

**FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT
Process, Actors and Trends^{1/}**

As you walk into the Robert F. Kennedy Department of Justice building from Pennsylvania Avenue, etched into the building on the corner of 9th Street are these words: "Justice is founded in the rights bestowed by nature upon man. Liberty is maintained in security of justice."

To fulfill this commitment, the Department of Justice (DOJ) is responsible for bringing actions in federal court to assure compliance with the nation's laws, including laws designed to prevent pollution and protect human health and the natural environment. Environmental enforcement is one of the core responsibilities of DOJ, acting through the Environment and Natural Resource Division (ENRD) and the ninety-four United States Attorneys Offices located throughout the nation.

This article will generally describe the structure of environmental enforcement in the United States, including the fundamental role of the states and localities and the key federal enforcement players, before turning to the enforcement process. The discussion of the enforcement process will focus primarily on one aspect of environmental enforcement--civil judicial cases brought by the United States in federal court. While this discussion is intended to be a basic summary, it includes all of the major phases of civil enforcement actions, from investigation to trial or settlement.

The Structure of Environmental Enforcement in the United States: A Pyramid

Environmental enforcement is often described from a quantitative perspective as a huge pyramid of actors and actions. At the base of the pyramid are State, tribal, and local prosecutors and attorneys general, State and tribal environmental and natural resource agencies, and citizen groups. They engage in a wide variety of enforcement actions, ranging from simple citations, to compliance orders and permit

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revocations, to formal civil or criminal proceedings before administrative tribunals or in state or federal court. As a whole, they bring by far the most enforcement actions each year, with State agencies bringing the largest number.

The next level of the pyramid is comprised of federal administrative agency actions. Many federal departments and agencies, including the United States Coast Guard, the United States Army Corp of Engineers, and the Departments of the Interior, Commerce, and Housing and Urban Development, have significant enforcement authority under a variety of environmental protection statutes. The United States Environmental Protection Agency (EPA), however, exercises primary enforcement responsibility for most of the federal environmental protection laws. These laws include the Clean Air Act (CAA), the Clean Water Act (CWA), the Oil Pollution Act (OPA), the Safe Drinking Water Act (SDWA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), and the Emergency Planning and Community Right-to-Know Act (EPCRA). While each statute is different in its particulars, most authorize federal agencies to issue emergency orders to prevent risks to public health; cleanup, corrective action, or compliance orders to address ongoing releases or violations; and formal administrative complaints, usually adjudicated by an administrative law judge, for an assessment of civil penalties and other relief.

Next in the pyramid, and the primary focus of this article, are civil actions brought in federal district court by the United States. Virtually all modern-era federal environmental laws provide for civil judicial enforcement to secure injunctive relief, civil penalties, recovery of government response costs, enforcement of administrative orders, or other relief. *See, e.g.*, CAA § 114, 42 U.S.C. § 7414; CWA §§ 309(b), 311, 33 U.S.C. §§ 1319(b), 1321; SDWA § 1414(b), 42 U.S.C. § 300g-3(b); OPA § 1002, 33 U.S.C. § 2702; RCRA §§ 3008(a), 7003, 42 U.S.C. §§ 6928(a), 6973; CERCLA §§ 106, 107, 42 U.S.C. §§ 9606, 9607. In recent years, DOJ has had an active docket of over a thousand matters under the

federal pollution prevention statutes and files, on average, a federal complaint nearly every business day.

Finally, at the top of the pyramid are federal criminal actions, which, although fewer in number, are nevertheless a key component of environmental enforcement. Just as most modern-era pollution prevention statutes feature both administrative and civil judicial enforcement mechanisms, so many also include criminal sanctions for the most significant violations of those laws. *See, e.g.*, CAA § 113(c), 42 U.S.C. § 7413(c); CWA § 309(c), 33 U.S.C. § 1319(c); SDWA § 3008(d), 42 U.S.C. § 6928(d); CERCLA § 103, 42 U.S.C. § 9603. Because of the severity of the punishment, criminal prosecutions of environmental violations usually focus on conduct that presents an endangerment, demonstrates a disregard for human safety or environmental integrity, or reflects a pattern of dishonest or false conduct. Numerous examples of recent criminal prosecutions can be found at the DOJ website, www.usdoj.gov.

The Key Federal Actors

The Attorney General is charged, by statute, with conducting and supervising all litigation to which the United States, or its departments or agencies, is a party. 28 U.S.C. 515-519. *See also* 6 U.S. Op. Off. Legal Counsel 47, 48 (1982). In fact, absent expressed statutory authorization, no federal agency may “employ an attorney or counsel for the conduct of litigation in which the United States [or] an agencyis a party, or is interested,.... but shall refer the matter to the Department of Justice.” 5 U.S.C. 3106. With respect to all matters relating to civil enforcement of the environmental laws, the Attorney General has delegated that authority to ENRD’s Assistant Attorney General (28 C.F.R. 0.65; USAM 5-1.100, 5-1.300), who acts primarily through two of ENRD’s sections: Environmental Enforcement (EES) and Environmental Defense (EDS). Both of these sections are supervised by the same Deputy Assistant Attorney General.

EES was created in 1980 to provide a specialized legal staff to carry out enforcement of laws relating to protection of the environment. USAM 5-12.002. It is responsible for most affirmative district court litigation brought to enforce the nation’s environmental protection statutes. EES is headed by a

Chief, two Deputy Chiefs, and eight Assistant Chiefs. It is organized into litigating groups each of which has responsibility for cases in geographic areas that coincide with one or two EPA Regions. EES has approximately 250 employees, including 150 lawyers, located primarily in Washington, D.C., but with field office personnel in San Francisco, Denver, Boston, Anchorage, and Seattle. The Section currently handles a very broad range of enforcement matters that include, to cite only a few examples, CAA New Source Review cases brought against coal-fired power plants, petroleum refineries, ethanol producers, and other industries for failing to obtain permits and install pollution controls to prevent dangerous excess emissions; actions against major cities for failing to maintain and upgrade aging sewage collection and treatment systems resulting in overflows of raw sewage; cases to address patterns of oil spills from poorly maintained pipelines; cases to prevent excess emissions of ozone-depleting substances such as chlorofluorocarbons; and a large docket of CERCLA, CWA, and OPA cleanup actions and natural resource damages cases.

EDS was created in 1981 to defend, support, and coordinate the defense of all civil cases and proceedings arising under statutes concerned with the regulation and abatement of sources of pollution or with protecting the environment. USAM 5-6.100. EDS also brings civil enforcement actions under Sections 10 and 13 of the River and Harbor Act of 1899 and Section 404 of the CWA. EDS is headed by a Chief, Deputy Chief, and seven Assistant Chiefs. EDS currently has approximately seventy-five total staff, including fifty attorneys, mostly located in Washington D.C., but with field office personnel in Denver, San Francisco, and Seattle. Examples of the Section's work include defending EPA's more stringent clean air standards for heavy-duty trucks and diesel fuel, its safety standards for the Yucca Mountain nuclear waste repository in Nevada, and EPA administrative enforcement actions, such as a major clean air enforcement action against coal-fired power plants; and defending challenges to the United States implementation of international treaties involving the elimination of chemical weapons.

The ninety-four United States Attorney's Offices play a key role in enforcing the nation's

environmental laws, both civil and criminal. In particular cases, they may be lead counsel, co-counsel, or supporting counsel. Local Assistant United States Attorneys will also review pleadings, and if they are lead counsel, they will coordinate with subject matter experts in ENRD who provide them with sample pleadings, model consent decrees, and internal memoranda on important legal topics.

Although ENRD's Assistant Attorney General must ultimately approve most significant civil complaints and settlements, the United States Attorneys have substantial authority. For instance, wetland cases brought at the request of the Army Corps of Engineers, actions under CWA and OPA to secure cleanup costs or civil penalties on behalf of the United States Coast Guard, actions to secure access or enforce warrants, and certain cases to collect administratively assessed civil penalties may be referred directly to the United States Attorney for review and filing. In addition, most other civil environmental enforcement actions may be delegated to the United States Attorney by the Assistant Attorney General on a case-by-case basis.

Most federal civil enforcement cases are brought by either ENRD or a United States Attorney's Office. Because these offices generally do not have investigative staff, they rely initially on information gathered by federal agencies, states, and other interested parties. In practice, EPA and other federal agencies investigate and "refer" most civil cases to DOJ.

At EPA, the agency's ten Regional Offices develop and refer most civil enforcement cases. The Regional Offices each have a Regional Administrator and a Regional Counsel or Enforcement Division Director, who directs the development and referral of enforcement actions in their geographic areas. In recent years, EPA Headquarters' Office of Enforcement and Compliance Assurance (OECA), headed by an Assistant Administrator appointed by the President, has taken a greater role in developing and referring enforcement matters to DOJ. These include not only potential violations of CAA mobile source regulations, which are not geographic in nature, but also multi-regional or company-wide enforcement initiatives that involve polluting facilities in more than one EPA Region.

In some cases, statutory limitations on administrative authorities compel agencies to refer alleged violations to DOJ for civil enforcement. For example, some statutes impose caps on the amount of civil penalties that can be assessed administratively. *See, e.g.*, CAA § 113(d), 42 U.S.C. § 7413(d) (\$200,000 limit, unless waived by DOJ); CWA § 309(g), 33 U.S.C. § 1319(g) (\$125,000 limit for class II penalties); SDWA § 1414(g), 42 U.S.C. § 300g-3(g) (\$25,000 limit). In many cases, however, the desired relief may be obtained through either administrative or judicial means. In such cases, the agency must decide whether the matter is best addressed administratively or through judicial enforcement, considering, among other things, whether the violation is sufficiently egregious or repetitive to call for greater deterrent impact, requires long-term or complex compliance measures, or has important legal implications, all of which favor pursuing judicial enforcement.

The Civil Judicial Enforcement Process

The Referral Process

All environmental enforcement actions start with an event. The event could be the decision by a company to do nothing in the face of an immediate environmental problem (such as leaking drums, faulty valves, or poorly maintained storage areas), a decision to shortcut environmental responsibilities by delaying installation of pollution abatement controls, a failure to get a required permit, or the accidental discharge of oil or hazardous substances.

These events are brought to EPA's attention through several means. First, local citizens or local response agencies, such as police, fire, or public health departments, can observe and report them. Second, State regulatory agencies can refer them, for example when the State does not have the resources or capacity to handle the matter itself. Third, the company itself can bring the incident to EPA's attention, sometimes in compliance with a statutory or regulatory reporting requirement. *See, e.g.*, CERCLA § 103, 42 U.S.C. § 9603; EPCRA § 313, 42 U.S.C. § 11023. Finally, EPA or State personnel might discover the event through review of company records or monitoring reports, a random compliance

inspection of the facility, or as part of a larger investigation of a targeted company or industry.

If the triggering event appears to be a violation of state or federal law, then a decision must be made as to which agency or agencies will assume jurisdictional responsibility for the matter. In many United States Attorney districts, Law Enforcement Coordinating Committees (LECCs) – comprised of representatives of local, state and federal law enforcement agencies – play an important role in this decision making process. In addition, the EPA Regional Office and their State agency counterparts frequently communicate regarding which agency will assume lead responsibility for a matter.

Once a decision is made as to which agencies will participate in developing the case, the next step is to conduct a fuller investigation of the incident, usually by regulatory or enforcement personnel or skilled investigators. If EPA is pursuing the matter, its Regional offices or the National Enforcement Investigations Center (NEIC) located in Denver will usually examine company documents, review state records, orchestrate inspections, and identify witnesses. Because many environmental regulations or permits impose record-keeping obligations, such as monthly reports or emissions or discharge monitoring, there is often information of a public nature that may assist the investigation. In addition, EPA has broad fact-gathering authority under most environmental statutes that enables it to request information, subpoena documents, and even conduct site inspections to support an investigation. *See, e.g.,* FIFRA §§ 8, 9, 7 U.S.C. §§ 136f, 136g; TSCA § 11, 15 U.S.C. §2610; CWA § 308(a), 33 U.S.C. § 1318(a); RCRA § 3007(a), 42 U.S.C. § 6927(a); CAA § 114, 42 U.S.C. § 7414; CERCLA § 104(e), 42 U.S.C. § 9604(e)..

If the investigation indicates that a violation has occurred and the matter is considered appropriate for federal civil enforcement, EPA (or another federal agency) prepares a “referral” requesting that DOJ initiate a lawsuit on its behalf. An appropriate agency official must sign the referral, which in EPA’s case is ordinarily a Regional Administrator, Regional Counsel, or Enforcement Division Director. The referral is accompanied by a “litigation report” that describes the proposed

defendant, the violation and basis for the claim, the evidence supporting the claim, any anticipated defenses, and the relief sought by the agency. The report will also contain the agency's analysis of any disputed legal issues and a discussion of the enforcement history, including any prior enforcement actions, State involvement or prior negotiations.

The Pre-Filing Process

Agency referrals and litigation reports are usually sent to both ENRD and the United States Attorney's Office for evaluation. Upon receipt, all cases are immediately subject to triage to determine whether there are ongoing violations that present an immediate risk to human health and the environment or other basis for preliminary injunctive relief, whether the case presents an imminent statute of limitations deadline or pending bankruptcy bar date, or whether there is another reason the matter should be given priority treatment.

In reviewing the litigation report and deciding whether to bring a civil action, DOJ gives careful consideration to the client agency's views on matters that fall within the agency's regulatory responsibilities or its technical and scientific expertise. However, DOJ conducts its own independent and rigorous review of each referral to determine whether judicial enforcement is in fact warranted. The DOJ attorney must satisfy himself or herself as to the legal and factual sufficiency of the proposed claims and will independently evaluate the strength and weaknesses of the agency's interpretation of the law. The DOJ attorney will also consider strategic and programmatic concerns. For example, DOJ staff may conclude that, under the particular facts and circumstances of the case, the referring agency is unlikely to achieve its intended goals or its purpose would be better served through other means or in other cases.

Another consideration is whether the case raises environmental justice concerns. The concept of environmental justice relates to the fact that low-income and minority communities have historically borne disproportionately greater adverse public health and environmental effects from polluting industries and environmental violations than have other communities. A 1994 Executive Order directs

all federal agencies to be sensitive to such disproportionate impacts and to take steps, to the extent possible within existing programs, to minimize or reduce the burdens imposed by pollution on environmental justice communities. Exec. Order 12898, 59 Fed. Reg. 7629 (1994). While environmental justice concerns tend to be more of an issue in the context of siting decisions or in issuing permits to polluting facilities, they can be relevant and are taken into account by DOJ and agency attorneys in prioritizing among potential enforcement actions and in crafting appropriate relief in individual cases, particularly where the case presents adverse health impacts to the affected population.

Finally, the DOJ attorney must be sure that the positions taken in the case are consistent with those being taken by the government in other cases and that filing the case is consistent with the overarching goals of the Executive Branch. 6 U.S. Op. Off. Legal Counsel 47, 54 (1982). As Solicitor General Olson explained when he was the Assistant Attorney General of DOJ's Office of Legal Counsel:

[T]he Attorney General alone is obligated to represent the broader interests of the Executive. It is this responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive, are given a paramount position over potentially conflicting interests between subordinate segments of the government of the United States which uniquely justifies the role of the Attorney General as the chief litigator for the United States. Only the Attorney General has the overall perspective to perform this function.

Id. at 54. As a result, DOJ plays a role that differs from that of a private attorney because it not only must vigorously represent the interests of the client agency, but it must exercise its independent judgment as to what is in the best interests of the United States.

If the designated DOJ counsel decides to recommend filing a case, he or she prepares a complaint, an approval memorandum, and a briefing memorandum. The briefing memorandum contains a description of the legal and factual background of the case, the proposed claim, the evidence supporting each element of the claim, potential defenses and other issues that might arise in the case, and the proposed relief. It is not intended to be an "advocacy piece," but presents an objective appraisal of the strengths and weaknesses of the claim and a candid discussion of other factors that might influence a

decision to file the case.

This “briefing package” is reviewed by a number of people, including experienced supervisors within the staff attorney’s Section. It is then submitted to the supervising Deputy Assistant Attorney General and Assistant Attorney General (or, if approval authority is delegated to Section management, to the Chief or Deputy Chief of the Section) for final review and approval. In particularly noteworthy or legally significant cases, it is not unusual for the Assistant Attorney General to meet with senior managers of the client agency, as well as other agencies that have an interest in the matter, before making a decision regarding the filing of the case.

Even after DOJ management has approved and signed the complaint, it is typically not filed right away. Instead, Executive Order 12988 requires that, absent exigent circumstances such as an impending statute of limitations deadline or concerns that the defendant will dissipate its assets, DOJ gives the prospective defendant notice of the proposed claim and an opportunity to settle prior to filing. Exec. Order 12988, 61 Fed. Reg. 4729 (1996). In fact, it is not at all unusual for settlement negotiations to commence even prior to approval of the complaint where a prospective defendant has indicated a willingness to settle.

This pre-filing notice usually consists of a relatively short summary of the alleged violations (often referring to more lengthy documents or letters from the client agency) and sought-after injunctive relief or penalty, and a date certain by which the defendant must respond. Occasionally, we in ENRD hear that defense counsel were surprised that the case was filed even though they admit they received such a notice. It is always surprising to us when we do not receive a response to an Executive Order letter, because we *will* file the case precisely when we said we would in the letter.

In addition to the Executive Order notice requirements, many environmental statutes require notice of the commencement of the action to the relevant state regulatory agency. *See, e.g.*, CWA § 309(g), 33 U.S.C. § 1319(g); CAA § 113(b), 42 U.S.C. § 7413(b); RCRA § 3008(a)(2), 42 U.S.C.

§6928(a)(2). In addition, as a matter of policy, when ENRD plans to initiate a civil action in a state, we also advise the relevant State Attorney General's Office to provide it advance notice and give it an opportunity to join the litigation. If the State chooses to join, the United States will normally share any penalty with the State, provided that it has independent legal authority for assessing a penalty and actively participates in the prosecution of the case.

The Complaint

Most civil environmental complaints that DOJ files follow a recognized format. They each commence with a statement identifying upon whose authority and behalf the complaint is being filed, followed by a short statement of the nature of the action. The complaint then describes the basis for the court's jurisdiction and venue, summarizes the statutory, regulatory and factual background of the case, and includes one or more claims for relief, specifying in more detail the violations or grounds for the defendant's liability.

An essential feature of each complaint is the prayer for relief. Typically, ENRD's civil complaints seek one or more of the following: (1) an injunction to stop an illegal action, require defendant to correct damage caused by the illegal action, or require defendant to come into compliance with the law; (2) an order that defendant pay an appropriate civil penalty for the violation; or (3) an order that defendant reimburse the government for its expenses in responding to the polluting event or in mitigating or restoring injuries to federally protected natural resources.

If the violations are ongoing, an injunction will be sought to stop the violations and prevent further harm to the environment or public health. In cases where the unlawful conduct must be stopped immediately – for example, where pollutants are being discharged immediately upstream of a drinking water intake (as in United States v. Penn Hills (W.D. Pa.)) or a company facing substantial environmental liabilities proposes to sell its largest asset for inadequate value (as almost occurred in United States v. ASARCO (D. Ariz.)) – a motion for temporary restraining order or preliminary injunction will often

accompany the complaint. If the violations cannot be stopped immediately, the court will be asked to impose a compliance schedule, requiring the defendant to come into compliance as quickly as feasible, as well as take interim measures to reduce the severity of the violations. Examples of such cases include United States v. Alisal Water Co. (N.D.Cal.), in which ENRD acted to protect the safety of drinking water supplied to residents in California's Monterey County by obtaining a court-appointed receiver to take over the privately-owned drinking water companies supplying them with water, and a series of consent decrees with large municipalities, including Miami, Atlanta, New Orleans, Baltimore, Cincinnati, and Toledo, providing for both interim measures and long term control plans to address unauthorized discharges from their sanitary sewer collection and treatment systems. Such compliance plans may require the defendant to apply for applicable permits, install or upgrade pollution control equipment, change its methods of operations, or improve its operations and maintenance procedures.

When a defendant's cessation of violations and future compliance with the law will not fully redress the harm its violations have caused, ENRD's complaints have sought injunctive relief designed to mitigate the injuries caused by the polluting event. For example, in oil spill cases, defendants have been ordered to clean up the spill; in CWA wetland fill cases, defendants are usually ordered to remove the fill; and in RCRA illegal dumping cases, defendants are required to undertake corrective action to address threats posed by their discarded wastes. Even in cases in which the defendant's pollution has dissipated or been combined with other pollution so that it is not readily identifiable, complaints have increasingly sought some form of mitigation for the past harm. For example, in a series of actions filed against manufacturers of heavy duty diesel engines, in which the United States alleged that defendants' violations of CAA standards in the manufacture and sale of those engines resulted in substantial increases in air pollution, the complaint sought (and the settlement contained) defendants' commitments to produce and sell cleaner engines than required by EPA standards and undertake other projects designed to partially offset the increased pollution. See also United States v. Alcoa, Inc., 98 F. Supp. 2d

1031 (N.D. Ind. 2000) (defendant may be required to help remediate sediment contaminated in part by PCBs that it discharged in violation of CWA).

Civil penalty demands are another major form of remedy requested in most civil environmental enforcement cases. Civil penalties punish a defendant for its violations and deter future violations, not only by the defendant, but by others as well. Most federal environmental laws specify maximum penalty amounts for each violation and a set of statutory factors to guide judicial penalty determinations. For example, Section 113(e) of the CAA requires the court to consider “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 the economic benefit of noncompliance, and the seriousness of the violation.” 42 U.S.C. 7413(e). *See also* CWA § 309(d), 33 U.S.C. 1319(d).

Disgorgement of any economic benefit reaped from the violation is essential to ensure a level playing field among regulated entities; otherwise, the violator will have profited from its violations and placed its competitors at a disadvantage. For this reason, economic benefit usually serves as a floor below which the penalty should not be mitigated. Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1141 (11th Cir. 1990) (“Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations”); United States v. Smithfield Foods Inc., 191 F.3d 516 (4th Cir. 1999); United States v. Municipal Authority of Union Township, 150 F.3d 259 (3rd Cir. 1998).

If the complaint includes a penalty demand, it will usually only recite the statutory standard (e.g., “up to \$27,500 per day for each violation”) and does not give a precise amount. However, before the complaint is filed, DOJ, in consultation with the client agency, normally has determined an appropriate penalty range for the case. EPA has an elaborate set of penalty policies that govern what it will demand in administrative penalty proceedings and that also guide the agency’s recommendations to DOJ in judicial cases. In particular, EPA will use a computer model (known as the “BEN model”) to estimate

the economic benefit of noncompliance or delayed compliance resulting from a violation. While neither the penalty policy nor the BEN model is used as evidence in federal court, they are frequently used to assist in determining an appropriate pre-filing settlement number.

Finally, a number of federal environmental protection statutes – such as CERCLA, CWA, and OPA – provide for recovery of government expenses incurred in cleaning up a hazardous waste site or responding to a spill of oil or hazardous substances, as well as recovery of the cost of restoring, replacing, or mitigating natural resources injured by hazardous substance spills or releases. If the complaint seeks money owed to a federal agency, the amount will ordinarily be stated specifically, but if the work is ongoing it will also be accompanied by a request for declaratory judgment for future costs of that same type.

Litigation Considerations

Once a case is filed, government counsel focus first on meeting their initial obligations under the Federal Rules of Civil Procedure and any applicable local rules, concerning mandatory disclosures, meeting with counsel, and organizing discovery. In addition, counsel must address whether the trial will take place in an “electronic courtroom.” DOJ attorneys will routinely meet with opposing counsel early on to discuss a proposed case management order, initial disclosures, discovery protocols, exchange of expert reports, and scheduling issues.

For case management purposes, DOJ will generally seek “trifurcation” in CERCLA cases and “bifurcation” in non-CERCLA enforcement cases. Bifurcation simply means that the case management order provides that liability will be decided first and that discovery in the first phase will be limited to those issues, with the second phase addressing remedy and penalty. “Trifurcation” is unique to CERCLA cost recovery cases in which a third phase is added to address the statutory contribution claims of persons found liable in the first phase by allocating recoverable response costs as determined in the second phase among themselves and any third-party defendants. *See* 42 U.S.C. 9613(f).

In cases involving review of an EPA cleanup decision or other agency decision-making, the government will submit and certify the administrative record on which the decision was made and move to limit discovery and restrict the court's review to the administrative record. *See, e.g.*, 42 U.S.C. 9613(j)(1); United States v. Iron Mountain, 987 F. Supp. 1244, 1249 (E.D. Ca. 1997). For factual matters subject to discovery, DOJ will often look to the Manual for Complex Litigation in encouraging common document repositories, common definitions, and production of documents on CD-ROM. The issue of liability in environmental cases is frequently susceptible to summary judgment disposition, especially where evidence of the violations derives from defendant's own discharge monitoring reports or emissions data. *See* Sierra Club v. Simkins Industries, 847 F.2d 1109, 1115 n.8 (4th Cir. 1988); United States v. Murphy Oil USA, Inc., 143 F. Supp. 2d 1054, 1112 (W.D. Wis. 2001).

The advent of digital technologies is having a dramatic impact on pre-trial discovery and trial presentation. *See* Federal Judicial Center, *Effective Use of Courtroom Technology: A Judge's Guide to Pre-trial and Trial* (2002). It is becoming increasingly common to have document collections scanned, organized, and produced on electronic media. This in turn facilitates presentation of evidence at trial through electronic means which allows trial counsel to place exhibits on monitors throughout the courtroom and then direct the witness' attention to particular passages highlighted on the screen. It also allows for powerful opening and closing arguments in which demonstrative and real evidence can be woven together in a presentation that dramatically conveys the key elements of proof. In one recent case, for example, key documents obtained from the defendants were interspersed with animated graphics depicting the actions described in the documents. In addition, at the close of trial in two recent cases, the United States submitted its post-trial briefs electronically and, at the Court's request, included hyperlinks to each passage of the trial transcript, each exhibit, and each case cited in the post-trial brief.

As will be discussed later in this article, the stakes in civil enforcement cases – in terms of environmental impacts and costs of compliance – have increased dramatically in recent years. One

consequence is in the number of cases that go to trial, which now occurs on an average once every six to seven weeks. In 2003, for example, trials were held in the first two of a series of CAA New Source Review actions against the coal-fired electric power industry, in four CERCLA actions, and two CWA cases. However, jury trials are still an infrequent occurrence in civil environmental enforcement cases. Although defendants are entitled to a jury trial on the issue of liability where the United States is seeking a civil penalty, regardless of whether it is also seeking injunctive relief (see Tull v. United States, 481 U.S. 412 (1987)), requests for jury trials happen only occasionally. Moreover, CERCLA, CWA and OPA cost recovery claims are in the nature of equitable restitution and, therefore, are not subject to jury trial rights. See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir.1987).

Settlements

As noted above, Executive Order 12988 requires that DOJ must, absent exigent circumstances, give the proposed defendant notice of the intended action and an opportunity to settle before filing a civil complaint. Even after a complaint has been filed, DOJ will ordinarily consider reasonable settlement offers. In most cases, resolution of a civil claim through a negotiated settlement is preferable to litigating the case to judgment because it minimizes transaction costs, conserves the resources of the parties and the court, and can expedite compliance, clean up or other relief. Settlement also affords the parties greater flexibility in fashioning relief that meets their mutual needs than might be available if the matter were fully litigated. See, e.g., U.S. v. Charles George Trucking, Inc., 34 F.3d 1081, 1090 (1st Cir. 1994) (upholding decrees that resolved potential claims for damages to natural resources not included in complaint); United States v. Smithfield Foods, Inc., 982 F. Supp. 373, 375-76 (E.D. Va. 1997) (supplemental environmental projects permissible as part of a settlement, but cannot be ordered as relief by the court). For this reason, despite the recent increase in number of cases being tried, the vast majority of civil environmental enforcement cases are still resolved through settlement.

Because of the preference for settling cases, DOJ has a policy of encouraging the use of alternate dispute resolution (ADR) techniques to resolve environmental disputes. *See* DOJ, Promoting the Broader Appropriate Use of Alternate Dispute Resolution Techniques, OBD 1160.1 (1995). ENRD has successfully utilized a range of ADR tools, including non-binding mediation, early neutral evaluations, neutral expert evaluations, and mini-trials.

Once an agency has referred an enforcement matter to DOJ, it is usually settled through a consent decree lodged with and entered by a federal court. This is especially true for settlements that include injunctive relief that must be carried out over time and will be subject to agency and, ultimately, judicial oversight. In some instances, the use of a judicial consent decree is statutorily mandated. *See, e.g.*, CERCLA § 122(d)(1)(A), 42 U.S.C. 9622(d)(1)(A) (covering agreements to conduct remedial actions). To expedite negotiation and review of consent decrees, ENRD uses model settlement documents where appropriate. Model settlement documents are particularly useful in CERCLA cases (*see, e.g.*, Model CERCLA Remedial Design/Remedial Action Consent Decree; Model Past-Cost Consent Decree; Model De Minimis Party Consent Decree). While models can never supplant site-specific evaluation and considerations, they can save a tremendous amount of time in preparation, negotiation, and review of documents, and can avoid “re-inviting the wheel” in each case.

Before DOJ attorneys, in consultation with the client agency, will settle a case, they need to be satisfied that the relief proposed will adequately address the alleged violations. As noted above, this relief ordinarily includes an injunction requiring defendant to cease its illegal conduct, to undertake cleanup, corrective action or other measures to mitigate the harm caused by the violations, or to implement a compliance plan to ensure the violations will cease within a reasonable period of time. The details of these compliance measures are often set forth in work plans, statements of work, or technical appendices attached to and made an enforceable part of the decree. Increasingly, settlements also require defendants to undertake environmental audits or implement environmental management systems,

especially for larger corporations or companies whose violations are linked to inadequate management control over environmental decision-making. *See* NEIC, Compliance-Focused Environmental Management System (CFEMS) - Enforcement Agreement Guidance (Aug. 2002); EPA Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects (2003). To ensure that all of this work is done properly and in a timely fashion, stipulated penalty provisions are included as an essential feature of every consent decree that requires compliance, cleanup, or other injunctive relief.

Most settlements also include a civil penalty, paid to the United States Treasury or shared with a co-plaintiff State, that not only recoups the economic benefit of noncompliance, but imposes an additional amount to sanction the violator and deter future violations. Because of the important deterrent role that civil penalties play, decrees must refer to payments to the United States as “civil penalties” and not just a “payment” made in settlement of the case.

In considering what relief should be imposed, the United States considers the financial condition of companies. Compliance with the law and correcting environmental damage are a priority and must be achieved, but the resources of the company are taken into account in determining the compliance schedule and the amount of penalties ultimately imposed. Determining a defendant’s ability to pay often requires a sophisticated expert analysis. Within EPA, NEIC or Regional financial analysts may undertake this analysis. In DOJ, ENRD frequently seeks the expert assistance of financial analysts in the Corporate Finance Unit of the Antitrust Division. In determining what is appropriate relief in a case, it is never the goal to put a legitimate enterprise out of business, but rather to attain compliance with the law in a reasonable time frame and to ensure that the company’s future operations are conducted in a manner that protects public health and the environment.

In appropriate circumstances, settlements may include supplemental environmental projects (SEPs). SEPs are environmentally beneficial projects that a defendant agrees to undertake in settlement

of an enforcement action, but is not otherwise legally required to perform. The government then takes that commitment into consideration in setting its civil penalty settlement demand, which will be less than it would have been without the SEP. All SEPs must satisfy requirements detailed in a series of EPA policies, including that there be a nexus between the project and the alleged violations, that the project not reduce the penalty below the defendant's economic benefit, and that the defendant commit to performance of the project rather than the mere payment of money. *See, e.g.*, Final EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24796 (1998).

SEPs can include public health projects, pollution prevention and reduction projects (such as school bus retrofits or removal of hazardous feedstock or raw materials from a manufacturing process), environmental restoration projects (such as conservation easements and brownfield development projects), certain audits and environmental assessments, and emergency planning and preparedness projects. SEPs are especially important in addressing violations that impact environmental justice communities because they provide for projects that help mitigate the cumulative adverse impacts on the community resulting from multiple sources of pollution not necessarily attributable to the defendant's violations.

A central component of any settlement is the "resolution of claim" provision or "covenant not to sue." This provision is carefully drafted to make clear that the settlement resolves only those claims alleged in the complaint. A civil consent decree will not, for instance, ever provide a release of criminal liability. Criminal matters are handled separately and must be raised directly with the criminal prosecutors. In addition to these provisions, other typical provisions describe the parties bound, dispute resolution and force majeure procedures, reporting, record-keeping and inspection requirements, the court's continuing jurisdiction, and the decree's effective date and termination.

Public notice and comment is an important part of the settlement and consent decree process. CERCLA section 122(d)(2) requires public comment on agreements pertaining to remedial action. 42

U.S.C. 9622(d)(2). In addition, since 1973, DOJ policy has been to seek public comment on consent decrees that enjoin discharges of pollutants. *See* 28 C.F.R. 50.7. In practice, this means that most federal consent decrees include a provision stating that the settlement will be lodged with the court and provide an opportunity for public comment, as well as a reservation of the United States' right to withdraw or withhold its consent if the public comments indicate that entry of the consent decree would be inappropriate, improper, or inadequate. Concurrent with lodging, a notice is published in the *Federal Register*, usually giving a 30-day opportunity to comment, and consent decrees are made available to the public on the internet at the DOJ website. All comments submitted during the established time frame are carefully reviewed and evaluated. Comments can range from a favorable review of the settlement to very technical comments by interested parties to opposition by non-settling defendants. If modifications are necessary based on the comments, further negotiations may be required with the settling parties.

If the comments do not lead the United States to conclude that changes are needed, then DOJ will move to enter the consent decree. The motion to enter will discuss the basis for the settlement and the applicable law and will attach and review all of the comments submitted. Courts have established the standard for entry to be whether the settlement is "fair, reasonable, and in the public interest," and have recognized the advantages of resolving cases through settlement and the deference that must be accorded the government in negotiating the terms of the settlement. United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1084-85 (1st Cir. 1994); United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990).

Once the court enters the consent decree, it becomes a court order that can be enforced in subsequent actions. For example, in 1998 the United States brought CAA enforcement actions against most of the major manufacturers of heavy duty diesel engines in the United States. It simultaneously filed consent decrees with each manufacturer in which each agreed to extensive injunctive relief to build cleaner new engines, pay a collective penalty of \$83.4 million, undertake projects to further reduce

nitrogen oxide emissions at a cost of \$109.5 million, and rebuild the older engines to cleaner levels. In addition, the decrees provided for per engine penalties for engines that did not meet the cleaner emission levels that took effect under the decrees beginning October 1, 2002. After substantial public comment by a variety of sources, the district court entered the consent decrees in July 1999. All of the engine manufacturers complied with the consent decree terms except one company, which advised EPA that it would not meet the October 2002 emission limits on the decree and moved to amend the consent decree to avoid paying the penalties to which it had agreed. The United States opposed, and the Court rejected the motion and “defendant’s attempt to invoke calamitous scenarios resulting from a decree they voluntarily entered into four years ago and failed to challenge until the eve of its key requirements.”

United States v. Caterpillar, Inc., 227 F.Supp 2d 73, 86 (D.D.C. 2002).

Recent Trends and Developments in the Federal Enforcement Docket

The civil environmental enforcement docket is not static. It changes daily based on the progress of investigations, the emphasis and priorities of client agencies, the willingness of parties to settle, and the disposition of courts. It also reflects broader changes in the law as new regulations are promulgated and new areas of noncompliance are identified and enforcement actions taken.

The relative distribution of regulatory enforcement cases among the major environmental protection statutes has not changed significantly over time. Clean water and clean air cases dominate, constituting around 40% each, give or take a few percent. RCRA cases constitute around 15 % of enforcement cases. While there has been a modest increase over the years in the relative number of CWA enforcement actions and a corresponding modest decrease in the relative number of RCRA and CAA cases, for the most part, the relative distribution of regulatory enforcement cases among clean air, clean water, hazardous waste, and other enforcement actions has remained remarkably consistent over time.

There have, however, been dramatic changes in the nature and scope of the cases that comprise

the civil judicial docket. During the past decade there has been a marked shift away from smaller cases with more limited environmental impacts to cases addressing violations that have much greater impacts on public health and the environment. There has also been a steady shift from single-media to multi-media cases. And, while a majority of cases continue to allege violations that arise at a single facility or from a single event, there has been a dramatic increase in the number of cases that address multiple facilities or arise from a series of events.

For example, ten years ago, the CAA stationary source docket was dominated by cases brought under the National Emission Standards for Hazardous Air Pollutant (NESHAP) for asbestos for the improper renovation or demolition of buildings with asbestos-containing materials. Although these violations were certainly significant, given the extremely hazardous nature of friable asbestos, their health and environmental impacts were usually confined to the area in or immediately adjacent to the construction site. Today, these cases are only a small part of the docket and are routinely handled administratively. Instead, a majority of CAA stationary source cases now focus on heavily polluting industries, such as coal-fired power plants, oil refineries, wood products facilities, and chemical plants, whose illegal emissions have far-reaching adverse impacts well beyond the immediate vicinity of the plant. Likewise, the CAA mobile source docket, which once included lots of suits against auto repair or muffler shops for faulty replacement of catalytic converters, has now given way to far more significant actions against major automakers, such as Honda, Ford, General Motors, and Toyota, for manufacturing and selling tens of thousands of vehicles in violation of air pollution control standards.

A similar transformation has occurred in enforcement of other environmental statutes. For example, ten years ago, the CWA docket included a number of cases alleging inadequate primary or secondary wastewater treatment by small municipalities that were probably more in need of federal grants than federal enforcement action. Today, the CWA docket is filled with cases – both in active litigation and in negotiation – against some of the nation’s largest cities for failing to maintain or upgrade

their aging sewage treatment systems or address overflows of untreated sewage from faulty or inadequate collection systems. Similarly, whereas ten years ago, cases brought for illegal discharges from pipelines, tanks, or impoundments would have focused on a single spill, it is now common in such cases for EPA and DOJ to investigate whether there has been a pattern of such spills and, if so, to seek system-wide relief. Two recent examples are United States v. Olympic Pipe Line Co. (W.D. Wash.), in which co-defendant Shell Pipeline Company agreed to spend approximately \$80 million to restore and maintain its 2,100 mile pipeline running through seven states, and United States v. Colonial Pipeline Co. (N.D. Ga.), in which Colonial agreed to undertake a comprehensive maintenance and repair program for its entire 5,500 mile pipeline spanning nine states from Texas to New York Harbor.

The docket has also been greatly influenced by inspection trends. In prior years, it was fairly common to have what was referred to as a “single media” case in which violations of only one statute were alleged. That did not mean that there were no other violations occurring at the facility, only that the inspector was charged with – and trained to address – only that one subject matter area. Today, it is far more common for EPA to refer, and DOJ to initiate, “multi-media” cases in which violations of several environmental statutes are investigated and alleged in a single complaint. A good example is a case brought against Morton International in which the defendant agreed to pay a \$20 million civil penalty for violating six environmental statutes at its chemical plant in Moss Point, Mississippi, as well as conduct multi-media environmental audits at 23 other facilities.

Probably the most significant changes in the civil environmental enforcement docket are attributable to EPA’s decision in the early 1990’s to embark upon a series of sector-based initiatives. These initiatives began with far-reaching investigations of major polluting industries to determine whether there was a discernible pattern of noncompliance, followed by a series of enforcement actions designed to address the worst violations first. Probably the best example of these sector-based initiatives is the series of civil actions brought to enforce the New Source Review provisions of the CAA, first

against wood products industry giants Louisiana Pacific, Georgia Pacific, Willamette, and Boise Cascade, followed by enforcement actions against a number of petroleum refiners, corn products and ethanol producers, and coal-fired electric utilities. In each instance, EPA uncovered a pattern of major modifications within the industry undertaken without the benefit of permits and pollution controls to address increased emissions resulting from the modifications. Unlike the typical single-facility, single-media case that dominated the civil judicial docket a decade ago, these cases tend to be broader in scope and much more complex and resource-intensive, with significantly greater consequences in terms of both environmental impacts and costs of compliance. To take just one recent example, in an April 2003 settlement, the Virginia Electric Power Company (VEPCO), one of the nation's largest coal-fired electric utilities, agreed to pay a \$5.3 million civil penalty, undertake about \$14 million in supplemental environmental projects, and install \$1.2 **billion** in modern pollution controls on twenty electricity-generating units at its eight plants. These capital improvements are expected to reduce by 235,000 **tons** per year the company's emissions of nitrogen oxides and sulfur dioxides, which are major causes of smog and acid rain.

DOJ's environmental enforcement efforts have been unusually successful in the last few years. In three well-publicized press events in 2003, DOJ announced key enforcement accomplishments and priorities in both civil and criminal enforcement. For example, in March 2003, the Attorney General announced that ENRD had just completed the most successful two years in its history in obtaining injunctive relief in litigation and settlements. Specifically, in Fiscal Year 2001 and Fiscal Year 2002, ENRD secured approximately \$7.95 billion worth of environmental remediation, environmental controls, and environmental safeguards through vigorous enforcement of existing laws.

At that time, the Department also announced three priorities for civil environmental enforcement. These priorities are 1) leveling the corporate playing field by ensuring that companies that violate environmental laws by avoiding or short-cutting environmental protection do not gain an unfair economic

advantage over their law-abiding competitors; 2) maintaining the integrity of our nation's infrastructure through vigorous enforcement of laws relating to pipeline safety, leaky storage tanks, endangerment from chemical and manufacturing plants, and threats to public drinking water systems; and 3) conserving the Superfund (which provides funding for the cleanup of contaminated hazardous waste sites) by recovering cleanup costs from those responsible for the contamination and returning the money to the Superfund to help sustain the fund and support the cleanup of additional dangerous sites.

In September 2003, the Attorney General and Secretary of Transportation announced the Hazardous Materials Transportation (or Hazmat) Initiative. This criminal enforcement initiative uses available tools in environmental and safety law to deal with potential security threats from the illegal transport of hazardous materials and targets violators of hazmat requirements in all transportation modes. The Attorney General simultaneously announced the first major successful prosecution under this initiative, which involved Emery Worldwide Airlines, Inc., entering a guilty plea to twelve felony violations of the Hazardous Materials Transportation Act. Pursuant to its plea, Emery will pay a \$6 million criminal penalty and will develop a compliance program to detect and prevent future violations.

Finally, in December 2003, the Attorney General announced that the fiscal year just completed was a record breaking year for the recovery of civil penalties in environmental cases. Court awards and consent decrees achieved by ENRD and United States Attorney's Offices resulted in more than \$203 million in penalties for civil violations of the nation's environmental laws. In contrast, during the three previous years, awards averaged approximately \$75 million. Of the \$203 million in civil penalties recovered, \$144.6 million were assessed for violations of the CAA, \$53 million for violations of the CWA or OPA, \$4.3 million for violations of CERCLA, and \$920,000 for violations of RCRA. ENRD also obtained the largest civil penalty in history against a single company for violations of an environmental statute when it settled a CWA enforcement action against the Colonial Pipeline Company for a \$34 million penalty and a comprehensive repair and maintenance program for its 5,500 mile

pipeline. The case resolved charges that Colonial violated the CWA on seven occasions by spilling 1.45 million gallons of oil from its pipeline in five states.

Conclusion

Environmental enforcement and dedication to the rule of law are necessary to assure the protection and improvement of human health and the environment. While ENRD is proud of the accomplishments so far in this area, there remains much to do. Enforcement is, by its very nature, the last step in the process of laws, regulations, voluntary compliance, auditing, environmental management systems, consultants, and permitting. Most companies are doing their best to understand and comply with the law. Companies that do not, however, not only endanger others and injure a sometimes fragile environment, but may also gain a competitive advantage over companies spending money to put on necessary pollution abatement equipment or setting in motion protective measures to avoid spills, leaks, explosions, or hazard waste accidents. For all those reasons, enforcement remains an essential component of protecting public health and our natural resources, ensuring compliance with environmental laws, and promoting a level playing field.