

THINKING BEYOND GRIDLOCK: TOWARDS A CONSISTENT
STATUTORY APPROACH TO FEDERAL ENVIRONMENTAL
ENFORCEMENT

BY

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This Essay suggests that the disparate and outdated enforcement provisions of several major federal pollution control statutes be revised and made consistent. Focusing on the enforcement sections of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act, I examine the extent to which each of those provisions promotes the efficient and effective enforcement of pollution control requirements. The Essay closely compares the relevant enforcement provisions, identifying key similarities and differences among them, and noting several significant, currently unresolved legal issues common to all three pieces of legislation. It assesses the relative merits of the statutory sections in question, and offers some practical recommendations for statutory reform.

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I. INTRODUCTION

Since the mid-1990s, the United States Congress has been embroiled in bitter partisan rivalry. A priori ideological notions have guided the behavior of many of our nation's lawmakers, and bipartisan compromise—a common feature of the forty year period that followed the end of the Second World War—has largely vanished. Instead, the past twenty years have been mostly an era of congressional discord, with low legislative productivity and a dramatic loss of public confidence in our national Legislature.

One unfortunate consequence of this ongoing congressional dysfunction has been a freezing in place of the federal environmental laws that were enacted, typically with broad bipartisan support, in the 1970s and 1980s.¹ As of this writing, no major overhaul of any federal environmental statute has been enacted since the passage of the Clean Air Act Amendments of 1990.² Although this phenomenon (often referred to as congressional “gridlock”) has been widely noted and frequently lamented, to date no observer has made a comparative analysis of the extent to which the enforcement provisions of our long unchanged federal environmental laws are efficacious, consistent, and up-to-date.³

On the hopeful assumption that, at a future time, Congress will once again engage constructively in environmental issues, this Essay seeks to “think beyond gridlock” and remedy that shortcoming. It focuses on the enforcement sections of three important federal environmental statutes: the Clean Water Act,⁴ the Clean Air Act,⁵ and the Solid Waste Disposal Act⁶ (which was later amended to include the Resource Conservation and Recovery Act of 1976⁷), and it examines the extent to which those provisions promote the efficient and effective enforcement of environmental requirements.⁸ In Part I, I briefly describe “deterrent enforcement,” the

¹ See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified throughout 42 U.S.C. §§ 7401–7671(q) (2012)).

² Notably, as this Essay goes to press, Congress is giving serious (and long overdue) consideration to a comprehensive reauthorization of the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629 (2012).

³ Since the dynamics of governmental enforcement of environmental laws are essentially the same across all environmental media, this Essay is premised on the notion that there is a meaningful benefit to having consistent—as well as effective—enforcement provisions of federal environmental statutes that focus on the control and abatement of separate types of environmental pollution.

⁴ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁵ 42 U.S.C. §§ 7401–7671(q) (2012).

⁶ 42 U.S.C. §§ 6901–6992(k) (2012).

⁷ Pub. L. No. 94-580, § 1, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901–6992(k) (2012)).

⁸ While I will focus on as “the Big Three” among federal pollution control statutes, it bears mention that other federal environmental legislation—including the Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2012), the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012), the Endangered Species Act of 1973, 16

theory that has framed the federal approach to environmental enforcement since the establishment of the U.S. Environmental Protection Agency (EPA) in 1970.⁹ I also outline some of the potential benefits of a comprehensive environmental enforcement statute—an enactment that would apply across all environmental media and create an effective and uniform enforcement “toolkit” for government officials. In Part II, I identify key similarities and differences among the enforcement provisions of the Clean Air, Clean Water, and Solid Waste Disposal Acts, and I note several significant, yet unresolved legal issues that are common to all three pieces of legislation. In Part III, I assess the relative merits of the enforcement aspects of the three statutes in question and suggest that some well-established administrative enforcement policies provide a workable substantive basis for statutory reform. Finally, I offer some practical recommendations for statutory reform that may eventually provide the basis for a uniform treatment of environmental enforcement.

II. THE DETERRENCE THEORY OF ENVIRONMENTAL ENFORCEMENT AND THE POTENTIAL BENEFITS OF A UNIFIED FEDERAL ENFORCEMENT STATUTE

For nearly all of its forty-six year history, deterrence theory has served as the primary basis for the enforcement of federal pollution control requirements by EPA. This theory is based on an assumption that individuals and firms are rational, utility-maximizing actors.¹⁰ They will comply with environmental laws where they perceive that it is in their economic self-interest to do so. The central tasks for environmental enforcement agencies are thus to detect violations promptly and punish them effectively because—the theory goes—when the probability of detection is great enough and penalties are high enough, it will become economically irrational for regulated parties to violate applicable standards.¹¹

U.S.C. §§ 1531–1544 (2012), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012)—pose parallel issues and concerns.

⁹ See Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413, 431, 436 (discussing deterrence as key goal of EPA policies and penalties); U.S. Env'tl. Prot. Agency, *EPA History*, <http://www.epa.gov/aboutepa/epa-history> (last visited Feb. 15, 2016) (describing EPA's establishment in 1970).

¹⁰ See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STANFORD L. REV. 1471 (1998) (discussing the assumption of rational actors in law and economics theory generally and suggesting ways in which to implement realistic deterrent policies).

¹¹ I do not mean to suggest that deterrence theory is the only theoretical approach to environmental enforcement. Based on my past experiences as an EPA attorney and chief attorney, I believe that theory to be sound, at least for the most part. However, a competing theory—cooperation-based enforcement—views corporations as institutions generally inclined to comply with the law. Under that theory, the best means of encouraging environmental compliance is to eschew sanctions for noncompliance and to provide regulated entities with advice about regulatory requirements, incentives, and rewards. In fact, no agency appears to follow a “pure” deterrence-based or cooperation-based approach to noncompliance. However, agencies do differ significantly in the emphasis they place on deterrence. In my view and

If one accepts the premises underlying deterrence theory, it seems logical to ask what legal provisions and approaches best promote environmental effectiveness. Among other factors, the presence or absence of clear and efficacious enforcement provisions in environmental statutes (including provisions allowing for the prosecution of environmental crimes) plays an important role in the success or failure of the deterrent environmental enforcement efforts of government regulatory agencies.¹² However, those provisions now differ markedly from statute to statute, with no apparent rationale.¹³ The current federal environmental statutory regime thus lacks overall consistency and coherence. Moreover, the enforcement provisions of environmental statutes are sometimes outdated—based upon assumptions respecting what will work in redressing and deterring environmental violations that are inconsistent with the experiences of administrative agency professionals.

Although some statutory enforcement provisions—such as those that pertain to pretreatment violations under the Clean Water Act¹⁴ and the release of hazardous air pollutants under the Clean Air Act¹⁵—are necessarily related to a single environmental medium, many (if not most) of the enforcement tools provided to government enforcement officials may easily be separated from their single medium statutory settings and combined into a single multimedia environmental enforcement statute. Such an act could provide a means by which enforcement mechanisms that have been shown to be dysfunctional or extraneous may be discarded while enforcement approaches that have proven fair and successful in the context of one statute may be made available for broader implementation.¹⁶ A unified

experience, corporate cultures vary immensely. Thus, while I favor deterrent enforcement, I also see a role for enforcement cooperation with regulated entities in limited circumstances.

¹² I have elsewhere suggested that, in addition to a clear, effective, and enforceable set of environmental requirements, the presence or absence of eight other factors is likely to have an important effect on how successful an environmental enforcement program will be at the national level. These include widespread respect for the rule of law; legal sanctions that are sufficient to deter noncompliance; an administrative agency approach that predominantly emphasizes deterring noncompliance; a dedicated, interdisciplinary professional enforcement staff; a capable set of midlevel career managers and supervisors; visible and consistent support from elected officials and political appointees; adequate enforcement agency resources; and a workable, transparent, and efficient organizational structure. Joel A. Mintz, *Assessing National Environmental Enforcement: Some Lessons from the United States' Experience*, 26 GEO. INT'L ENVTL. L. REV. 1, 1–3 (2013). For an analysis of how best to measure the successfulness of government environmental enforcement efforts, see Joel A. Mintz, *Measuring Environmental Enforcement Success: The Elusive Search for Objectivity*, 44 ENVTL. L. REP. 10751, 10755 (2014).

¹³ See *infra* Part III for a comparison of statutory environmental enforcement provisions.

¹⁴ 33 U.S.C. § 1317(b) (2012).

¹⁵ 42 U.S.C. § 7412 (2012).

¹⁶ For an argument that an American Law Institute (ALI) Restatement of Environmental Law is needed to make environmental law more rational and consistent, see Tracy Hester et al., *Restating Environmental Law*, 40 COLUM. J. ENVTL. L. 1, 20 (2015) (arguing that environmental law's well-known complexity bars some attorneys from practicing in the specialized field) and Tracy Hester et al., *Time for a Restatement*, ENVTL. FORUM, January/February 2015, at 38, 40 (“[T]he ALI already has the level of expertise needed to navigate the complexities of environmental law. And the controversies surrounding U.S. environmental law do not exceed

enforcement act may also create a useful vehicle for filling significant gaps in coverage that may be found in the enforcement sections of all extant environmental legislation. Moreover, it can provide authoritative guidance to individual U.S. states, and to other national and subnational entities that may wish to enact legislation that will improve the effectiveness of their environmental enforcement programs.

III. SIMILARITIES, DISPARITIES, AND GAPS AMONG CURRENT FEDERAL ENFORCEMENT PROVISIONS

The enforcement sections of the Clean Air Act, Clean Water Act, and Solid Waste Disposal Act have a number of substantial similarities. For example, the provisions of the Acts that authorize EPA to require regulated entities to submit reports and records of their activities, to enter premises, to have access to records, and to sample pollutants are nearly identical.¹⁷ All three statutes provide the Agency with the ability to conduct administrative enforcement, to engage in civil judicial enforcement, and—through the U.S. Department of Justice—to prosecute environmental violators in criminal actions.¹⁸ The statutes each impose the same requirements for prosecution against persons who knowingly endanger the health and safety of others.¹⁹ They all authorize the imposition of monetary penalties and other sanctions against noncomplying parties,²⁰ and all three enactments create important enforcement roles for state officials²¹ and private citizens.²² Notwithstanding these similarities, however, on close reading striking differences among the enforcement provisions of these statutes emerge.

the storms and disagreements over other legal fields that have received restatements or principles projects, including labor law, family law, and international intellectual property.”).

¹⁷ Compare 42 U.S.C. § 7414 (2012) (authorizing inspections under the Clean Air Act), with 33 U.S.C. § 1318 (2012) (authorizing inspections under the Clean Water Act), and 42 U.S.C. § 6922 (2012) (authorizing inspections under the Solid Waste Disposal Act).

¹⁸ See 33 U.S.C. § 1319(a)–(c) (2012); 42 U.S.C. § 7413(a)–(c) (2012); 42 U.S.C. § 6928(a), (c)–(d) (2012); U.S. Dep’t of Justice, Env’t and Nat. Res. Div., *About the Division*, <http://www.justice.gov/enrd/about-division> (last visited Feb. 15, 2016) (explaining that the Department of Justice prosecutes environmental crimes under several statutes).

¹⁹ Compare 42 U.S.C. § 7413(d)(5) (2012) (requiring punishment by a fine or imprisonment, or both, for anyone who is convicted of knowingly violating the Clean Air Act and thereby placing another person in imminent danger of death or serious bodily injury. Organizations that are convicted under this subsection are subject to a fine of not more than \$1 million, with double the maximum penalty for repeat violators. The defendant is responsible only for actual awareness, actual belief, or willful ignorance regarding the harm resulting from the defendant’s conduct.), with 33 U.S.C. § 1319(c)(3) (2012) (requiring the same punishment as Section 113 of the Clean Air Act, including the maximums and caveats for organizations and repeat violators. The standard for responsibility of “knowing” is also the same, as are the definitions of “organization” and “serious bodily injury”), and 42 U.S.C. § 6928(e) (2012) (requiring the same penalties and standards for responsibility as both 42 U.S.C. § 7413 and 42 U.S.C. § 1319).

²⁰ See 42 U.S.C. § 7413(b) (2012); 33 U.S.C. § 1319(d) (2012); 42 U.S.C. § 6928(g) (2012).

²¹ See 42 U.S.C. § 7414(b) (2012); 42 U.S.C. § 6929; 33 U.S.C. § 1319(a) (2012).

²² See 33 U.S.C. § 1365 (2012); 42 U.S.C. § 7604 (2012); 42 U.S.C. § 6972 (2012).

A. Administrative Enforcement

Both the Clean Air Act and the Clean Water Act authorize EPA to issue Notices of Violation (NOV) to violators²³ while the Solid Waste Disposal Act has no NOV provision.²⁴ Moreover, the NOV portion of the Clean Water Act limits EPA to issuing NOVs for violations of state-issued discharge permits,²⁵ and it grants the Agency discretion to move directly to other modes of enforcement (e.g., administrative orders or civil action) without first issuing an NOV.²⁶ Under the Clean Air Act, in contrast, an NOV, followed by a mandatory thirty-day waiting period, is a mandatory prerequisite to any additional form of EPA enforcement action.²⁷

With regard to administrative compliance orders, the Clean Air Act requires EPA to mandate compliance with applicable requirements “as expeditiously as practicable,” but not later than one year after the date of the order,²⁸ and EPA must provide parties subject to its orders with an opportunity to confer with Agency personnel.²⁹ EPA administrative orders under the Clean Water Act—which must be delivered by personal service—mandate compliance with interim requirements within thirty days and compliance with final deadlines within a reasonable time.³⁰ EPA does not need to provide any opportunity for regulated parties to confer with the Agency. Similarly, the Solid Waste Disposal Act does not require the Agency to confer with parties to whom it has issued compliance orders. However, unlike the other two statutes, the Solid Waste Disposal Act affords parties subject to such orders the right to a prompt public hearing before an administrative order will be deemed a final agency action.³¹ Administrative orders issued by EPA under the Solid Waste Disposal Act must require compliance “immediately or within a specified time period,”³² and—in contrast to the Clean Air and Clean Water Acts—EPA may use its administrative order authority under the Solid Waste Disposal Act to suspend or revoke permits issued under the statute.³³

B. Civil Judicial Enforcement

The civil judicial action subsections of the Clean Water Act, the Solid Waste Disposal Act, and the Clean Air Act also differ. In all instances under

²³ 33 U.S.C. § 1319(a) (2012); 42 U.S.C. § 7413(a)(1) (2012). Citizen suit enforcement, per se, is outside the scope of this Essay.

²⁴ See 42 U.S.C. § 6928 (2012) (authorizing EPA to issue administrative orders, commence civil actions, or refer matters to the U.S. Department of Justice for criminal prosecution).

²⁵ 33 U.S.C. § 1319(a)(1) (2012).

²⁶ *Id.* §1319(a)(3).

²⁷ 42 U.S.C. § 7413(a)(1) (2012).

²⁸ *Id.* § 7413(a)(4).

²⁹ *Id.*

³⁰ 33 U.S.C. § 1319(a)(5)(A) (2012).

³¹ 42 U.S.C. § 6928(b) (2012).

³² *Id.* § 6928(a)(1).

³³ *Id.* § 6928(a)(3).

the Clean Water Act and the Solid Waste Disposal Act, EPA has complete discretion as to whether or not to file a civil judicial enforcement case.³⁴ The Clean Air Act, on the other hand, albeit in somewhat confusing terms, uses the word “shall” to make it mandatory “as appropriate” for EPA to commence a civil action to redress violations by “any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source.”³⁵ Unlike the other two statutes, the Clean Air Act also authorizes courts to award litigation costs to defendants in civil judicial enforcement cases where the court finds the initiation of the action to have been “unreasonable.”³⁶ Additionally, the Clean Air Act contains a provision requiring EPA to provide members of the public with reasonable notice in the Federal Register (and an opportunity to comment) with respect to any consent order or settlement agreement into which the Agency enters.³⁷

Significant differences also appear in the subsections of the statutes that authorize criminal prosecutions. Only the Clean Water Act allows the U.S. Department of Justice to prosecute regulated parties for negligent violations of applicable requirements.³⁸ The Clean Air Act alone authorizes the payment of awards of up to \$10,000 to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for a violation of the Act.³⁹ The Solid Waste Disposal Act and the Clean Air Act—but not the Clean Water Act—contain language allowing defendants in criminal cases to assert all “general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses,”⁴⁰ and direct courts to determine the validity of those defenses “according to the principles of common law as they may be interpreted in the light of reason and experience.”⁴¹ The Clean Air Act and Clean Water Act both contain similar provisions prohibiting federal agencies from contracting for the procurement of goods, materials, and services if the contract is to be performed at a facility where events underlying a criminal prosecution occurred.⁴² The Solid Waste Disposal Act, however, is devoid of any parallel provision.

Although all three statutes authorize EPA to assess civil penalties against environmental violators, the statutes differ markedly in their approaches to administrative penalty assessment. The Solid Waste Disposal Act allows EPA to assess civil penalties “for any past or current violation” up to a maximum amount per day of noncompliance.⁴³ In assessing such a penalty, the Agency must consider two factors: the seriousness of the

³⁴ See Clean Water Act, 33 U.S.C. § 1319(a)(1) (2012); Solid Waste Disposal Act, 42 U.S.C. § 6928(a)(1) (2012).

³⁵ Clean Air Act, 42 U.S.C. § 7413(b) (2012).

³⁶ *Id.*

³⁷ *Id.* § 7413(g).

³⁸ *Id.* § 7413(c)(4).

³⁹ *Id.* § 7413(f).

⁴⁰ *Id.* § 7413(c)(5)(D); Solid Waste Disposal Act, 42 U.S.C. § 6928(f)(4) (2012).

⁴¹ 42 U.S.C. § 7413(c)(5)(D) (2012); 42 U.S.C. § 6928(f)(4) (2012).

⁴² Clean Water Act, 33 U.S.C. § 1368 (2012); 42 U.S.C. § 7606 (2012).

⁴³ 42 U.S.C. § 6928(a)(1) (2012).

violation and any good faith efforts of the violator to comply.⁴⁴ The Clean Air and Clean Water Acts, on the other hand, require EPA to determine penalty amounts by evaluating more factors than must be considered under the Solid Waste Disposal Act.⁴⁵ In addition, the Clean Air Act contains a sui generis provision authorizing the Agency to create a field citation program to redress certain types of minor violations.⁴⁶ Moreover, the Clean Air Act creates a mechanism—not contained in the other two statutes—for the EPA to assess and collect “noncompliance penalties.” Those penalties must be in an amount that is no less than the economic benefit of noncompliance to the owner or operators of a noncomplying source, minus any expenditures made to bring the source into and maintain compliance.⁴⁷

Finally, the Clean Air Act and the Clean Water Act both allow EPA to assume full responsibility for the enforcement of environmental requirements where a state’s failure to enforce those requirements effectively has given rise to widespread violations.⁴⁸ The Solid Waste Disposal Act, however, includes no similar “federally assumed enforcement” language.

C. Other Disparities

Beyond these important differences, the Clean Air Act, Clean Water Act, and Solid Waste Disposal Act all contain significant gaps and ambiguities. None of these enactments sheds light on whether EPA is limited to the investigative techniques prescribed by the discovery rules of the Federal Rules of Civil Procedure—rather than being free to make use of its statutory

⁴⁴ *Id.* § 6928(a)(3).

⁴⁵ Under the Clean Water Act, in determining the amount of penalties to assess, EPA must take into account “the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.” 33 U.S.C. § 1319(g)(3) (2012). The Clean Air Act, however, requires that, in assessing administrative penalties, the Agency take into consideration

(in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

⁴² U.S.C. § 7413(e)(1) (2012).

⁴⁶ 42 U.S.C. § 7413(d)(3) (2012).

⁴⁷ *Id.* § 7420(d)(2)(A)–(B) (2012). Notably, the federal Alternative Fines Act, 18 U.S.C. § 3571(d) (2012), application of which is limited to federal crimes, creates a somewhat parallel provision. After establishing maximum fines for various categories of federal crimes, this statute provides, in relevant part, “If any person derives pecuniary gain from the offense [for which the defendant has been convicted], or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.” 18 U.S.C. § 3571(d).

⁴⁸ 33 U.S.C. § 1319(a)(2) (2012); 42 U.S.C. § 7413(a)(2) (2012).

authority to enter and inspect pollution sources—after it has filed a civil judicial enforcement action.⁴⁹ Similarly, the statutes leave unresolved the issue of whether a regulated party that has engaged in self-monitoring and reported itself to be in violation may defend itself in an enforcement case by asserting that its monitoring results were unreliable because of the defendant's own sampling errors.⁵⁰ The Acts provide no guidance as to whether a defendant's failure to comply with a statutory provision should be treated as a one-time, one-day violation or a continuing violation that occurs on every calendar day that the defendant is out of compliance.⁵¹ Nor do they clarify whether statutory language that makes it a crime to “knowingly violate” a section of the Acts requires proof that the defendant knew that its actions were unlawful, as opposed to proof that the defendant simply knew what its actions were without necessarily understanding their legal significance.⁵²

IV. WHICH STATUTORY APPROACHES BEST DETER ENVIRONMENTAL NONCOMPLIANCE?

For nearly all of its forty-five year existence, EPA has actively enforced federal pollution control requirements. This long period of institutional experience provides an ample basis for observers to assess the efficacy of the enforcement toolkit, described above, that the Agency's enforcement personnel may draw from to redress environmental violations and deter future non-compliance. In this Section, I examine the relative merits of existing statutory enforcement provisions with respect to three critical components of environmental enforcement: administrative enforcement, civil judicial enforcement, and the size and scope of authorized monetary penalties.

A. Administrative Enforcement

One question that arises from our comparison of the enforcement sections of the Clean Air Act, Clean Water Act, and Solid Waste Disposal Act

⁴⁹ In *Stanley Plating Co., Inc.*, 637 F. Supp. 71, 73 (D. Conn. 1986), a U.S. District Court held that the Federal Rules of Civil Procedure do not limit EPA's statutory authority to enter and inspect a regulated facility during the pendency of a civil judicial enforcement action.

⁵⁰ See *Sierra Club v. United Oil Co.*, 813 F.2d 1480, 1491 (9th Cir. 1987) (holding that sampling errors should not be recognized as valid excuses for asserted exceedances of Clean Water Act requirements), *vacated on other grounds*, 485 U.S. 931 (1988).

⁵¹ The federal courts are divided on this issue. Compare *Atl. States Legal Found. Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) (upholding imposition of daily penalties), and *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338 (E.D. Va. 1997), *aff'd*, 191 F.3d 516 (4th Cir. 1999) (same), with *United States v. Trident Seafoods Corp.*, 60 F.3d 556 (9th Cir. 1995) (finding the Clean Air Act too unclear to impose daily penalties for a “continuous violation” that exceeds the maximum penalties for a single violation).

⁵² Several judicial decisions have addressed this issue. See, e.g., *United States v. Goldsmith*, 978 F.2d 643, 646 (11th Cir. 1982); *United States v. Hofflin*, 880 F.2d 1033, 1039 (9th Cir. 1989); *United States v. Sinskey*, 119 F.3d 712, 715–16 (8th Cir. 1997).

is the extent to which their different provisions for the issuance of NOV do or do not contribute to vigorous environmental enforcement. In fact, the NOV is the mildest administrative enforcement action. In a sense it is similar to a traffic warning issued by a police officer to a speeding motorist. An NOV simply informs the entity to whom it is issued that that party is in violation, and it requests compliance with applicable requirements.⁵³

The NOV may be a useful tool for government enforcement officials in circumstances of noncompliance with interim requirements where a gentle, yet formal, push from the government can spur the violator into taking prompt steps to achieve compliance. Its overall utility seems limited, however, particularly in cases where the violator is recalcitrant, the achievement of compliance is likely to be time-consuming and complex, or both. Despite this limitation, it will be useful to retain the NOV in any uniform environmental legislation as an enforcement tool to be employed at the sole discretion of government enforcement personnel. However, there seems little reason to make the issuance of an NOV a prerequisite to more emphatic enforcement steps—as the Clean Air Act does—or to limit its availability to state-issued environmental permits in the pattern of the Clean Water Act.

In contrast with the NOV, the administrative compliance order is a more potent, and frequently used, device.⁵⁴ These orders have the advantage of allowing enforcement agencies to require regulated parties to take specific steps to achieve compliance in accordance with a detailed timetable.⁵⁵ They allow for a quick and flexible response that seems especially well-suited to remedying more minor environmental violations. Authorization for agency issuance of administrative compliance orders should thus be part of any uniform environmental enforcement statute. On the other hand, the deadlines for compliance with the terms of these orders—which, as we have seen, now differ from statute to statute—seem arbitrary.

The circumstances of environmental violations vary immensely, and so too does the length of time in which it is reasonable to compel violators to achieve compliance. For this reason, in a uniform enforcement statute, it seems sensible to drop any reference to particular deadlines for achieving compliance with the terms of the order and instead include a simple requirement that compliance with the order be achieved “within a reasonable time, as expeditiously as possible.” Such language will allow

⁵³ See 33 U.S.C. § 1319(a) (2012) (requiring notice of a finding of violation before initiating a civil suit); 42 U.S.C. § 7413(a)(1) (2012) (requiring the Administrator of the EPA to provide notification after a finding of violation).

⁵⁴ Craig N. Johnston, Sackett: *The Road Forward*, 54 ENVTL. L. 993, 1003–04 (2012) (indicating that direct legal consequences flow from compliance orders, while NOV merely “purport to inform their recipients of legal obligations, not to establish them”).

⁵⁵ U.S. Env'tl. Prot. Agency, *Overview of the Enforcement Process for Federal Facilities*, <http://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities> (last visited Feb. 15, 2016) (“A typical compliance order will require that the owner/operator come into compliance immediately or within a reasonable, specified period.”).

environmental enforcement officials a freer hand to tailor the requirements of the order to the unique circumstances of each case.⁵⁶

Additionally, the Clean Air Act requirement that parties subject to administrative orders be given an opportunity to confer with EPA and the Clean Water Act requirement that administrative orders be delivered by personal service seem unnecessary. Government enforcement officials can always allow regulated parties to meet with them without such a provision, and when requested those officials will generally schedule such a meeting reasonably promptly. Moreover, personal service of orders creates needless expense for hard-pressed government enforcement staffs, while providing little or no genuine benefit to regulated parties.

B. Civil Judicial Enforcement

Civil judicial actions are a mainstay of environmental statutes, and they play a major role in government enforcement programs.⁵⁷ Civil suits typically have higher visibility than administrative orders and they are often perceived as having greater power to deter violations.⁵⁸ Environmental enforcement authorities tend to resort to them to respond to serious or recalcitrant violators, where the agency wishes to establish a particular legal precedent, or both.⁵⁹

The civil judicial action provision of a uniform federal environmental enforcement act should avoid replicating the Clean Air Act's use of the word "shall." Civil enforcement actions may well be necessary in some cases, but in other matters their initiation can be counterproductive, and a needless drain on scarce agency and judicial resources. Therefore, the decision whether to bring a civil enforcement case to redress an instance of environmental noncompliance is best left to the discretion of enforcement officials.⁶⁰

⁵⁶ Some might contend that the inclusion of a standard such as this will give rise to inappropriate inconsistencies in the remedial measures imposed under administrative compliance orders. Although I recognize that as a valid concern, I think it is outweighed by the value of a flexible provision that allows enforcement officials broad discretion to fashion administrative orders in ways that take account of variations in the circumstances of individual cases that are a common and inevitable feature of environmental enforcement.

⁵⁷ See ROBERT ESWORTHY, CONG. RESEARCH SERV., FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? 23 (2014), available at <https://www.fas.org/sgp/crs/misc/RL34384.pdf> (reporting that civil judicial actions constitute the second largest category of environmental enforcement after administrative enforcement actions).

⁵⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL ENFORCEMENT: EPA NEEDS TO IMPROVE THE ACCURACY AND TRANSPARENCY OF MEASURES USED TO REPORT ON PROGRAM EFFECTIVENESS 2 (2008), available at <http://www.gao.gov/assets/100/95764.pdf>.

⁵⁹ U.S. Env'tl. Prot. Agency, *RCRA Corrective Action Enforcement Actions*, <http://www.epa.gov/enforcement/rcra-corrective-action-enforcement-actions> (last visited Feb. 15, 2016) ("Civil judicial actions are often used in cases of repeated violations, those of significant nature, or when serious environmental damage is involved.").

⁶⁰ See *Heckler v. Chaney*, 470 U.S. 821, 821, 838 (1985) (holding that administrative agency decisions regarding whether to pursue enforcement actions should be viewed as "committed to agency discretion by law," and thus not subject to judicial review).

A uniform act would also do well to resolve two issues that the present environmental statutes fail to address. First, such a statute should provide that when a regulated party's self-monitoring reports indicate that the party has violated applicable environmental standards, that party may not impeach its own reports by demonstrating sampling errors. Given the immense number of pollution sources, and the relative paucity of government enforcement resources, environmental officials rely heavily on the accuracy of self-reporting.⁶¹ Allowing regulated parties to excuse reported violations would undermine the efficacy of self-monitoring by rewarding such parties for sloppy laboratory practices and by opening the door to lengthy enforcement litigation.

Similarly, a uniform environmental enforcement statute should make it clear that the pendency of a government-initiated civil enforcement matter will not prevent government officials from conducting facility inspections under color of statutory inspection provisions. The Federal Rules of Civil Procedure do not limit the government's statutory inspection authority. The discovery procedures involved are entirely compatible with that authority. Moreover, these inspections may result in follow-up enforcement actions that are entirely separate and distinct from an initially filed case.

With respect to environmental criminal prosecutions, it seems appropriate for a uniform act to make clear that where the statute criminalizes knowing violations of an environmental standard, the government must prove that the defendant knew what its actions were, and not that the defendant knew that its actions were in violation of the law. The latter approach runs afoul of the principle that ignorance of the law is no excuse. It also ignores the fact that individuals and companies that handle environmental contaminants are so likely to be aware of the existence of applicable regulations that their knowledge of those regulations may be fairly presumed.⁶²

To maximize its deterrent impact, uniform environmental enforcement legislation should also adopt the approach of the Clean Water Act by criminalizing the negligent violation of environmental requirements. Although criminal negligence prosecutions under the Clean Water Act have been relatively infrequent, there are several circumstances in which the negligent violation language of the Act has proven helpful to environmental prosecutors. These include situations involving extraordinary environmental harm, human injuries, or both; gross negligence; cases where negligence charges are combined with felony environmental charges, allegations of

⁶¹ See ESWORTHY, *supra* note 57, at 21 (identifying self-reporting as a common form of compliance monitoring).

⁶² *United States v. Sinskey*, 119 F.3d 712, 715–17 (8th Cir. 1997). The sort of mens rea requirement that should be included in the criminal enforcement provisions of federal environmental statutes has been the subject of a lively debate. Compare Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law*, 83 GEO. L.J. 2407, 2512–17 (1995), with Lois F. Schiffer & James F. Simon, *The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus*, 83 GEO. L.J. 2531, 2536–37 (1995). See also Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115 (1998).

traditional federal crimes, or both; and cases where negligence charges serve as the basis for a plea agreement.⁶³ Since these sorts of circumstances may arise with regard to environmental misconduct that does not involve water pollution, criminal negligence should apply across environmental media.⁶⁴

Additionally, for the sake of completeness, the language of the current Solid Waste Disposal Act and Clean Air Act that allows criminal defendants to assert all general criminal affirmative defenses available at common law⁶⁵ deserves a place in uniform environmental enforcement legislation. Although it may be argued that courts will recognize such defenses whether or not such a provision exists, some courts may fail to do so. In addition to being a matter of basic fairness, this provision may provide an additional incentive for enforcement officials to avoid misconduct and respect defendants' legal rights.

C. Monetary Penalties

A uniform environmental enforcement statute must also address the nature, amount, and applicability of administrative and civil penalties for environmental violations. At the outset, serious consideration should be given to creating a consistent, across-the-board classification of penalty amounts that distinguish minor violations from those that are more serious, and that raises the outdated maximum amounts of penalties applicable to more egregious instances of noncompliance. Moreover, a uniform environmental enforcement statute would do well to follow the lead of the Clean Air Act and the Resource Conservation and Recovery Act (within the Solid Waste Disposal Act) by providing for the creation of a field citation program to address minor violations, which applies across all environmental media.⁶⁶ Where they have been adopted, field citation programs appear to have encouraged compliance with paperwork requirements without placing an undue burden on administrative agency enforcement staffs.

⁶³ Steven P. Solow & Ronald A. Sarachan, *Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and Evaluation of the Impact of Hanousek and Hong*, 32 ENVTL. L. REP. 11,153, 11,157–58 (2002).

⁶⁴ In a highly controversial decision, *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999), the United States Court of Appeals for the Ninth Circuit interpreted the criminal negligence provision of the Clean Water Act as requiring proof of ordinary—as opposed to gross—negligence. Since ordinary negligence—the mere absence of reasonable care—is a concept that is more associated with civil matters than with criminal prosecution, I am not fully persuaded that ordinary negligence is an appropriate standard on which to base a criminal prosecution. A uniform environmental enforcement statute would do better, in my view, to require proof of gross negligence in this context.

⁶⁵ Clean Air Act, 42 U.S.C. § 7413(c)(5)(D) (2012); Solid Waste Disposal Act, 42 U.S.C. § 6928(f)(4) (2012).

⁶⁶ 42 U.S.C. § 7413(d)(3) (2012) (giving the EPA Administrator authority to implement a field citation program); 42 U.S.C. § 6991e(a) (granting EPA authority to issue compliance orders, allowing for field citations in the form of expedited compliance orders).

Rather than incorporate one of the various multifactor approaches to penalty assessment included in current environmental legislation, well-designed reform legislation should remove distinctions between the penalty structures that apply to administrative and judicial enforcement matters. A useful starting point for a new statutory approach to penalty assessment is EPA's carefully crafted and well-respected Policy on Civil Penalties.⁶⁷ This EPA Policy calls for the calculation of an "economic benefit component" that reflects the amount of money the defendants saved by failing to comply with environmental requirements, and a "gravity component" that takes account of actual or possible harm from the defendant's pollution, the importance of the defendant's violation in the regulatory scheme, and the availability of other relevant data (including compliance data) from other sources.⁶⁸ Under this sensible administrative policy, penalties are calculated by combining the economic benefit and gravity components into an initial penalty figure, and then adjusting that figure up or down to take unique factors into account (such as the violator's history of compliance or noncompliance and the extent of the violator's good faith and cooperativeness).⁶⁹ This EPA policy has proven a sound and workable framework for setting penalties in enforcement matters. Its uniform application by courts and agencies is likely to yield more consistent results than the highly variable penalty amounts now set by federal judges in civil enforcement cases.⁷⁰

A sound uniform enforcement statute will also give both environmental agencies and courts express authority to negotiate and approve supplemental environmental projects (SEPs). Under a statutory SEPs provision, defendants will be permitted to settle enforcement cases by undertaking environmentally beneficial projects that they are not otherwise legally required to perform, in exchange for a limited reduction in the amount of their civil penalties. In a number of instances, SEPs have benefitted the public's interest in protecting an aspect of the environment while being attractive to defendants.⁷¹

⁶⁷ U.S. ENVTL. PROT. AGENCY, POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY (1984).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ In the absence of more detailed and specific legislative guidance, courts have used their discretion to impose civil penalties on environmental violators in inconsistent ways. Some courts make use of a "top-down" approach, determining the maximum penalty authorized by the statute and then adjusting that maximum penalty downward to take account of the factors set forth in the statute. *See, e.g.,* United States v. Roll Coater, Inc., [1991] 21 *Envtl. L. Rep. (Envtl. Law Inst.)* 21073, 21075 (S.D. Ind. 1991); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). In contrast, other courts set penalty amounts using a "bottom-up" approach, determining the economic benefit to the defendant of noncompliance, and then adjusting the penalty figure upward or downward based on statutory factors. *See* United States v. Municipal Authority of Union Township, 929 F. Supp. 800, 806 (M.D. Pa. 1996); United States v. Smithfield Foods, 191 F.3d 516, 528–29 (4th Cir. 1999).

⁷¹ *See* Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as well as to Achieve Significant Additional Environmental Benefits*, 10 *WIDENER L. REV.* 413, 424, 438 (2004) (noting that SEPs may be

To be both fair and effective, however, SEP agreements must be subject to strict limitations and conditions. Once again, an EPA policy document, the Supplemental Environmental Projects Policy, provides a balanced starting point for fashioning the SEPs provisions of a uniform enforcement act.⁷² This Policy clearly defines supplemental environmental projects, details various legal guidelines that apply to SEPs—including the establishment of a “nexus,” or connection, between the violation in issue and the project to be undertaken—and makes clear that any reduction of civil penalties will not give the violator any economic advantage over its competitors.⁷³

As noted above, currently prevailing environmental statutes speak in terms of penalties “per day of violation,”⁷⁴ yet they fail to define the term “day of violation.” A uniform enforcement reform statute will remedy this shortcoming by providing that, in instances where a defendant commits multiple environmental violations on the same day, each particular violation—whether or not it occurs at the same plant or facility—will be considered a separate day of violation for penalty purposes. To avoid underdeterrence, a uniform enforcement statute should make plain that, in cases where a defendant has failed to provide environmental authorities with a required notification, each day that the mandated notice is not given to the appropriate agency—beginning with the day on which the notice is required to be provided and ending on the day that the notice is actually given—must be deemed a day of violation.⁷⁵

attractive to defendants because they enable defendants to garner goodwill and good public relations from implementing local mitigation and restoration projects,” and that to be approved, SEPs must “remain consistent with the public interest”).

⁷² U.S. ENVTL. PROT. AGENCY, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE (2015), *available at* <http://www2.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

⁷³ *Id.*

⁷⁴ *See supra* notes 38–42 and accompanying text.

⁷⁵ The Clean Air Act takes this approach with respect to the calculation of penalties assessed administratively by EPA. The Act provides, in relevant part:

“For purposes of determining the number of days of violation for which a penalty may be assessed, . . . where the [EPA] Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of the notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.”

Clean Air Act, 42 U.S.C. § 7413(e)(2) (2012). However, some federal courts have taken a contrary approach. *See, e.g.,* United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995) (holding that defendant who failed to provide required advance notice of asbestos removal is not subject to a continuous violation penalty).

A uniform enforcement act should also expand the contract debarment provisions of the Clean Air Act and Clean Water Act⁷⁶ by making them applicable to *all* cases where EPA finds a facility to be in significant noncompliance, whether or not the violator in question has been convicted of an environmental crime. Although a debarment provision may have only limited deterrent effect on environmental violators who do not do business with the federal government it can be a powerful means of deterring environmental violations by firms that contract with the government on a frequent basis. There seems no sound reason why its applicability must be strictly limited to only a few facilities where criminal convictions have been obtained but regulatory compliance has not been achieved.

Finally, a comprehensive enforcement statute should include a section that allows for federally assumed enforcement when a state's failure to enforce has led to widespread violations. Even though EPA has rarely used its authority to implement this provision for a number of reasons (both practical and political), the fact that a possibility of federally assumed enforcement exists may well have motivated some states to be more vigilant in their enforcement efforts.

V. CONCLUSION

Despite their similarities, the enforcement provisions of our current environmental statutes contain major differences—differences with important implications for deterrent enforcement. As my comparative analysis of the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act has demonstrated, the more effective enforcement mechanisms of some of the enactments have not been replicated in other statutes. Some of the Acts contain language that imposes needless burdens on government enforcers for little or no reason. Moreover, all three of the Acts in question fail to address important legal questions. They thus open the door to inconsistent administrative practice and highly variable judicial interpretation.

This Essay proposes the enactment of a uniform federal environmental enforcement statute to remedy current statutory inconsistencies and shortcomings. Although the enactment of such reform legislation may well be unlikely in the short-run, it is hoped that the recommendations offered in this Essay will at least spark a broader discussion of the merits of the enforcement sections of our existing environmental statutes. That discourse, followed by careful, prudent amendment of the environmental laws at issue—accomplished by a Congress that no longer abdicates its environmental law-making responsibilities—is as much needed as it is long overdue.

⁷⁶ Clean Water Act, 33 U.S.C. § 1368 (2012) (prohibiting federal agencies from entering into contracts with violators of the Act); 42 U.S.C. § 7606 (2012) (same).