

**Statement of Scott H. Segal  
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Before the Subcommittee on Energy Policy, Natural Resources  
and Regulatory Affairs  
Committee on Government Reform  
United States House of Representatives**

**Hearing on the Status of U.S. EPA Enforcement Programs  
Ipswich Town Hall - Ipswich, Massachusetts  
October 14, 2003**

Chairman Ose, Congressman Tierney and Members of the Subcommittee, thank you for this opportunity to testify regarding the current state of EPA enforcement programs. My name is Scott Segal, and I am a partner at the law firm of Bracewell & Patterson. In that capacity, I have represented clients in Washington on environmental policy matters for fourteen years. I have worked with a wide variety of federal agencies, and have become familiar with a number of industrial sectors. I have represented private corporations, trade associations, and non-profit organizations. In addition, I serve on the adjunct faculty of the University of Maryland (University College) in the area of Science and Technology Management. I represent many groups that have taken an active interest in environmental enforcement matters. While I have learned much from these clients, the views I express today are my own.

**1. Indicators of Environmental Protection *and* Environmental Enforcement are Positive**

In the United States today, we have much to be proud of when we contemplate the success of environmental programs. It should not be surprising that the numbers of fines and lawsuits being brought under environmental statutes has declined, since our environmental efforts have been largely successful over the past three decades. It is clear that substantial environmental progress has been made since the adoption of major control statutes. Gregg Easterbrook, a senior editor at the *New Republic*, wrote recently:

In the past decade...all pollutants regulated by the Clean Air Act have declined nationally. Airborne lead concentrations were down 56 percent during the '90s, sulfur dioxide (the main cause of acid rain) and carbon monoxide ("winter smog") emissions fell 25 percent, nitrogen dioxide (a smog factor) dropped 14 percent, and ground-level ozone fell four percent, even as the consumption of gasoline...has skyrocketed. U.S. water is cleaner as well; the proportion of lakes and rivers classified as "safe for fishing and swimming," about one-third in 1970, is up to about two-thirds. Toxic emissions declined 44 percent nationally in the last decade, even as domestic petrochemical manufacturing rose. Nearly every other trend is positive, too.<sup>1</sup>

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<sup>1</sup> Gregg Easterbrook, *Enviros' Bad Math: Sunny Side Up*, New Republic Online (June 19, 2000), available at <http://www.tnr.com/061900/easterbrook061900.html>.

The case of water quality achievement is particularly impressive. Since the adoption of the Clean Water Act in 1972, the United States has spent over \$100 billion in meeting our water quality objectives. Today, twice as many assessed waters meet national goals, and wetlands losses occur at one-quarter the previous rate. When the Act was adopted, sewage treatment plants served only 85 million Americans; today, with the construction of some 14,000 new facilities, 173 million are served. With industrial discharges down over 100 million pounds, 89 percent of the U.S. population is served by water systems reporting no health standard violations.<sup>2</sup>

Additionally, EPA's commitment to a strong enforcement program has shown no indication of weakening, and in fact enforcement programs have been the beneficiaries of much larger budget increases than their compliance-oriented counterparts. For example, in Fiscal Year (FY) 2003 the administration requested an increase of almost \$16 million for enforcement programs, while seeking only an additional \$103.9 thousand for compliance incentives and assistance programs.<sup>3</sup> This trend continued in FY 2004, when the administration requested an increase of almost \$26 million for enforcement programs, compared with an increase of \$2.5 million for compliance incentives and assistance programs.<sup>4</sup> The request for \$26 million in additional funds and more than 170 additional Full-Time Employees dedicated to enforcement efforts reflects EPA's continued commitment to enforcement programs.<sup>5</sup>

A complete analysis of environmental enforcement cannot ignore the fact that while EPA sets standards and priorities, States undertake most enforcement actions. As the Agency has explained to Congress,

State, tribal, and local governments bear much of the responsibility for ensuring compliance, and EPA works in partnership with them and other Federal agencies to promote environmental protection...Coordinating its activities with the states, EPA will continue to support deterrence and compliance activities by focusing its compliance monitoring on site inspections and investigations.<sup>6</sup>

Relying on a strong partnership with state enforcement officials, the goal of cooperative federalism, is not a novel approach to effective environmental protection. In fact, the EPA, during the Clinton Administration, affirmed the leadership role of the states and called for new

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<sup>2</sup> Jack M. Hollander, *The Real Environmental Crisis* (2003) at 103-04.

<sup>3</sup>U.S. EPA, Summary of The EPA's Budget for FY 2003, available at: <http://www.epa.gov/ocfo/budget/2003/2003bib.pdf>

<sup>4</sup>U.S. EPA, 2004 Annual Performance Plan and Congressional Justification, available at: <http://www.epa.gov/ocfo/budget/2004/2004cj.htm>

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

efforts to "improve the capacity of states, localities, and tribes to conduct enforcement and compliance assurance programs."<sup>7</sup>

A cooperative relationship with the states has helped protect the environment over the past three decades. While EPA critics point to the number of enforcement actions and lawsuits, these measures are not a proper tool for judging environmental protection. Mark Coleman, the former Executive Director of the Oklahoma Department of Environmental Quality and Chairman of the Compliance Committee of the Environmental Council of the States (ECOS) testified before the Senate Committee on Environment and Public Works that:

Our main goal is, and should be, reaching the environmental quality goals that Congress and our legislatures have set. No amount of enforcement and compliance activity measures will tell us anything about whether we have met, or will meet, that goal...No state would deny that enforcement is an important and necessary tool. But...an increase in enforcement actions would mean a terrible breakdown in communications between government and regulated communities had occurred. Such a breakdown would mean little chance of improvements in environmental quality.<sup>8</sup>

Furthermore, calling on EPA to centralize enforcement actions and limiting the leadership role of states will not enhance environmental protection. As Mr. Coleman has explained:

Since States have primary responsibility for enforcement in most EPA programs the national enforcement strategy cannot be implemented without active State participation. If EPA begins to aggressively pursue national or Regional initiatives without adequately involving the States, there is serious potential for damaging the EPA/State relationship.<sup>9</sup>

The practical impact of undermining State approaches to enforcement can be to slow down the rate of settlement of environmental cases by reducing the confidence defendants place in the ability of States to be the final word on a given set of facts. One leading practitioner has described the problem in this way, "from the state's perspective, the threat of EPA overfiling [state enforcement actions] may significantly undermine its ability to obtain effective settlements with regulated entities. As there is no guarantee that EPA will not decide to file another

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<sup>7</sup> U.S. EPA, Summary of The EPA's Budget for FY 2000, available at: <http://www.epa.gov/ocfo/budget/2000/2000bib.pdf>

<sup>8</sup> Mark Coleman, *Hearing on the Enforcement of Environmental Laws: Federal State Relations*, Senate Committee on Environment and Public Works (June 10, 1997) available at: <http://www.senate.gov/~epw/105th/coleman.htm>

<sup>9</sup> *Id.*

enforcement action against a company once it has settled with the state, a company's incentives to agree to such a settlement may be significantly diminished."<sup>10</sup>

In sum, EPA has shown a strong commitment to enforcement that is reflected in improved environmental quality, rising enforcement budgets, and a healthy partnership with the States. Three decades of success should not be sacrificed at the altar of statistics, which fail to fully explain the wide range of efforts being undertaken in the environmental arena.

## 2. Downside Consequences to Inflexible Environmental Enforcement

It has often been observed that at the outset of the current federal environmental programs in the early 1970's, our problems were substantial and obvious. It stands to reason that at that time, and for a period following, our environmental enforcement priorities were also fairly obvious. In many ways, as milestones of environmental achievement have been reached, our adversarial enforcement model has not caught up to reflect new realities.

In some respects, we are victims of our own success. As environmental indicators are trending in a positive fashion, the decisions we make as a society become more difficult in the area of allocation of resources. Environmental protection remains just as important, but the tools we use must become more refined. Unfortunately, while many program officers understand the need for changing priorities, enforcement officers often view the world in a binary fashion with little room for subtlety. There is a significant downside consequence to this view, since inflexible enforcement can produce perverse results. As one economist found, strict and harsh penalties undermine a cooperative approach to environmental protection, ultimately resulting in greater environmental damage.<sup>11</sup> We are all familiar with examples that illustrate the law of unintended consequences.<sup>12</sup>

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<sup>10</sup> Daniel M. Steinway, The Unsettling Effects of EPA Overfiling in State-Lead Case, originally published in the Outside Perspectives section of CCM - The American Lawyer's Corporate Counsel Magazine (Mar. 1999) available at <http://www.kelleydrye.com/resourcecenter/environmental/articles/1999/3-99%20CCM%20-%20Unsettling%20Effects%20of%20EPA%20Overfilin.PDF>.

<sup>11</sup> Nicola Jones, Heavy Environmental Polluters 'Should Pay Less', New Scientist (August 2002), (interviewing economist and scholar Richard Damania), at <http://www.newscientist.com/news/news.jsp?id=ns99992697>.

<sup>12</sup> Take, for instance, the example of the Stephens' kangaroo rat, a species the government has listed as endangered since 1988. In one enforcement action, the Fish and Wildlife Service (FWS), in compliance with the Endangered Species Act (ESA), prohibited a fifth generation farming family from plowing 800 tillable acres that are considered prime rat habitat. The family, threatened with stiff penalties (*i.e.*, a \$50,000 fine, impoundment of farming equipment, or jail time) for every "taking" of a rat, lost \$75,000 in forgone crops for four years—a total of \$300,000. Because the FWS prohibited the family from farming the land, it became overgrown and caught fire, costing the family even more money. Ironically, in the aftermath of the fire, FWS biologists determined that prohibiting the family from working their land actually

There seems to be a bipartisan consensus that such an inflexible, strictly adversarial approach makes little sense. Then-Vice President Al Gore, in his September 1994 report to President Clinton on the progress of governmental reinvention activities, observed that, "EPA Administrator Carol M. Browner, for instance, is reaching out to all parties with potential roles to play. Environmental protection, she says, can no longer succeed as an adversarial process, with the polluter on one side of the table and the offended party on the other. Now, all parties must sit and work together."<sup>13</sup> Two years later, Vice President Gore revealed the successes that could be achieved when pilot projects were adopted—sometimes over the objections of enforcement officers—such as Project XL and the Common Sense Initiative at EPA. He stated, "EPA has found that when they let companies volunteer to cut pollution without the government dictating how they had to do it, thousands of companies jumped at the chance."<sup>14</sup>

What Vice President Gore and Administrator Browner recognized from their efforts at governmental reform is what is evident today: as the nature of environmental challenges has changed, so too must antiquated notions of a purely adversarial approach to enforcement.

An excellent example of the drawbacks of reflexive enforcement is the enforcement of the New Source Review (NSR) program. An inflexible approach undermines our energy supply, environmental protection, and workplace safety. Because NSR is a costly and time-consuming process, this position discourages utilities from undertaking needed maintenance projects. This makes plants more reliant on deteriorating components, resulting in less efficient, less reliable and higher emitting power generation. As Howard Gruenspecht from the respected environmental think-tank Resources for the Future and Robert Stavins of Harvard University recently wrote:

Research has demonstrated that the New Source Review process drives up costs tremendously (not just for the electricity companies, but for their customers and shareholders, that is, for all of us) and has resulted in worse environmental quality than would have occurred if firms had not faced this disincentive to invest in new, cleaner technologies.

Our environmental enforcement programs must not create disincentives to the very activities calculated to optimize environmental behaviors. At the very least, regulatory authorities should swear a Hippocratic oath; they should do no harm.

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destroyed the critical habitat of the kangaroo rats. Thus, the kangaroo rat left the area before the fire, seeking an amenable habitat elsewhere. See <http://www.cato.org/pubs/regulation/reg16n4h.html>.

<sup>13</sup>Vice President Al Gore, *Creating A Government That Works Better and Costs Less* (Chapter III - Creative Approaches to Environmental Protection)(September 1994).

<sup>14</sup>Vice President Al Gore, "The Environment" from 1996 Annual Report: *The Best Kept Secrets in Government* (report to President Clinton regarding Reinvention of Government and the National Performance Review).

### 3. Options for the Future

As discussed, the current enforcement approach is less than optimal, often resulting in greater environmental harm than benefit. Two thoughtful legal observers have articulated a rubric for judging effective environmental enforcement. To be effective, an enforcement regime must:

- ?? be clear in what it mandates and prohibits;
- ?? be predictable in how it punishes violations of the regulations, and rely where possible on cooperative, problem-solving approaches; and,
- ?? seek environmental improvement, not numerical enforcement targets.<sup>15</sup>

If an enforcement system is to succeed in achieving additional compliance, enforcement programs must be less adversarial and of greater real assistance. As one State regulator put it, "the true measure of successful enforcement is in quantifiable improvement in our environment. Improved natural resources, not fines, must be the primary objective of any effective environmental policy." She concluded: "Allowing states to establish, develop, and implement environmental improvement policies is critical to their autonomy and the health of the environment. Heavy fines simply encourage litigation and slow environmental progress."<sup>16</sup>

The best way to serve the principles of clarity, predictability, and real environmental improvement is to pursue flexible and rational enforcement programs. Existing programs can be so confusing and can rely upon contradictory or changing interpretations, greatly reducing the ability of the regulated community to comply.<sup>17</sup> In particular, market-based solutions and compliance assurance programs are the best ways to achieve meaningful environmental protections.

Although command-and-control instruments have dominated environmental regulations over the years, tradable permit systems were used in the 1980s to phase leaded gasoline out of the market and to phase out chlorofluorocarbons (CFCs). Such market-based systems offer significant improvements in environmental quality:

The establishment of tradable lead rights in gasoline not only dramatically reduced the cost of complying with requirements to phase out the use of lead as a fuel additive, but simplified enforcement as well, by eliminating refineries' efforts

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<sup>15</sup>Alexander Volokh and Roger Marzulla, *Environmental Enforcement: In Search of Both Effectiveness and Fairness*, RPPi Policy Study No. 210 (Aug. 1996) at <http://www.rppi.org/environment/ps210.html>.

<sup>16</sup>Becky Norton Dunlop, *Environmental Enforcement: Supporting State Efforts to Encourage Voluntary Compliance* at [http://www.adti.net/html\\_files/reg/dd/dddunlop.htm](http://www.adti.net/html_files/reg/dd/dddunlop.htm)

<sup>17</sup> Jonathan H. Adler, *Anti-Environmental Enforcement* (Feb. 1, 1997)(citing "survey of 200 corporate general counsels conducted by the *National Law Journal*" which found that "fewer than one third of the responding attorneys felt that it was possible to comply fully with state and federal environmental laws."), available at <http://www.cei.org/gencon/005,01307.cfm>.

to obtain variances from regulations based on technology and feasibility defenses.<sup>18</sup>

By far, though, the most ambitious and successful market based system has been for the control of acid rain (SO<sub>2</sub>) contained in Title IV of the 1990 Clean Air Act amendments. The acid rain reductions are of special importance because they in part serve as a model for a successful market-based approach to environmental protection. The SO<sub>2</sub> allowance trading system gives utilities flexibility in meeting aggregate emissions reductions goals and may thus allow them to meet those goals at much lower cost than under normal traditional command and control approaches. Title IV has, by all accounts, been highly successful. Gregg Easterbrook wrote last summer that the results have been "spectacular. Acid rain levels fell sharply during the 90's, even as coal combustion (its main cause) increased."<sup>19</sup>

Additionally, greater emphasis must be placed on working with regulated communities to prevent environmental harm by incentivizing compliance, *i.e.*, providing technical assistance and greater regulatory clarity. EPA has already recognized the importance of compliance assurance programs:

To achieve compliance, the regulated community must understand its regulatory obligations and how to comply with those obligations. EPA supports the regulated communities by assuring that requirements are clearly understood and by helping industry discover cost-effective options to comply through the use of pollution prevention and innovative technologies....Maximum compliance requires the active efforts of the regulated community to police itself.<sup>20</sup>

EPA needs to expand these efforts by committing more fully to compliance assistance and incentives. As the New Zealand government found when it undertook a major study of its regulatory approaches realignment of incentives were able to achieve more substantial environmental benefits than command-and-control schemes. "These changes not only made important improvements in the way natural resources, such as fisheries and native forests, were used and managed, but also improved the quality of the nation's air and water."<sup>21</sup>

Analyzing actions undertaken by the New Zealand government, the George Mason University Mercatus Center noted:

EPA should step back from its tradition command-and-control, or regulate-and-enforce, approach to evaluate ways to better align the goals of the regulated community with social goals. The New Zealand approach of (1) studying

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<sup>18</sup> George Mason University Mercatus Center, Comments on the Environmental Protection Agency's Environmental Enforcement and Compliance Assurance Activities: Request for Comments, at <http://www.mercatus.org/regulatorystudies/article.php/117.html>.

<sup>19</sup> *Id.*

<sup>20</sup> *Supra* at 3.

<sup>21</sup> *Supra* at 15.

carefully the incentives involved in each situation and (2) determining how those incentives might be realigned to produce the desired outcome resulted in not only an improved outcome but also less invasive procedures by government and a better rapport between regulators and industry.<sup>22</sup>

Developing a compliance approach that works with regulated entities rather than against them is the best way to ensure compliance with environmental laws and regulations. This new enforcement agenda is necessary to place the interests of the environment and the public over the interest of bureaucrats and litigators.

Thank you for this opportunity to offer testimony. I look forward to answering any questions the Subcommittee may have.

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<sup>22</sup> *Id.*