

ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT AT THE UNITED STATES DEPARTMENT OF JUSTICE AND THE ROLE OF ENFORCEMENT IN GOOD DOMESTIC GOVERNANCE

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SUMMARY

Environment and Natural Resources Division (ENRD) of the United States Department of Justice has responsibility for over 10,000 cases filed in all 94 federal judicial districts, utilizing over 400 attorneys. In this paper, four topics are covered:

- How ENRD is organized and how it handles environmental litigation
- Where ENRD fits into environmental litigation efforts in the United States, and in particular environmental enforcement.
- The value of strong environmental enforcement.
- The concept of good domestic governance and how it relates to enforcement.

1 THE ENVIRONMENT AND NATURAL RESOURCES DIVISION (ENRD)

ENRD is one of the six litigating divisions of the Department of Justice. Our specific goals are to:

- ensure strong and fair enforcement of our Nation's civil and criminal environmental laws;
- provide effective stewardship of our natural resources;
- protect the rights of Native Americans;
- ensure that land acquisition activities are well managed;
- protect wildlife and marine resources;
- balance energy needs with environmental protection; and
- help protect the nations security.

In addition, the Division seeks

strong relationships with our locally based federal prosecutors, the United States Attorneys, and with state law enforcement officials. Finally, ENRD represents the interests of all our client agencies, such as the Environmental Protection Agency (EPA) and the Departments of Agriculture and Interior. Indeed, in regards to enforcement, ENRD has no investigators of its own, and instead relies on its client agencies, as well as on investigator groups like the Federal Bureau of Investigation, states, and citizens.

ENRD was created on November 16, 1909 as the Public Lands Division. For the first 50 years, the Division's litigation was primarily concerned with federal lands, water and Native American disputes. As the Nation grew and developed, ENRD's areas of responsibility expanded to include litigation concerning the protection, use and

development of the Nation's natural resources and public lands, wildlife protection, Native American rights and claims, cleanup of the nation's hazardous waste sites, the acquisition of private property for federal use, and defense of environmental challenges to government programs and activities. ENRD has its headquarters in Washington, D.C., and maintains branch offices in Denver, Colorado; San Francisco and Sacramento, California; Anchorage, Alaska; Boston, Massachusetts; and Seattle, Washington. Division attorneys, however, litigate in all federal district courts, which include Puerto Rico and the Virgin Islands, as well as in special courts such as the Court of Federal Claims and the Court of International Trade. ENRD attorneys litigate at the district and appellate level, and frequently participate in litigation before the United States Supreme Court.

At present, ENRD has approximately 650 persons on staff, which includes over 400 attorneys. About half of the attorneys are dedicated to environmental (e.g. pollution) matters and the other half to natural resource issues, Native American issues, and land acquisition. In fact, the Division is sometimes referred to as the Nation's largest environment law firm. ENRD is organized into nine litigating sections with different areas of expertise, and an Executive Office. The Appellate Section handles appeals culminating from the litigating sections, as well as various matters originating in the courts of appeals, and assists the Department of Justice's Solicitor General when the Division's cases reach the Supreme Court. Pollution litigation is handled principally in the Environmental Crimes Section which prosecutes criminal environmental cases, the Environmental Defense Section which defends EPA's rulemakings and administrative actions against challenge, defends all federal agencies in litigation under the pollution control laws and brings wetlands

enforcement actions, and the Environmental Enforcement Section which enforces the Nation's environmental laws in civil cases.

The General Litigation Section conducts affirmative and defensive litigation involving federal property and natural resources not subject to one of the Division's specialized sections, and defends claims filed by Native American tribes against the United States. Native American litigation is also handled in the Indian Resources Section, which litigates either to defend tribal interests or to bring actions on their behalf. The Land Acquisition Section handles the acquisition of property for Congressionally-authorized purposes. The Policy, Legislation and Special Litigation section provides advice on legislation, policy, and international issues, serves as special counsel to the Assistant Attorney General, acts as liaison with interagency working groups, monitors citizen suits under the environmental laws and participates as *amicus curiae*, when appropriate. The Special Litigation section works on specific complex matters. Finally, the Wildlife and Marine Resources Section prosecutes and defends criminal and civil cases arising under the federal fish and wildlife laws.

ENRD is relatively unique among the justice ministries in the world for creating a large unit focusing exclusively on environmental and natural resources litigation. This has enabled the Department of Justice to develop expertise and experience in environmental litigation, to better coordinate major national enforcement initiatives and to maintain consistent positions in its litigation. Currently, approximately 30% of ENRD's cases are affirmative environmental enforcement matters. The majority of our attorney time is spent on non-discretionary cases, e.g. defensive litigation and land acquisition.

2 THE ROLE OF ENRD AND ENVIRONMENTAL ENFORCEMENT WITHIN THE U.S. GOVERNMENT

Environmental enforcement relies on many elements to be successful. If you can visualize the entire enforcement picture as a huge triangle with four levels, the base of the triangle has the largest volume in terms of enforcement actions. In the U.S., that base consists of state and local enforcement actions that are by far the biggest number of cases filed annually. I also include citizen group enforcement in this category. And, that is precisely as it should be, with those closest to the polluting activity being the ones that care the most.

Next, moving up the triangle to a second level by volume are federal administrative actions, brought principally by the EPA and other federal agencies. These actions tend to be smaller, tend not to involve a penalty, and are usually resolved faster without any court involvement. Although significant, administrative enforcement represents a smaller volume of cases than state and local actions.

Only now, as one moves up toward the top of the triangle at the third level do you get to ENRD's role, which is to file civil judicial actions in federal court. In fiscal year 2001 we filed 219 civil cases and resolved 218 by consent decrees. Although smaller by volume, civil enforcement cases are typically more significant cases than administrative and non-federal ones. This can be demonstrated by our accomplishments last year (fiscal year 2001): we obtained \$95.3 million in civil penalties; we secured \$78.4 million worth of supplemental environmental projects; and we recovered \$103.6 million in natural resource damages. The value of injunctive relief for environmental cleanups under our Comprehensive Environmental Response, Compensation and Liability Act (also known as Superfund) was \$1.076 billion

and we obtained another \$562.8 million to replenish the Superfund for money the government has spent to clean up contaminated property. Finally, we obtained \$1.901 billion in the value of injunctive relief under the Clean Air Act, Clean Water Act, Resource Conservation Recovery Act, and Safe Drinking Water Act; a great portion of this amount will be spent by industry on state-of-the-art pollution control equipment. While this is one of our most successful years ever, it gives you some idea of what we are accomplishing.

Finally, at the very top of the pyramid, with the smallest volume, are federal environmental criminal cases brought by our environmental crimes section and United States Attorneys nation wide. As these often result in criminal fines and imprisonment, they provide the most deterrent value and are reserved for the most serious acts of illegal misconduct. In fiscal year 2001, we obtained 150 convictions, the majority of which were through guilty pleas. We secured \$52.9 million in criminal fines and \$62.3 million in fines, restitution, special assessments, environmental compliance plans and court costs.

3 THE PURPOSES OF ENVIRONMENTAL ENFORCEMENT

Why enforce at all? Although there are many reasons to have strong environmental enforcement, for the purpose of this paper, four reasons are identified. These are not in order of significance, but are all important:

- Environmental Protection - Enforcement protects human health and the environment. Everyone deserves to breathe clean air, drink pure water, swim in safe waters, and live in neighborhoods not threatened by toxic waste dumps.
- Deterrence - Prompt and effective environmental enforcement deters illegal conduct. That is precisely the reason that

countries should aggressively reach out to notify and involve the public regarding their enforcement actions so that the results are visible, understood, and accepted. Every enforcement action has a cascading effect on potential wrongdoers, encouraging them to abide by the law.

- **Level Playing Field - Uniform, fair and comprehensive environmental enforcement protects companies and individuals who comply with the law.** To assure that air and water emissions do not harm human health or the environment, pollution abatement equipment, good management practices and an overall culture of compliance are necessary. This can be expensive or reduce capacity at times. To assure that complying companies are not put at an economic disadvantage by companies violating the law, effective enforcement is critical. And, at a minimum, effective enforcement includes recouping any economic benefit that the noncomplying party gained from violating the law.
- **Protecting Government Resources -** Strong and effective enforcement protects government resources. At a time where every nation is guarding its economic resources and carefully budgeting where money is to be used, environmental resources are all the more important. Each time a government spends cleanup money where another party is responsible, environmental enforcement can be used to recoup the money so it can be used elsewhere. The principle that the polluter should pay is not only sound enforcement strategy, but also valuable resource strategy for all governments.

4 THE ROLE OF ENFORCEMENT IN GOOD DOMESTIC GOVERNANCE IN THE U.S.

4.1 Good Domestic Governance and Environmental Enforcement

Having discussed the organization of ENRD, how it fits into the enforcement picture in the United States, and the overall value of enforcement, I now want to turn to the concept of good domestic governance and how it relates to environmental enforcement. By good domestic governance, I mean the manner in which governments can work with the public and private sectors to make sound decisions and promote sustainable development, including environmental protection. Good domestic governance includes a number of principles such as effective institutions, public access to information, public participation in official decisions and access to justice. It is also a concept that the U.S. and others are underscoring in preparations for the World Summit on Sustainable Development, to be held in Johannesburg in August 2002, since good governance is critical to achieving sustainable development. In my view, good domestic governance has three primary components:

- First, businesses need confidence that, if they comply with laws, their competitors will do the same.
- Second, citizens need to be confident that they will have access to information and that their voice will be heard before decisions are made and actions taken that will affect their health, livelihoods and communities.
- Third, governments have a responsibility to enact laws to protect the public welfare, to educate their citizens about the laws, to inspect and assure compliance with the laws, and to effectively enforce the laws when they are violated.

As I will describe, these three components are interrelated with and support effective enforcement. In turn, strong enforcement helps bolster other governance institutions and mechanisms. In the U.S., we strive to integrate all these components into the daily functioning of government, and in particular, into the devel-

opment and implementation of our environmental and sustainable development policies. Thus, our environmental enforcement is made effective by strong laws and regulatory and enforcement authorities, as well as fair judicial institutions - all critical elements of good domestic governance.

For example, we have a broad range of laws that protect air, water, natural resources, public health and other important interests, and clear authority to enforce those laws, including statutorily prescribed and meaningful penalties. Just as important, we provide adequate resources for and political commitment to compliance and enforcement.

Moreover, at the federal level in the U.S., we fully integrate the expertise and resources of law enforcement and environmental agencies. Environmental agencies establish and implement regulations, work with regulated entities to assure compliance, monitor their compliance, and, when necessary, initiate administrative enforcement actions. Only at the end of this process would they refer a matter to ENRD for judicial enforcement. This integration allows agencies to focus their expertise and resources appropriately and to coordinate enforcement and compliance efforts, including pro-active enforcement approaches that address broad patterns of non-compliance by industrial sectors or by media.

Finally, in the U.S. we can rely on a fair, independent and impartial judicial system, with judges who are informed about environmental laws and the environmental and economic harm caused by non-compliance. In the criminal area, consistency in punishment is ensured by use of nationally applicable sentencing guidelines. Impartiality, fairness and consistency are key to broad public acceptance of judicial determinations, which is itself vital to the rule of law and creating a public culture of compliance.

4.2 Graduated Responses to Non-Compliance

Another important aspect of enforcement that relates to good governance is the availability of graduated responses to violations. In the U.S., our environmental laws provide a range of responses to noncompliance, based on the type and degree of violation. This helps our enforcement agencies develop flexible approaches tailored to specific situations. It also helps with institutional integrity and public credibility since actions can be taken that are proportionate to the violation and there can be some consistency developed in enforcement approaches. Governments are also more likely to take actions if they have a range of choices, from administrative to criminal, from which to choose rather than one response that may be too weak or too strong for a given case.

For example, an administrative agency such as the EPA can respond informally to identified instances of minor non-compliance. Such informal actions include phone calls, site visits, warning letters and notices of violations. These actions advise a company about the violation and direct compliance by a date certain. They can also initiate a more formal legal process such as civil administrative order which is a legal, independently enforceable order that describes the violation, provides evidence of the violation, and requires corrective action by a certain date. Administrative orders may include cease and desist orders, requirements to abate a hazard, or authority for the agency to enter and correct an immediate danger to the public or the environment. Such an order is handled by the administrative system within the agency. However, if a company violates the order, the agency then can refer the matter to ENRD for enforcement in a federal court. Some environmental laws authorize an agency to assess administrative penalties as well, which may also be enforced in

court by ENRD if the entity does not pay. Overall, administrative actions are the most common type of federal enforcement response.

Civil judicial enforcement in the U.S. generally results from a referral to ENRD from one of the agencies that monitors environmental compliance, such as the EPA or the Fish and Wildlife Service. Sometimes, referrals are also made by state agencies and private citizens. For example, ENRD may initiate a legal action against a company for failing to comply with an administrative order. Or we will sue to recover funds spent by an agency in responding to an environmental harm. Where necessary, we will bring an action to respond to an emergency or abate an immediate endangerment to human health or the environment. ENRD will ask the court to provide the appropriate relief, such as an order enjoining present and future harmful actions, requiring payment of fines or penalties, and/or mandating mitigation or remediation of the environment. Other types of relief can include denial or revocation of permits, shutdown of facilities, and requiring further reporting, inspections, training or other actions designed to ensure long term compliance.

The U.S. environmental statutes provide specific maximum amounts of penalties that can be assessed for violations of the law. Under that authority, ENRD will generally seek to secure a penalty that recoups any economic benefit the violator might have enjoyed as a result of noncompliance as well as an additional amount appropriate to the nature and gravity of the violation. ENRD also is committed to resolving civil actions, where appropriate, through settlement. Settlements can allow the Division to secure effective remedies and actions at substantially less cost than trying a case before a judge. In such instances, the Division may consider cooperative actions by the defendant as mitigat-

ing any penalty sought. For example, in addition to an order to comply, the settlement may require a defendant to perform a supplemental environmental project (SEP). A SEP must have some nexus to the violation. Examples include establishing a voluntary compliance program beyond that required by law or an agreement that the defendant purchase and/or protect sensitive habitat. Settlements are generally embodied in consent decrees, which are agreements signed by the court and enforceable as judicial orders.

At the other end of the spectrum, criminal enforcement is generally appropriate when a person or company has knowingly and willfully violated the law. Examples include falsifying documents, operating without a permit, or deliberately taking an action prohibited by law. Again, ENRD will receive referrals from relevant federal agencies, state agencies or the public that such conduct has occurred. ENRD will then consider whether the matter merits criminal charges. Depending on the alleged crime, we may seek monetary penalties and imprisonment, as well as seizure or forfeiture of property. Criminal cases are particularly appropriate where violations are serious or have caused serious harm. Criminal cases must satisfy a higher burden than civil cases because of the rights accorded criminal defendants by the U.S. Constitution. Several U.S. environmental laws provide for criminal penalties and enforcement, but federal prosecutors may also rely on general criminal provisions that make it illegal to report false information or obstruct justice. This frequently occurs in prosecutions for wildlife and the smuggling of ozone depleting substances.

Finally, citizen involvement in enforcement is encouraged and specifically provided for in several U.S. environmental laws. This kind of public involvement generally ensures the integrity of the

enforcement system and augments the often-limited government resources. These so-called private attorneys generally can file civil judicial actions, with notice to the relevant agencies, to enjoin pollution and force compliance. As an incentive, some statutes allow citizens to recover the costs of litigation and attorney's fees if they substantially prevail on the merits. The public is also provided an opportunity to review and comment on consent decrees. Citizens are not authorized to bring criminal actions, but citizen complaints and tips can lead to successful ENRD prosecutions.

4.3 Enforcement Programs and Approaches

Whatever differences countries may have in their enforcement schemes, we all share a common concern: How to maximize our limited financial and technical resources. In the U.S., we have developed a number of programs and approaches that seek to make the most effective use of resources and ensure other good governance principles.

4.3.1 Focusing on High Impact Industries and Top Executives

We are utilizing a multi-media and sector-based enforcement approach to focus some of our enforcement efforts on violations that occur in particular industrial sectors that have a significant impact on the environment and human health. For example, we have had initiatives focusing on the refinery and wood product industries. This type of approach allows us to address environmental problems in a number of media and to take high-profile national actions that will have significant environmental benefits. It also serves as notice to the regulated community of the government's intention to enforce the law vigorously. Similarly, where appropriate, we enforce against the highest levels of a corporation to ensure that we reach the real

decision makers in environmental violations. The threat of criminal penalties presents a powerful incentive to top executives to comply with the law.

4.3.2 Focusing on Ecosystems

Similarly, another major priority is focusing enforcement efforts to protect ecosystems of special concern. For example, we joined other federal agencies and concerned state agencies to coordinate enforcement efforts to address the conditions of the Mississippi River and its tributaries. We have also focused enforcement efforts on cleaning up the Great Lakes.

4.3.3 Environmental Justice

We have followed the U.S. government's express policy that federal agencies evaluate and take into account environmental justice concerns in their work. We have focused enforcement efforts to ensure we are providing environmental protection to minority and low-income communities and Native American tribes that may be particularly at risk from harm due to the locations in their communities of hazardous waste sites or industrial sources of pollution.

4.3.4 Pro-active Programs and Interagency Coordination

Finally, we are looking for opportunities to address non-compliance more broadly and maximize our resources. In the past, enforcement efforts have often been reactive, for example responding to tips, news of incidents and referrals from agencies. However, we are developing more coordinated approaches whereby prosecutors and investigators at the local, state and federal levels share their knowledge and expertise to identify and respond to broader patterns of non-compliance - whether by industry or region or nationwide. I will describe later how this approach has been particularly effective in combating the growing black market in ozone depleting sub-

stances. The approach has also been quite successful in combating illegal traffic in endangered species and vessel source pollution.

4.4 Enforcement Policies

In the U.S., we have also developed enforcement policies and goals to guide our efforts, again based on principles of good governance such as fairness, transparency, science and public involvement. As I stated earlier, our enforcement policies seek to ensure equity and fairness by leveling the playing field; provide deterrence; and ensure benefits to environment and human health. For example, EPA and ENRD utilize an established penalty policy to determine the appropriate amount of penalties and other relief to seek in a given case. This policy provides general consistency while allowing flexibility in individual cases. In addition, to determine when non-compliance occurs, we rely on a full menu of information derived from agency inspections, investigations, self-reporting and citizen monitoring.

4.5 Implementation of International Environmental Obligations

Finally, strong enforcement is vital to the full implementation of international obligations the U.S. and others have undertaken in multilateral environmental agreements. These agreements represent a unified response to global concerns and they cannot be fully effective unless member countries fully implement their obligations through domestic laws and enforcement. This area, in particular, is a clear example of how strong enforcement and other governance components are critical to achievement of environmental protection and sustainable development on a global level.

In the U.S., we have made effective enforcement of our international obligations a priority. In particular, we have

focused our criminal enforcement efforts on the growing and lucrative illegal trade in ozone depleting substances and endangered species which are governed by the Montreal Protocol on Substances that Deplete the Ozone Layer and the Convention on the International Trade of Endangered Species of Wild Fauna and Flora (CITES), as well as on the discharge of pollutants into the oceans from vessels, which is governed by Convention and Protocol on the Prevention of Pollution from Ships (MARPOL.) This focus has required effective use of all elements of good governance. For example, we have developed strong laws, such as the Endangered Species Act, the Clean Air Act and the Act to Prevent Pollution from Ships to implement our international obligations. These laws proscribe substantial penalties for violations, and ENRD and its client agencies vigorously enforce the laws before a judiciary well informed about the environmental significance of the issues. Our enforcement also relies on citizen monitoring to identify violations of law.

Our enforcement efforts are further bolstered by interagency coordination and pro-active enforcement approaches. For example, ENRD is working cooperatively with law enforcement and environmental agencies in the United States and other countries to share information necessary to prosecute smuggling of chlorofluorocarbons (CFCs) and other ozone depleting substances through a National CFC Enforcement Initiative. We meet regularly with representatives from EPA, Customs, other relevant federal, state and local agencies and representatives from other countries to share experiences and information and discuss possible areas for targeting enforcement resources. We follow a similar procedure regarding vessel source pollution. In the wildlife area, we have also broken up several international enterprises trading illegally in protected birds and rep-

tiles. For example, our Division has worked with the U.S. Fish and Wildlife Service and Customs Service to identify and interdict illegal smuggling of reptiles, including tortoises, turtles, snakes and lizards from Africa, Asia and South America - part of a \$5 billion dollar yearly international black market in live animals and animal products. These joint efforts have led to numerous indictments, guilty pleas and sentences. In many instances, our enforcement efforts have required and benefited from the assistance of enforcement officials in other countries.

The transnational nature of illegal trade and other violations of multilateral environmental agreements requires an effective international enforcement network to allow countries to work cooperatively with law enforcement and environmental agencies in other countries to share information to prosecute crimes and to notify each other of suspected illegal actions. We at ENRD would like to continue to share information on specific matters as well as more general expertise on investigation and prosecution experiences, including through joint enforcement projects and efforts to build capacity in other countries for strong enforcement. To this end, we look to INECE to enhance these networks and cooperative work and hope that the upcoming World Summit will highlight the importance of joint efforts to implement multilateral environmental agreements.

5 CONCLUSION

In summary, four major themes were discussed:

- the structure of ENRD;
- the role of ENRD in U.S. environmental enforcement;
- why we enforce;
- and how strong enforcement and other components of good domestic governance are critical for the U.S. in terms of achieving environmental protection and sustainable development.

The U.S. and other countries have especially stressed good domestic governance in the run up to the August 2002 World Summit on Sustainable Development in Johannesburg, South Africa. It is our hope that conferences such as the 6th INECE Conference and the work of INECE in general will help strengthen environmental enforcement and good domestic governance and provide for future opportunities for information exchange and collaboration.