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# STRATEGIES AND DESIGN PRINCIPLES FOR COMPLIANCE AND ENFORCEMENT

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## SUMMARY

Compliance and enforcement practices should not remain static. Rather they must evolve to account for the changing nature of environmental problems, the number of organizations and individuals subject to regulations, the complexity of the regulations, the availability of human and financial resources, the level of public concern about environmental issues and of support for enforcement, and changes in other societal and economic factors affecting enforcement. This article explores the evolution of compliance and enforcement strategies and design principles, primarily in the United States context, in light of these factors. It points out the increasing use of strategic planning to ensure that limited enforcement and compliance resources are deployed to address priority problems. This article also notes the importance of looking beyond the traditional enforcement and compliance tools to build an effective compliance program. It suggests that strategies for compliance should incorporate the important roles that economics and values can play in holding regulated entities accountable for their environmental behavior.

## 1 INTRODUCTION

Compliance and enforcement activities are essential to effective implementation of environmental legislation. Despite, or perhaps because of, the decades of experience government agencies have had in designing and deploying a wide range of compliance and enforcement techniques, there exists no unified theory of environmental compliance and enforcement. Instead, a variety of theories and program design principles have emerged, perhaps because compliance and enforcement approaches must reflect unique circumstances in each particular program and in each cultural setting. Several of these strategies and design principles are discussed in this article. It is important to note that these approaches are not mutually exclusive. Government officials may rely on a combination of several of these theories

in managing compliance and enforcement programs.

## 2 THE COMPLETE COVERAGE MODEL

Early enforcement efforts in the United States followed what might be called a "complete coverage model." Michael Stahl, a senior EPA official, notes:

The traditional strategy of regulated compliance programs has been to create and maintain a presence in the regulated universe, which could identify and correct violations and deter others from violating the laws and regulations. This strategy viewed complete coverage of the regulated universe and uniform enforcement of the law as overarching goals.

This model places emphasis on identifying all of the facilities subject to a

particular regulation, regularly inspecting those facilities, and initiating enforcement actions for all of the identified violations.

The complete coverage model deters poor environmental conduct – both specifically for the particular violator and generally in the wider regulated community – by increasing the likelihood that violations will be detected and punished. The model works best in situations where the number of regulated entities is relatively small and where government inspection and enforcement resources are relatively high.

### **3 A FOCUS ON COMPLIANCE ASSISTANCE**

As the number and type of regulated entities expand, particularly when smaller facilities make up a significant percentage of the regulated universe, the complete coverage enforcement model breaks down because of the enforcement resources needed to inspect facilities and to initiate enforcement actions. Further, enforcement against small facilities, especially soon after a new regulation is adopted, can be quite controversial, with many arguing that operators of small facilities do not have the time or staff resources to understand what needs to be done to comply with the law. And because compliance is the principal goal for government officials, if that goal can be achieved more efficiently or more effectively through assistance, then compliance assistance becomes a preferable strategy.

Compliance assistance programs in the environmental field have both practical and philosophical facets. From a practical perspective, small facilities do not have employees who can spend significant time understanding environmental laws and adjusting business practices to comply with the laws. As a result, government agencies may assist facility operators by providing training or engineering expertise to help the operators meet environmental requirements.

From a philosophical perspective, some environmental agencies have adopted a “customer service” orientation under

which the agency sees its first obligation as assisting its “customers” – the regulated entities – comply with the law. Agencies with a customer service orientation may reserve “hard” enforcement – penalty assessment – for circumstances where the regulated entity has had access to compliance assistance but persists in violating the law. This orientation essentially adds a fault element to environmental violations since violators will have had knowledge of the requirements and the opportunity to comply but nevertheless failed to comply. Measuring the effectiveness of enforcement and compliance programs is a critical factor in understanding whether the programs are effective. Historically, compliance assistance programs have not been rigorously evaluated for effectiveness. Instead, the measure often relied upon by government agencies is the number of “compliance contacts” with the regulated community. This measure does not provide much information about how effective the programs are in changing behavior.

### **4 TARGETING ENFORCEMENT RESOURCES**

One consequence of the rapid expansion of the number of regulated facilities and limited enforcement resources is the need to “target” at least “hard” enforcement to the highest priority situations. Facilities may be targeted for enforcement based on a variety of factors but three of the most common targeting factors are:

- (1) the amount and kind of emissions from a particular industry or industry sector;
- (2) the level of risk presented by those emissions;
- (3) the history of compliance by the industry or the sector. Effective targeting relies on the ability of government officials to obtain a wide range of sound data on the polluting activities of regulated facilities and the ability to analyze the data in a way that identifies high priority violators.

Targeting allows limited enforce-

ment resources to be focused on the highest risk, highest return problems. If an industry sector is targeted, the targeting effort is likely to increase deterrence in that sector. However, targeting means that fewer resources will be directed to enforcement in other areas. This fact requires a thoughtful analysis about what non-enforcement strategies may be available to maintain or improve compliance in the non-targeted sectors.

## 5 COMPLIANCE MANAGEMENT SYSTEMS

The expanded use of compliance assistance and targeting introduces significant complexities into the enforcement planning process. In response, some governmental agencies have developed “Compliance Management Systems” or “CMS” that take into account a wide variety of information and factors in order to more strategically deploy government compliance and enforcement resources. These systems may, for example, employ compliance assistance techniques for a discrete period of time after a regulation is adopted to educate regulated entities about the requirements of new regulations, to provide information on compliance technologies, or to deploy direct engineering assistance to help small businesses change their production technology. The CMS may then target enforcement to the same sector after an initial compliance assistance focus to reinforce the idea that companies that do not change their conduct as a result of the assistance programs will be subject to enforcement. These combined assistance/enforcement strategies may have the secondary benefit of increasing support for enforcement by showing that the government has given the regulated entities a fair chance to comply before enforcement occurs.

A CMS may also be used to map out a larger set of compliance and enforcement measures beyond a single sector. The CMS might lay out the overall approach the agency will take towards compliance assistance, when it will resort

to hard enforcement, how it will target that enforcement, what mechanisms it will use to promote compliance in non-targeted sectors, and how it will evaluate success of its compliance programs and adjust the programs based on this evaluation.

The CMS concept is reflected in EPA’s concept of “smart enforcement.” The smart enforcement approach is comprised of five components that, in combination, are designed to produce a “strategic and focused” enforcement program. The components are:

1. Addressing significant environmental problems.
2. Using data to help make strategic decisions for better resource utilization.
3. Using the most appropriate tool to achieve the best possible outcome.
4. Assessing the effectiveness of program activities to ensure continuous improvement and desired program performance.
5. Effectively communicating to the public and other regulated entities the environmental, public health and compliance outcomes of activities to enhance program effectiveness.

## 6 PENALTY POLICIES

Approaches to penalty assessment also vary significantly. In some systems, penalties may only be assessed after repeated notices of violations and efforts to achieve compliance by “jawboning,” that is, urging the facility to comply through such means as issuing warning letters. In other systems, laws may require that an operator be notified of a violation and given an opportunity to correct the violation before a penalty can be imposed. And in yet other systems, penalties are imposed without any advance notice.

Several factors typically are used in calculating penalties including:

- history of non-compliance.
- the nature of the emissions.
- the level of cooperation.

- actual harm to public health or the environment;
- the type of violation involved.

In some systems, government agencies attempt to separately calculate the economic savings to the regulated entity that occurred as a result of not complying with the law and then recapture that “economic benefit” as part of the penalty. In these systems, there are typically two penalty elements: the economic benefit element designed to recapture any of the economic benefit gained as a result of non-compliance and the “gravity” element designed to punish the illegal behavior and deter future violations by the facility or by other similarly situated facilities.

Some government agencies will reduce penalties in recognition of conduct seen as environmentally beneficial. For example, penalty policies may encourage facilities to adopt environmental management systems (such as ISO 14001) or conduct environmental audits by reducing or even eliminating penalties if a facility periodically audits its compliance, promptly reports any identified violations, and corrects any violations found through the audit. Penalties may also be reduced if a facility agrees to undertake projects that benefit the environment as part of an enforcement settlement. In the United States, these environmentally beneficial activities are known as “Supplementary Environmental Projects”. Typically, these projects must not include work required by law to remedy the violation. They often involve projects that provide amenities to communities like restored wetlands, new parks, or health screening programs.

## **7 EMPHASIS ON BEHAVIORAL DRIVERS**

Most of the discussion above has focused on how the regulatory system, through enforcement and compliance assistance programs, can change undesirable behavior. There are, however, two other key drivers of environmental behavior – economics and values. Government offi-

cial tend to be less comfortable relying on these drivers since the government has less control of the environmental outcome produced by economic factors or by individual or organizational values. Still, economics and values appear to have an increasing influence on the environmental behavior of individuals and organizations. As a result, if government officials are to get the most out of the limited resources they can direct towards compliance, they must understand and take advantage, in a strategic way, of these non-regulatory behavioral drivers. For example, information about the impacts of noncompliance may encourage facility operators who care about the environment to comply with the law. Similarly, consistent efforts to inform the public about the importance of a sound environment may create a societal compliance ethic and condition the citizenry to demand better compliance. The information may alter the values of those who may control or influence the polluting activity.

Economics can also drive compliance in a wide variety of ways. Data about cost savings associated with pollution prevention, waste minimization or emissions reductions can stimulate better compliance or even result in actions that go beyond compliance. Well-designed trading systems can encourage compliance by allowing companies to make or save money by improving their environmental performance. The acid rain trading program in the United States has functioned for several years with almost no enforcement actions through a combination of a well-designed trading system that includes information from continuous emissions monitors, and mandatory penalties that far exceed the cost of acquiring emissions credits on the open market. Liability standards can substantially increase the cost of poor environmental management, creating a strong economic incentive to comply. Companies with a high public profile may find it important as a matter of reputation to maintain a very good record of compliance. Companies may also find that environmental compliance, or even activities that go beyond compliance, are important to assure that

they will have access to markets in countries where customers or regulators place a high value on a company's environmental record. The environmental conduct of companies is increasingly affected by concerns from their insurers about environmental liability, by scrutiny from investors including socially directed investment funds and by "green" procurement standards.

## 8 COMPLIANCE INCENTIVES

Government can provide incentives including penalty reduction, public recognition and regulatory relief to encourage compliance or beyond compliance behavior. Governments have used a wide variety of recognition programs to encourage emissions reduction and compliance. An early example in the United States was a program known as "33/50" that challenged companies to reduce emissions of 33 high priority chemicals by 50 percent over a period of a few years. More recently, the EPA's "Performance Track" program provides both recognition and some regulatory relief if a facility adopts an environmental management system consistent with ISO 14001, increases the information it makes available to the public and establishes clear emissions reduction goals that go beyond mere compliance.

## 9 CITIZEN ENFORCEMENT

In some legal systems, citizens are authorized to initiate enforcement actions. Under most of the major environmental laws in the United States, for instance, citizens are authorized to initiate enforcement actions against regulated entities who have violated the law, after providing the regulated entity and the government with advance notice of their intent to sue – a so-called "60-day notice." The 60-day notice allows the regulated entity time to come into compliance if it agrees that there is a violation. It also allows the government agencies the opportunity to initiate an enforcement action if the agency believes enforcement is appropriate. If the violation is not corrected and the government does not com-

mence "diligent enforcement," the citizens may proceed with the lawsuit, ask the court to order that the violations be corrected and that penalties be imposed, and be awarded their reasonable attorneys fees incurred in the litigation.

In addition to federal citizen suit authority, several states in the United States have enacted legislation that allows citizens to sue any person to prevent "pollution, impairment or destruction of the environment." Citizen enforcement plays an important part in the enforcement regime in the United States because it supplements the limited government enforcement resources and ensures that government inaction does not mean that there will be no enforcement.

## 10 ENVIRONMENTAL ACCOUNTABILITY

As the preceding discussion indicates, compliance can be shaped by a wide variety of tools. Enforcement, better information about how to comply with environmental requirements, public values that result in consumer pressure on companies to comply with the law, and economic factors such as access to environmentally restricted markets or the ability to make or save money through pollution trading programs, all play roles in driving environmental behavior. The term "environmental accountability" is designed to encompass this wide range of tools that can be strategically deployed to produce better environmental outcomes. It includes mechanisms that expose the environmental behavior of individuals or organizations to public scrutiny creating a legal obligation to improve behavior, an economic incentive to improve behavior, or a sense of responsibility to improve behavior.

These environmental accountability mechanisms are, however, just a means to an end. In his book, *The Regulatory Craft*, Malcolm Sparrow cautioned that a problem-solving approach to protecting the environment first picks the most important tasks and then selects appropriate tools in each case "rather than deciding on the

most important tools and picking the tasks to fit.” Once priority problems have been identified, though, it is important to systematically identify the tools that can best hold individuals and organizations accountable for behavior that creates or contributes to the problem.

The concept of environmental accountability suggests that government agencies should go well beyond the relatively limited strategic planning processes inherent in compliance management systems to build a much more comprehensive strategic compliance approach that maximizes environmental outcomes. A system more broadly focused on the concept of environmental accountability would incorporate enforcement options, assistance mechanisms, targeting, and other traditional compliance tools. But the system would also consider how government can take advantage of, or influence economic pressures for, compliance, build societal values to support compliance, and use mechanisms such as public access to data and innovative public involvement approaches in designing a strategic approach to environmental compliance that leverages governments’ limited compliance resources to maximize environmental outcomes.

## 11 CONCLUSION

Strategic compliance allows government to direct environmental conduct through tools such as traditional enforcement, but also to influence compliance, and even conduct that exceeds compliance, by understanding and using a broad range of regulatory, economic, and value-based tools. This integrated approach to compliance requires a strong planning process that sets and implements priorities, has access to adequate data and monitoring capabilities to support resource allocation

planning and adaptive management, utilizes a full range of “accountability” tools, includes a strong commitment to informing and interacting with the public, and has sufficient financial and human resources to carry out the essential tasks.

## 12 REFERENCES

1. Sparrow, Malcolm K., *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (2000).
2. U.S. Environmental Protection Agency, *Principles of Environmental Compliance and Enforcement*.
3. Environmental Law Institute, *Beyond Enforcement: Enforcement, Compliance Assistance, and Corporate Leadership Programs in Five Midwestern States* (2003).
4. Rechtschaffen, Clifford, & Markell, David L., *Reinventing Environmental Enforcement & the State/Federal Relationship* (2003).
5. Stahl, Michael, *Beyond the Bean Count: Measuring Performance of Regulatory Compliance Programs*, 28 *The Public Manager* (1999).
6. Paddock, Leroy, *Environmental Accountability and Public Involvement*, 21 *Pace Environmental Law Review* 243 (2004).
7. Beierle, Thomas C. & Crawford, Jerry, *Democracy in Practice: Public participation in Environmental Decisionmaking* (2002).
8. Food And Agriculture Organization of the United Nations, *International Code of Conduct on the Distribution and Use of Pesticides (Revised Version): Guidelines on Compliance and Enforcement of a Pesticide Regulatory Program* (October 2004).