. 1981).

<sup>3</sup> See Environmental Law Institute, *Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes* (Sept. 1984).

<sup>4</sup> Bureau of National Affairs, *Environmental Citizens Suits: Confronting the Corporation* (1988).

One of the most significant exceptions to the so-called “American rule” against awarding attorneys’ fees to litigants is the provision in the citizen suit statutes for the award of attorneys’ fees to any party.<sup>4.1</sup> While there is no way to know for sure whether the prospect of the award of attorneys’ fees acts as an incentive to bring citizen suits with which prospective plaintiffs would not otherwise bother, there can be no doubt that fee awards certainly do not discourage such suits.<sup>5</sup> It appears that the commencement of citizen suit litigation is, at least, partially influenced by these fee shifting provisions.

With some interesting and significant exceptions, these statutory citizen suit provisions have received generally uniform interpretation and the courts have felt free to cite to the legislative history of the Clean Air and Water Acts for the interpretation of decisions or provisions of subsequently enacted legislation providing for the commencement of a citizen suit.<sup>6</sup> This is not surprising, since the legislative history behind each subsequently enacted citizen suit provision refers to the legislative history underlying the earlier statutes.

Bearing in mind that there are differences in language, substantive provisions, and the manner of judicial interpretation among the various citizen suit provisions, the typical such provision seeks to balance the interests of government, citizens, and regulated parties, with a decided tilt in the balance toward the goal of persuading regulated parties not to pollute. Furthermore, it should be stressed that citizen suits may be filed for the violation of statutes and regulations that are merely reporting requirements, and do not involve actual pollution. Typically, a citizen suit provision includes the following features:

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<sup>4.1</sup> Reisinger et. al., “Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?,” 20 Duke Env’tl. L. & Pol’y F. 1, 13 (2010).

<sup>5</sup> Reisinger et. al., “Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?,” 20 Duke Env’tl. L. & Pol’y F. 1, 13 (2010) (“The inclusion of novel fee shifting provisions, however, provides perhaps the strongest evidence that Congress wanted to facilitate vigorous citizen participation.”). In one case, *NJPIRG v. Witco Chemical Corp.*, Nos. 89-3146, 90-968 (D.N.J. Feb. 22, 1993), a consent decree arising from a citizen suit filed pursuant to the Clean Water Act resulted in an alleged polluter’s agreement to pay a total of \$10 million to NJPIRG for “environmental projects,” to a local municipality for pollution abatement, to a local medical center for emergency medical training, and to the state of New Jersey for enforcement of the state’s Water Pollution Control Act. The defendant also agreed to build a wastewater treatment facility to bring it into compliance with the federal Clean Water Act, and to provide copies of its monthly monitoring reports to the plaintiff environmental groups. Finally, the defendant agreed to pay \$550,000 to various environmental groups for attorneys’ fees and costs.

<sup>6</sup> See:

*First Circuit*: *Save Our Sound Fisheries Ass’n v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977).

*District of Columbia Circuit*: *North Slope Borough v. Andrus*, 515 F. Supp. 961 (D.D.C. 1981), *rev’d on other grounds sub nom. Village of Kaktovik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982).

(1) Broad authority to “any person” to sue on his own behalf against either an alleged polluter or the government agency that is supposed to be regulating the activities of the alleged violator.

(2) The requirement that the plaintiff give notice to the EPA, the alleged polluter, and to the state in which the alleged violation occurs, usually at least sixty days before filing suit—during which time the defendant may be able to moot the suit by taking appropriate action.

(3) A provision that suit may be filed immediately after notice is given under certain emergency circumstances.

(4) A prohibition against the maintaining of a citizen suit where the government is already diligently prosecuting a civil or criminal action against the alleged violator.

(5) A description of the venue in which such a suit may be brought, typically the United States district court in the district where the alleged violation has occurred.

(6) Preservation of the right of the United States to intervene in a citizen suit.

(7) Award of costs and attorneys’ fees to plaintiffs, in some cases where they prevail or “substantially” prevail, and in other cases whenever the court deems it appropriate.

### § 1.07 The Criminalization of Environmental Enforcement

The relatively large amounts of money and effort associated with the cleanup of hazardous substances often distract the practitioner from the exposure of his or her client to criminal liability for violations of environmental statutes. Both federal and state prosecutors now routinely prosecute environmental dereliction that heretofore had either been ignored or prosecuted civilly.<sup>1</sup> The touchstone of these efforts has been an ability to prove a general criminal intent or *mens rea* on the part of the accused.<sup>1.1</sup> The “criminalization” of the environmental regulatory scheme presents grave issues relating to the standards upon which convictions can be maintained, and questions of fundamental fairness to members of the regulated community who now may face parallel civil and criminal actions for what appears to be the same activity.

Moreover, even though environmental statutes carry the possibility of both substantial pecuniary penalties and lengthy incarceration, they increasingly are being used to prosecute violations that formerly were addressed solely by the Occupational Health and Safety Act,<sup>2</sup> which provides only for relatively modest penalties. Indeed, statutes such as the Resource Conservation and Recovery Act and the Clean Air Act have evolved from strictly environmental legislation into tools used to prevent and to punish incidents of worker injury caused by exposure to hazardous substances.<sup>3</sup> This interplay of environmental and workplace regulation is of particular consequence to businesses dealing with hazardous substances, because even routine workplace-safety incidents may subject an employer and its management structure to increased scrutiny in both the safety and the environmental spheres, and, by extension, to the substantial criminal penalties provided for under the environmental statutes.

The criminal prosecution of environmental crimes may eventually predominate among all environmental enforcement approaches. Nothing catches the regulated community’s attention so much as the very real threat of criminal prosecution. The specter of incarceration, enormous fines, and the loss of public esteem are serious consequences for environmental dereliction that may or may not actually harm the environment, as opposed to the regulatory scheme. The concomitant civil consequences of criminal prosecution are often onerous. In addition to debarment and delisting,<sup>4</sup> parallel civil proceedings drawing upon the criminal investigation, the defendant’s elocution, or the trial record can result in additional fines<sup>5</sup> and the curtailment of permitted activities.

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<sup>1</sup> See generally: Uhlmann, “Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme,” 2009 Utah L. Rev. 1223, 1224 (2009); McIntyre, “Current Trends in Enforcement of Environmental Crimes,” 50 Advocate 31 (2007); Herz, “Structures of Environmental Criminal Enforcement,” 7 Fordham Env’tl. L.J. 679, 681 (1996).

<sup>1.1</sup> See discussion of criminal intent or *mens rea* at § 6:03 *infra*.

<sup>2</sup> 29 U.S.C. §§ 651 *et seq.*

<sup>3</sup> For further discussion, see §§ 6.02[3][a][ii] and 6.02[3][c][iv] *infra*.

<sup>4</sup> Under the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 9.400 *et seq.*, government contractors can be “debarred”—that is, prevented from participating in contract work for up to three years—if they are convicted of certain crimes or even if they are subject to civil judgments. Among grounds for debarment is the filing of

Accordingly, the regulated community will likely wish to conduct vigorous environmental audit programs. Department of Justice guidelines on the application of its prosecutorial discretion<sup>6</sup> and federal sentencing guidelines<sup>7</sup> indicate that doing so can lessen criminal enforcement risks. Therefore, there should be a substantial increase in self-enforcement, assuming the regulated community attunes itself to the message implicit in these policies.

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false reports, an easy trap to fall into for a party subject to environmental reporting requirements. In addition, certain federal environmental statutes have their own specific debarment provisions. See, e.g.: Clean Water Act § 309(c), 33 U.S.C. § 1319(c); Clean Air Act § 113(c), 42 U.S.C. § 7413(c).

<sup>5</sup> As large as the criminal fines provided by federal environmental statutes may appear to be, they can be dwarfed by the Federal Alternative Fines Act (AFA), 18 U.S.C. § 3571, which establishes the maximum fine for any felony as the greater of \$500,000 or twice the pecuniary gain to the defendant or loss to the plaintiff as the result of the felony. The statute states that unless another statute specifically exempts itself from the effects of the Alternative Fines Act, the AFA fine may be imposed. Since none of the environmental statutes exempt themselves from the AFA, conviction of an environmental felony can have far greater consequences than might be immediately apparent.

<sup>6</sup> See DOJ Policy Statement Prepared in Collaboration with the EPA, “Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure by the Violator” (July 1, 1991). This policy statement encourages the performance of environmental audits by seeking increased fines and sentences where a violation occurs and audits were not part of a comprehensive compliance program.

<sup>7</sup> The Federal Sentencing Reform Act, 18 U.S.C. §§ 991 *et seq.*, established the Federal Sentencing Guidelines Commission and gave it the power to recommend a unified sentencing structure for federal crimes. The statute provides that if Congress does not act on the Commission’s recommended sentences, they automatically become law, and are binding on federal judges for the crimes covered by the guidelines. One of the few areas of regulatory crime the Commission has dealt with is environmental regulation. See United States Sentencing Commission, 2012 Sentencing Guidelines Manual, “Part Q—Offenses Involving the Environment.” A glance at the guidelines for individuals convicted of environmental crimes can be sobering. For example, the offense of “knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides or other pollutants” (§2Q1.1) is assigned a base offense level of twenty-four, which calls for a mandatory sentence of fifty-one to sixty-three months in prison (for a person with little or no criminal history). Chapter 8 of the Sentencing Guidelines addresses the sentencing of organizations. Although an organization, qua organization, cannot be imprisoned, the guidelines provide for array of criminal penalties, including restitution, fines, probation, and forfeitures.

**§ 1.08 The Politics of Environmental Enforcement**

A significant factor in environmental enforcement decisions that cannot be ignored by any regulated party is political and social pressure that can be brought to bear heavily on those who must make important prosecutorial decisions. There is no doubt that public concern with environmental quality translates into a hot political issue. In turn, this means that politicians know they can count on environmental matters to generate favorable reactions among their constituencies. Accordingly, elected and other officials may be “tough,” not only with members of the regulated community, but also on the agencies that are supposed to be doing the regulating.<sup>1</sup> Consequently, the lawyers representing both government agencies and regulated parties must be aware that their actions and negotiations may be subject to the scrutiny of bystanders who may not have the same view of fairness or environmental values.

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<sup>1</sup> See Hassler, “Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes,” 24 *Envtl. L. Rep.* 10074 (Feb. 1994). The author presents a critical narrative account of two congressional and one academic investigation into alleged shortcomings in prosecutorial zeal on the part of lawyers for the Environmental Crimes Section of the Department of Justice’s Environment and Natural Resources Division. See also, Uhlmann, “Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme,” 2009 *Utah L. Rev.* 1223, 1229 (2009).

### § 1.09 Conclusion

The scary aspect about environmental enforcement is that few institutions can be assured that they are in compliance at any specific point in time. Thus, at any one time there may be an unpermitted vent, the improper storage of hazardous wastes, an SPDES exceedance, or a recordkeeping “glitch.” These routine deviations from the theoretical standard seldom produce harsh enforcement results unless there is another stimulus, and therein lies the problem. The stimulus may be an inspector upset over rude treatment, it may be an accidental spill with public attention, an on-site job injury, or a disgruntled employee drawing attention to passed over upgrade requests. Thus, regulated institutions are always at risk, and must constantly strive to insure compliance and be fully prepared to deal with the government’s enforcement initiative when it descends upon them.<sup>1</sup>

As an initial matter, it is essential that environmental audits be conducted on a regular basis by an audit team not subject to the authority of the auditing facility. Perhaps the leading reference in this field is Frank Friedman’s *A Practical Guide to Environmental Management*.<sup>2</sup> Careful attention must be given to the auditing process to insure that it does not become a means to overlook the hard issues. Moreover, if there is no commitment to deal with the problems discovered by an audit, auditing can have the negative side effect of providing the basis for establishing *mens rea* in a criminal prosecution.<sup>3</sup>

Second, auditor’s and expert’s reports are normally discoverable in civil and criminal proceedings,<sup>4</sup> so it is critical that some sophistication be developed in the way that environmental problems are described within the audited organizations. There is no reason why the government’s case has to be documented in the course of addressing various problems. Finally, members of the regulated community need to develop procedures in their dealings with the regulator. Candor and sophistication are both essential.

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<sup>1</sup> Jonathan Edwards may have caught this concept in his epic 1741 sermon “Sinners in the Hands of an Angry God,” wherein he commented on the need for being in compliance. “For it is said that when that due time comes, *their foot shall slide*. Then they shall be left to fall, as they are inclined by their own weight.” Foerster, *American Poetry & Prose*, 52 (1934). (Emphasis in the original).

<sup>2</sup> See Friedman, *A Practical Guide to Environmental Management* (1991).

<sup>3</sup> See Riesel and Zarin, “Environmental Action Program Model,” 17 *Cardozo L. Rev.* 1297 (April 1991).

<sup>4</sup> See, e.g., Fed. R. Civ. P. 26(b)(3), which offers only qualified protection to “documents and tangible things” that have been “prepared in anticipation of litigation or trial. . . .”