

I N S I D E T H E M I N D S

Environmental Law Enforcement and Compliance

*Leading Lawyers on Communicating with
Enforcement Agencies, Overcoming Compliance
Challenges, and Developing Response Strategies*



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Surviving the Enforcement First Culture

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Introduction

The web of federal and state environmental laws and regulations has never been more complicated. At the same time, the government is unable or unwilling to provide comprehensive compliance assistance to the regulated community. This convergence of complex and sometimes inconsistent legal requirements and a government “enforcement first” strategy challenge the regulated community as it has never been challenged before.

This chapter discusses the root causes of the “enforcement first” approach to environmental compliance and how the regulated community can most effectively respond to the increasingly hostile regulatory environment this approach creates.

The Genesis of the Enforcement First Approach

There are, I think, four root causes of the government’s enforcement first approach to compliance.

First, over the course of the modern environmental regulatory era, beginning in the mid-1970s, the government has had the benefit of very broad enabling statutes, giving it nearly unfettered discretion to promulgate even more favorable to the government regulations and policies. After these statutes and regulations were interpreted by the regulators themselves, those interpretations were reviewed by courts inclined to give the government the benefit of every doubt. Not surprisingly, this led to the development of a precedent that further emboldened the government. One of the best examples of this phenomenon is in the Superfund arena in which a “polluter pays” doctrine evolved that, at its apex, emboldened the pursuit of “generators” of anything containing “hazardous substances” as broadly defined. *See, e.g., US v. Burlington N. & Santa Fe Ry. Co.*, 520 F. 3d 918, 941 (9th Cir. 2007), [rev’d](#); 129 S. Ct. 1870 (2009) (“At the liability stage, CERCLA simply assigns liability to statutorily responsible parties so as to assure that, as between those with some connection to the contamination—and who have, it may be assumed, benefited from the contamination-causing process—and those with none, such as the taxpayers.”).

Second, many environmental regulators have had their budgets slashed. Perhaps because the regulatory agencies perceived it would cause the regulated community to advocate for additional funds for the regulators, or perhaps because regulators determined that enforcement provides a “bigger bang for the buck,” compliance assistance has been reduced and “compliance monitoring” has continued. In fiscal year 2010, the EPA conducted 21,000 inspections. More than one in four of those inspections identified a “potential violation.”¹

Third, the economic recession has made the regulated community less popular while the “green” movement has heightened environmental sensitivity. This has emboldened regulators to more aggressively pursue an enforcement first approach.

The fourth and final cause of the enforcement first approach is the perceived inability of elected and appointed managers of many regulatory agencies to manage in the way private sector managers do. I think the reasons for this include the fact that elected and appointed managers of environmental agencies are, for the most part, unable to hire and fire their subordinates and, as a result, subordinates are able to “outlast” their elected and appointed managers. In addition, the subject matter of enforcement proceedings is often sufficiently complicated that it is impossible for elected and appointed managers of regulatory agencies to sufficiently understand the details of those proceedings in a way that allows them to challenge staff even if they were inclined to do so.

These four factors have collectively resulted in the expansion of what I refer to as the enforcement “bubble.” However, like most bubbles it can expand only so much.

That brings me to the most significant force opposing the continued inflation of the enforcement bubble— the rejection of the liberal reading of environmental statutes by the judiciary. In *Burlington Northern*, the Supreme Court insisted that proof of an arrangement for disposal requires

¹ *Compliance and Enforcement Annual Results 2010 Fiscal Year*, EPA.GOV, <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/index.html> (last visited July 6, 2011).

proof of an intention to effect a disposal (as defined by the statute). 129 S.Ct. 1870, 1879-80 (2009). In June 2011, the Supreme Court granted a petition for a writ of certiorari to answer the question of whether the homeowner recipients of an EPA administrative order to demolish their house could seek pre-enforcement judicial review of that order and, if they can't, whether the order violates their constitutional due process rights. *Sackett v. EPA*, No. 10-1062, 2011 WL 675769 (U.S. June 28, 2011). We have not yet begun to see the effect of these judicial actions in the government's decisions about which cases to enforce and how to enforce them.

In any event, clients are unlikely to think that resort to the Supreme Court is a successful strategy for most cases. Therefore, other successful strategies for operating in an enforcement first environment are the subject of the remainder of this chapter.

Agencies Participating in Environmental Law Enforcement

The primary federal agency involved in environmental law enforcement is, of course, the Environmental Protection Agency (EPA). The EPA operates through its headquarters in Washington, D.C. and ten regional offices around the country. There is often not as much uniformity as one might expect in how the same laws and regulations are enforced by the different EPA regional offices. This requires one to understand and account for differences in positions among regions and to know, or find out, how the EPA headquarters might address such a difference in a given case.

Obviously, there may be a price to be paid in complaining to EPA headquarters about a decision in a regional office. The regional office will, of course, defend its position and will have access to the decision makers at headquarters that is likely to be better than yours. Therefore, this is not a decision to be made lightly. The best strategy will be one that is attuned to potential differences between a regional office view and what headquarters might require, and an early concerted effort to communicate with the regional office about the flexibility it may have, but not be exercising. Even if one is unsuccessful at the regional level, the record of the attempt to bridge a gap early will be important in any future conversation with headquarters.

Each state typically has some version of the EPA. For example, in Massachusetts, where I live, that agency is the Department of Environmental Protection. State agencies have the primary responsibility for enforcing state laws and regulations that may be the same as or different from the federal laws and regulations (or laws and regulations of other states) dealing with the same topic. There are countless examples of this phenomenon. One straightforward example is that the federal Superfund statute's definition of "hazardous substances" specifically excludes petroleum while the Massachusetts analog includes both "oil" and "hazardous materials."²

There is a wide spectrum of flexibility and responsiveness among state environmental agencies, and even among divisions of state environmental agencies. What may be a very reasonable request in one state may be out of the question in another state.

The state agencies also have primary responsibility for enforcing federal laws and regulations where responsibility for those programs has been delegated to the state.

Other Key Players in Environmental Law Enforcement

The Department of Justice (DOJ) and the State Attorneys General are critically important players in environmental law enforcement.

There is an entire division of the Department of Justice, the Environment and Natural Resources Division, that is responsible for enforcing more than one hundred federal laws. It has offices in six cities in addition to Washington, D.C.

In each United States Attorney's office there is also at least one assistant United States attorney who works with EPA's lawyers to represent the regional EPA office in litigation.

² Compare definition of "hazardous substances" in the Comprehensive Environmental Response, Compensation and Liability Act found at 42 U.S.C. §9601(14) and the definition of "oil" in the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. 21E § 2.

I have found that the interaction between EPA and the DOJ is somewhat equivalent to the interaction between an in-house lawyer of a corporation and an outside lawyer for that corporation. Even if EPA lawyers have not responded to a particular argument, one might find the DOJ lawyer representing the EPA responsive because it is the DOJ lawyer who needs to prosecute or defend EPA's position in court. Having said that, you should expect a DOJ lawyer to break ranks with their EPA counterpart about as often as you would expect outside counsel to break ranks with the in-house lawyer of their client.

Many state environmental agencies also have staff lawyers who may work with lawyers from the office of the state attorney general in the same way that EPA and DOJ lawyers work together. Other state environmental agencies rely exclusively on the office of the state attorney general for this support.

The Role of Elected Officials in Environmental Law Enforcement Proceedings

Clients need to know that the regulatory agencies they are dealing with can be responsive to political forces. Often lawyers and clients do not appreciate how elected officials can positively or negatively affect how a regulatory agency approaches a particular issue.

We see this playing out in Washington, D.C. today in a very high profile matter. As you no doubt know, several states sued the EPA over its failure to regulate greenhouse gas emissions under the federal Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007). The Supreme Court, siding with the states, determined that EPA was, in fact, required by the Clean Air Act to regulate greenhouse gas emissions. When EPA attempted to follow the Supreme Court's edict, members of Congress attempted to use the legislative process to neutralize the Supreme Court's decision. While no such legislation has passed, EPA has certainly responded to the forces behind such legislation by proceeding more "deliberately" and regulations that EPA has promulgated are the subject of judicial challenges by states.

Now I don't mean to suggest that many matters will garner the interest among elected officials that federal regulation of greenhouse gas emissions has attracted. However, it is a striking example of the power of political

forces in environmental matters, even environmental matters that have been litigated to a conclusion. These forces can operate at any level of government from the federal government in Washington, D.C. to the local city council. Whether or not you intend to attempt to employ these forces, it is critically important to understand how they may be employed, and by whom, as you develop your strategy for a matter.

The Role of Outside Counsel in Environmental Compliance

Many of my clients now have an internal team dedicated to environmental law compliance and those internal teams are assisted by consultants with special expertise in specific areas. Those clients are much more sophisticated about environmental law compliance than the regulated industry was at the beginning of my career.

These clients are also much more focused about what they're looking for from their environmental counsel. They already have, either on their internal teams, or through their consultants, much of the know-how that they would have historically looked to their lawyer to provide.

Of course, other clients don't have these internal and external resources.

We owe it to all of our clients, regardless of their expertise and resources, to be as expert as we can be about the current federal and state requirements in the areas in which we practice, and to know as much as we can about how the relevant federal and state agencies are enforcing those requirements. We also owe it to our clients, and ourselves, to be in a position to add value in as many areas as possible and to be honest about those areas in which we don't. In today's sophisticated market, our clients are likely to figure that out quickly in any event.

Even a very sophisticated client may not have sufficient reason to know how state regulators are interpreting their regulations in a specific area. By remaining active in local bar and industry groups, good environmental counsel in that jurisdiction can provide specialized knowledge that may not otherwise be available, even from leading national environmental legal practices or engineering firms. For example, there is considerable variability

in how EPA and various states are currently addressing the possibility that chemicals historically released to soil and groundwater might affect the quality of air inside buildings in the vicinity of those releases. In some cases, not even agency guidance has caught up with the current approach of agency staff. Only a lawyer or consultant who regularly deals with that staff will be able to provide effective counsel on this topic.

On the other hand, another environmental lawyer might be far better suited to advise the same client regarding the application of a specific federal regulation across several jurisdictions.

For instance, National Pollutant Discharge Elimination System (NPDES) permit writers are increasingly unlikely to solicit input from permit holders in the course of preparing a draft discharge permit, instead consulting a manual to identify the theoretical limits that they think a company should be able to achieve in its discharge. The limits that the permit writer would make enforceable in a permit are often completely divorced from the reality of the permit holder's operations, discharge, and the permit limits under which the permit holder is currently operating. In the absence of a proactive approach, the permit holder might not learn of its would-be limits until the permit is issued in draft form. A good practitioner in this area will know the regulator's general predilections and will engage in an early dialogue with the client and its consultants about what the client can achieve, help the client compare what it thinks it can achieve with what a draft permit is likely to require, and help the client assess ways that it may bridge the gap between those two things. These evaluations can be very time and resource intensive for the client and may require additional external resources. However, only after such an evaluation will a client be prepared to approach the agency to advocate in favor of something other than what the agency may initially have in mind.

Understanding Your Client's Operations

The old cliché about “an ounce of prevention being worth a pound of cure” is particularly true about environmental compliance. Because “[p]rosecution remains a cornerstone of [the government's] integrated

approach to ensure broad-based environmental compliance,”³ and, as indicated above, more than one in every four government inspections reveals a potential violation, there is no substitute for an effective compliance plan. However, before you can provide meaningful assistance to your client in developing an effective compliance plan, you need to understand your client’s operations. Your client may be able to provide you with the basis of this understanding. This may also involve the services of appropriate consultants working with the client to evaluate their operations.

Once you sufficiently understand your client’s operations and you have identified the federal, state, and local statutes and regulations that apply to them, you will be in a position to work with your client to distill that understanding into a compliance plan that is easy to implement. It is critically important that the compliance plan be periodically re-evaluated to ensure that it is up to date.

Frankly, a compliance plan that is not sufficiently understandable to all of the people who need to understand it, or is not up to date, can be worse than not having a plan at all because regulators might use the plan as evidence against your client. Comparing the elements of a compliance plan to conduct at a facility that conflicts with the elements of that plan can make a regulator’s job of establishing a violation easy.

Addition by Subtraction

I have found that many clients do not pay sufficient attention to the possibility of “addition by subtraction.” For example, there may be process changes that would change the nature or volume of an emission to eliminate or at least reduce a client’s regulatory burden. There can be no more efficient response to complex regulations than to develop a response that takes your client out of a regulatory “game” entirely, or at least out of the “big leagues.” That is why sophisticated clients and their lawyers will increase their attention to opportunities to minimize the regulatory “footprint” of their operations while at the same time ensuring that the requirements to which they are still subject are as easy to understand as

³ See U.S. DEP’T OF JUSTICE, STEWARDS OF THE AMERICAN DREAM, FY 2007-FY 2012 STRATEGIC PLAN, 63.

possible for the people actually involved in the operations that are subject to those requirements.

Compliance Training and Documentation

Once your client has minimized its regulatory footprint to the greatest degree possible, the next challenge is to make the remaining regulatory requirements as accessible as possible to everyone involved in the operations affected by those regulations. In other words, it is not sufficient for a client's in-house counsel to understand the plan. This means, among other things, clearly drawn lines regarding who is supposed to do what.

It also means taking the complicated issues we deal with and making them simple enough so that everybody can understand the pieces they need to understand. In my experience, one of the most common causes of environmental enforcement proceedings is that applicable requirements were not sufficiently digested for all of the people to whom the requirements were relevant.

An operator can be given a form that is specially designed for him to quickly, easily, and competently provide the information he is uniquely situated to provide that then finds its way into a much more complicated report required by the applicable regulations that is prepared by someone else. This minimizes the risk that the operator will ignore the form altogether or complete it inaccurately.

Giving sufficient thought to the documentation of environmental compliance is one of the best ways to avoid or at least quickly resolve an environmental enforcement proceeding.

Client Perspectives about Environmental Enforcement

I have found that there is a broad spectrum of respect for, or even fear of, governmental authority among clients faced with environmental law enforcement proceedings. At one end of that spectrum are those clients who react to word that they are the subject of such proceedings with the immediate reaction that they are innocent and will spare no expense to vindicate themselves. I've heard many clients say that "we are going to fight

this proceeding to our dying breath.” Fewer clients have actually done so. At the other end of the spectrum are those clients who assume that because the government tells them to do something, they must immediately do whatever it is that the government is demanding of them.

Of course, most often neither of these reactions is the right one. It is true that the role of the government in environmental law enforcement is unique because of its administrative authority. Essentially, the government is often—at least in the first instance—both the prosecutor and the judge. Many environmental statutes and regulations provide the regulator, whether it is the EPA or a state agency, with the choice of either commencing an enforcement proceeding in the courts or pursuing a violation administratively. If the agency itself issues an order requiring you to do or not do something, and/or administratively attempts to collect a penalty or otherwise require a payment, and you’re unhappy with the agency’s suggestion, you have to go through whatever procedures are specified by the agency to complain about the decision and then, and only then can you get limited judicial review by a court.

Therefore, an environmental law enforcement proceeding may be quite different from a typical litigation matter where allegations are adjudicated by a judge who at least theoretically does not have an affinity for either side.

I counsel my clients that the strategy for such matters depends on the specific circumstances of each case.

There are some cases in which we will decide that the best way to proceed is to attempt to reach closure as early as possible with as little process as possible either because the exposure to the client does not demand more, or because even if more was done one would be unlikely to get a significantly better result. Making this decision requires, among other things, a thorough understanding of the range of potential resolutions in such circumstances and an equally thorough understanding of the potential future implications of the resolution (i.e. does settlement require an agreement respecting future stipulated penalties or trigger heightened “repeat offender” sanctions?).

On the other hand, there are cases in which we know that an early resolution is impossible. This is most likely when there is a material disagreement about the facts at issue or the penalty sought for an alleged violation.

Responding to an Inspection

Any visit from a regulatory agency should be taken seriously. Hopefully your client is operating pursuant to a comprehensive, easy to understand and document, compliance plan when such a visit happens. Even if that's the case, your client should use the occasion of such an inspection to carefully assess what the inspectors may have seen. In some cases, you may be able to identify items that can be rectified in advance of any notice of noncompliance and being able to respond to such a notice that such items have already been addressed can mitigate a penalty the regulatory agency might otherwise seek.

Responding to a Notice of an Enforcement Proceeding

Needless to say, if your client has not already investigated the matters that are the subject of a notice of an enforcement proceeding (i.e. in connection with an agency inspection), it should do so upon learning of an enforcement proceeding against it. Counsel should speak to those who appear to be implicated and, at the same time, assemble and preserve any documents that relate to the subject of the notice. Fortunately, many clients have regular document retention policies. Upon receipt of notice of an enforcement proceeding, a client should ensure that such a policy does not result in the inadvertent destruction of relevant documents.

In the course of these early activities, you might determine that there are individuals or other entities that should have their own counsel because their interests might diverge from those of your client. That should happen quickly. You should also consider with your client whether you should suggest specific counsel to such individuals and entities and whether a joint defense agreement is appropriate. If a joint defense agreement might be appropriate, it should be negotiated as soon as possible.

Your client might have a knee jerk reaction to sever its relationship with an individual or an entity because of its receipt of notice of an enforcement

proceeding. Whether this is in your client's best interests is something to be carefully considered.

Some lawyers would say that whenever enforcement is threatened, related communications should always be between lawyers. I disagree. I think many clients have the sophistication necessary to be able to deal directly with regulators, even in an enforcement context. In fact, I think there can be an advantage to a non-lawyer reaching out in certain circumstances because it results in more positive and productive conversations than might occur between lawyers. Of course, this depends on the specific circumstances of a matter, including the capabilities of the client, the regulator, and the complexity of the alleged violation and decisions in this regard should be made only after the initial investigations discussed above.

Ideally, before any communications with a regulatory agency, your client and you will have considered a range of acceptable outcomes arising from a notice of an enforcement proceeding. If, for example, based on your initial investigation, you and your client reasonably believe that the matter is susceptible of a quick resolution (for example technical non-compliance with a requirement that can likely be resolved by compliance and perhaps a modest penalty), that may suggest an initially informal and conciliatory response by the client directly to the regulator. If, on the other hand, it is clear that a matter is unlikely to be resolved quickly, or without high level involvement within the regulatory agency, that may suggest a different sort of response.

In any event, a free flowing exchange between the client and the regulator is unlikely to be the right answer. The substance of any communication directly between the client and the regulator should be carefully vetted in advance and the client should be counseled to remain true to the plan developed.

Criminal Sanctions in Environmental Law Enforcement Cases

Many federal and state environmental agencies now have law enforcement officers. The EPA is just one example of an agency with a police force. It is increasingly common for regulatory agencies to seek criminal sanctions for alleged environmental law violations. For decades, the government used civil enforcement to establish helpful precedents and it now uses those precedents in the criminal context.

However, the government has learned that criminal prosecutions present unique challenges that do not loom as large in the civil context. In criminal prosecutions, statutes and regulations are typically construed much more narrowly. Statutes and regulations that may pass muster in the civil arena may be confusing to a jury, or even to a trial court judge. The government is also faced with the constitutional protections against self-incrimination and in favor of full disclosure of evidence. In such cases it is, of course, critically important that competent criminal defense counsel work side by side with environmental counsel from the first hint of a criminal investigation.

The Role of Third Party Audits

Over the past decade, the government has often required third party compliance audits in the context of resolving enforcement proceedings. This requires the regulated entity to retain a third party consultant to periodically audit the compliance of the regulated entity with respect to any of a wide range of regulations including relating to air emissions, water discharges, and hazardous waste storage and disposal issues. The consultant then reports to the government and the regulated entity about the regulated entity's compliance. Any instances of non-compliance are typically subject to significant and escalating stipulated financial penalties.

Such third party compliance audits can be very expensive to implement. For this reason the scope and duration of such audits should be carefully considered.

Assisting Clients with Operations across the US and the World

If you have a client with similar operations in several jurisdictions, there may be significant differences with respect to the environmental regulations and enforcement practices in each of those jurisdictions and unfortunately, there is no shortcut to understanding those differences and making sure that your compliance plan reflects those differences.

This is another area in which the role of consultants has exploded over the past ten to fifteen years. If you have a client with regulatory issues in several jurisdictions and they do not have the necessary cross-jurisdiction expertise

internally, you may need to help that client determine whether there is a role for a consultant, or consultants, to offer assistance in this regard.

Federal regulators are particularly interested in the circumstances of non-compliance in multiple jurisdictions.

Clients with international operations face an even greater challenge. Again, they need local experts familiar with each jurisdiction. If your client does not have the expertise to select such experts, you need to be honest about how your legal team can meet the needs of the client in each jurisdiction where the client may have issues.

Areas of Increased Enforcement Focus

Looking ahead, I think there will be an increasing focus on enforcement and increasing standardization in the government's approach. I also think that we will see an increasing focus on the prohibition of the use of certain chemicals perceived to be toxic or at least stronger regulations relating to the use and recycling of those materials.

I also think we will see an increased focus on the quality of indoor air. For most of my career indoor air standards have been the responsibility of the Occupational Safety and Health Administration (OSHA), and if indoor air concentrations of chemicals that were the subject of those standards were less than those OSHA levels that was good enough. There is, however, an increased focus by both state and federal governments on whether those OSHA levels are sufficiently protective, and whether enhanced remedial actions are required to prevent chemicals present in the environment from intruding into indoor spaces.

Another issue receiving increased attention is lead in paint in multi-family residential structures. Improper renovation and demolition of buildings containing asbestos also continues to be a focus of enforcement.

Conclusion

The “enforcement first” atmosphere is highly charged. Our clients face daunting regulatory requirements and stiff sanctions for not meeting those

requirements. Thorough knowledge of the statutes, regulations, and case law in the jurisdictions in which we practice is essential to our success. However, that's just the beginning. We also need to know the regulators and how they interpret these sources of their authority so that we can counsel our clients on the best way to ensure compliance with those statutes and regulations, and how to most effectively interact with those interested in that compliance. Because the best way to do these things will vary case by case, there is no substitute for experience in this area.

Key Takeaways

- Environmental laws, regulations, and, until recently, case law are, for the most part, stacked against our clients. For this reason, among others, the “enforcement first” culture is likely to persist for the foreseeable future.
- An ounce of prevention is worth a pound of cure. There is no substitute for a comprehensive compliance plan that is easy to understand and implement at all levels of your client's organization.
- It is impossible to develop a good compliance plan without a thorough understanding of your client's operations and the statutes and regulations affecting those operations. This will require close coordination between your client, its consultants, and you.
- Effectively interacting with regulators before, during, and after initiation of enforcement proceedings requires knowledge of the regulator's predilections and practices that only comes with experience.

Jeffrey R. Porter, the leader of Mintz Levin's Environmental Section, has been recognized as one of the leading environmental lawyers in the United States by *The Best Lawyers in America*, *Chambers USA: America's Leading Lawyers for Business*, *Who's Who in American Law*, *Who's Who in the World*, *Who's Who in America*, and the *Guide to the World's Leading Environmental Lawyers*.

Mr. Porter advises clients regarding complex environmental regulatory compliance and permitting issues, including issues relating to air and water discharges and hazardous waste storage and disposal. His extensive litigation and transactional experience provides him with unique insight, enabling him to deliver integrated legal, technical, and risk management solutions to the regulated community.

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Mintz Levin is an AmLaw 100 firm comprised of 450 attorneys across 15 distinct practice areas in eight offices (Boston, New York, Washington, London, Los Angeles, Palo Alto, San Diego, and Stamford). Mintz Levin's highly regarded environmental law practice represents Fortune 100 to 500 companies and other institutions with complex needs in this critical practice area.

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