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Approaches to Enforcement of Environmental Law: An International Perspective

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I. THE BACKGROUND OF ENFORCEMENT—EVOLVING PUBLIC ATTITUDES

The state of public awareness on environmental matters is one of the critical elements in the evolving trend toward stricter and more uniform enforcement of environmental law. The growing public concern about the environment in the 1960’s and through the 1970’s prompted varied governmental action designed to ensure more thorough consideration of environmental risks as well as more stringent enforcement in the area.¹

Underlying the post-World War II concern with all forms of environmental degradation is the massive growth in production and the availability of both public and private resources which provide the potential for dealing effectively with environmental problems. Once government has embarked on environmental programs of one sort or another, the momentum thereby established tends to create even greater public demand for further action and further enforcement. Once an official environmental body is created, that agency becomes the focal point for bringing environmental issues to the attention of the general public as well as of other government officials.

A much higher degree of sophistication and commitment on the

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part of government to do something about the environmental issues of the day is the net result of this process. Private and public interest groups concerned with environmental affairs continue to call for action and this in turn strengthens the hand of the governmental unit. This public concern with environment thus becomes institutionalized and the pressure to properly carry out the law becomes a constant. These evolving attitudes are discernable in the increased intervention by public organizations in matters of environmental concern.2

The following sections of this Article will briefly survey and analyze the characteristics of the various enforcement authorities, the forms of enforcement and classification of enforcement schemes in the United States and several Western European jurisdictions and will close with some observations on perceptible trends. The survey of various jurisdictions treats the European Economic Community (EEC) as a jurisdiction separate and distinct from its constituent parts. Particular jurisdictions have been selected for their representativeness of the civil law, common law, or Germanic law system.

II. THE ENFORCEMENT AUTHORITIES—AN OVERVIEW

No law is better than its enforcement scheme. It is also true that the first and most important step in establishing a compliance system is to determine the appropriate type of administrative structure which will carry out and monitor that system. This initial determination will in practice have a significant impact on the level and effectiveness of compliance. There are three distinct types of enforcement structures: a branch exclusively concerned with environmental protection; a branch specifically concerned with the substantive form of environmental degradation in question; and a branch having overall responsibility for coordinating environmental standards and compliance.

The first structure is one in which the controls over environmental quality and compliance are delegated to an administrative unit exclusively concerned with environmental protection. Such a unit may take the form of a government department or ministerial portfolio or some other quasi-autonomous agency. A prime example of this type of structure is found in the United States. The National Environmental Policy

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2. See, e.g., Roberts & Stewart, Book Review, 88 HARV. L. REV. 1644, 1656 (1975) ("environmental organizations had . . . convince[d] many elected officials by the late 1960's that they were a 'swing' constituency to be taken seriously").
Act\(^3\) (NEPA) mandated that federal agencies consider the environmental consequences of their actions and the environmental consequences of actions they fund or license. The Council on Environmental Quality (CEQ) was established under Title II of the Act and linked with the Executive Office of the President. It monitors and formulates environmental policy. It also advises and consults directly with the President. The Environmental Protection Agency\(^4\) (EPA) is responsible for carrying out environmental policies, and assists the CEQ in developing and recommending to the President new policies for the protection of the environment. The EPA is an independent regulatory agency concerned only with environmental matters. It has no other governmental functions. NEPA is silent on enforcement of its provisions. According to the legislative background, it was originally contemplated that the Office of Management and Budget (OMB) would enforce the Act and monitor the Environmental Impact Statement procedures.\(^5\) While there is no single agency in the federal government having overall responsibility for environmental control and compliance, the Council on Environmental Quality (CEQ) is the closest analogue to an enforcement agency. However, since its powers are merely consultative and admonitory, it cannot compel compliance with NEPA.\(^6\) Although no enforcement agency exists to guarantee compliance with the Act, the courts have taken it upon themselves to ensure that agencies comply with the NEPA provisions, in particular those provisions which relate to impact statements.\(^7\)

Within the European Economic Community (EEC), a second example of this administrative structure is found in Denmark. Danish environmental matters are dealt with by a tripartite administrative structure, consisting of the Ministry of the Environment, the Directorate of the Environment and the independent Environmental Appeal

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5. ANDERSON, supra note 3, at § 4 of the Act.

6. Shortly after NEPA's passage, Executive Order 11514 was issued, making CEQ responsible for issuing guidelines to federal agencies, for the preparation of detailed statements on proposals for legislation, and other federal actions affecting the environment, as required by § 102(2)(C) (Exec. Order No. 11514, sec. 3(h), 35 Red. Reg. 4247 (1970).

Board. The Ministry and the Directorate, with the Ministry in charge, have a broad range of duties, while the Appeal Board is the superior administrative agency. The Ministry is only partially concerned with environmental matters; it also deals with matters such as urban and rural planning and nature conservation. The Ministry, nevertheless, has a very broad legislative mandate with its enforcement authority. It is authorized to issue regulations\(^8\) and thus has significant power to control agency as well as individual actions in the environmental area. Further, the Ministry has basic authority in several fields to issue substantive decisions\(^9\) and possesses additional authority to intervene in substantive actions by lower level agencies or agency decisions taken in individual actions.\(^{10}\)

The Directorate as a unit comes under the Ministry but, in contrast to it, deals solely with environmental protection. While subordinate to the Ministry, the Directorate's field of operations and environmental expertise is quite broad. The Directorate advises the Ministry on its functions.\(^{11}\) In addition, the Directorate advises local agencies and agencies other than the Ministry;\(^{12}\) exercises delegated Ministry functions including issuance of intake/discharge guidelines;\(^{13}\) receives appeals against local agency decisions\(^{14}\) and acts as a public information agency for environmental matters.

The second administrative structure of a compliance system is one in which the competence for controls is assigned to that public agency whose field of operations is most closely associated with the particular form of environmental degradation. The work may be associated in the sense that it is negatively affected by a given type of environmental degradation, \(e.g.,\) the work of the health agency; or it may be associated in that it actually tends to create environmental problems, \(e.g.,\) the work of the transport or energy development agency. In several jurisdictions where this sort of structure is utilized, various central government departments exercise environmental control powers. Regional and local conventional public agencies, usually multi-sectoral units, simultaneously exercise controls either autonomously and in accordance

\(^9\) Id., art. 11.
\(^10\) Id., arts. 38, 47, 57, 70 (2-3).
\(^11\) Id., art. 45 (1-2).
\(^12\) Id., art. 45(1).
\(^13\) Order of 29 March 1974, No. 175 on the Assignment of Tasks and Powers to the Environment Board, Lov., 18 April 1974, No. 20, at 444 et seq.
\(^14\) Environmental Protection Act, art. 70(1).
with central government policy, or directly under central government supervision.

In many jurisdictions with the second type of administrative structure, there are numerous agencies which share some interest or responsibility for the problem. An illustration of this division of enforcement responsibility is found in Italy.

Several Italian government offices or central public agencies have powers of environmental control of either a supervisory, administrative, or executive nature. The division and overlap of environmental competences and organizational inconsistencies associated therewith reflect the lively debate in environmental circles on the role of central government and reflect on the nature of the interaction between the agencies and the central administrative apparatus. The sectoral approach in this instance translates into at least thirteen ministries having some interest in environmental control. These include, inter alia: Health, which is concerned with public hygiene and safeguarding against pollution; Public Works, which manages public water supply, planning and land conservation; Industry, which is responsible for the management of natural resources; Transport and Civil Aviation, which is responsible for the environmental ramifications of surface and air transport; Merchant Marine, which is charged with maritime matters; Agriculture and Forestry, which is responsible for agricultural activities and pollution control; Environment, which is responsible for researching environmental issues.

The structure of environmental control in Ireland is another example of this type of sectoral approach. No single Irish government agency has overall responsibility for environmental protection. Compliance duties are shared among several government departments and coordination is ensured through informal liaison committees and ex-

changes.22 The Department of Local Government has general responsibility for air and water pollution, oil pollution of coastal areas, development planning and has special sections dealing specifically with environmental and sanitary services. It is the key agency for environmental affairs. Other departments which deal with environmental problems include: Transport and Power, which has responsibility for transportation and energy, oil pollution of the sea, tourism, etc.; Agriculture and Fisheries, which has responsibility for agricultural control and fishery conservation; Industry and Commerce, which supervises prospecting licenses and mineral leases, and has responsibility for industrial development; Health, which has responsibility for environmental hygiene and supervising health boards; and Lands, which has responsibility for pollution impact on wildlife and forest development. In addition, there are regional and local authorities which have territorially limited jurisdiction in subject matters areas roughly corresponding to those of the central administration.

The third structure is a hybrid of the first two structures. In this structure, one branch has overall responsibility for coordinating environmental standards and enforcements. Such structures exist in France and the United Kingdom where central government authorities coordinate and promote environmental protection. Both countries have regional offices involved in environmental control which have original jurisdiction rather than delegated jurisdiction. The offices are subject, however, to central government supervision.

The distinct advantage of the various sectoral approaches is that those agencies most intimately associated with the subject matter of their environmental jurisdiction presumably have the knowledge and expertise to deal with it. The organizational confusion which prevails in these structures is to some extent typical of any multi-sectoral problem area confronted by central or regional government. Such organizational inconsistencies are also, in part, a reflection of rapid growth and change in the environmental field. The almost continual search for an organizational niche for noise pollution control or coastal zone management is a good example of administrative problems created by new issues or new ways of approaching old issues. A pervasive difficulty is that the lack of any single definition of the goals and nature of environmental control encourages many agencies to view one or another form of environmental degradation as within their authority. Proposals to

Comparative Environmental Enforcement Mechanisms

unify the different types of environmental control generally meet with little success.

There are no easy answers to the problems raised by the multitude of agencies and administrative departments in the environmental control field. The problems reflect the various approaches taken on environmental issues in industrialized, urban societies, and the more particular complexities of environmental quality itself.

III. FORM OF ENFORCEMENT: ENFORCEMENT FACTORS

The selection of a given form or technique of enforcement will necessarily depend on the characteristics of the specific environmental situation. One could refer to these characteristics as "enforcement factors." These factors tend in some way to favor a particular kind or degree of enforcement in each distinct factual context.

First and foremost among these enforcement factors is the type and degree of environmental degradation involved. There is no set pattern among the various jurisdictions with respect to this element. A general rule is that the severity of enforcement will vary in accordance with the perceived environmental priorities as well as with the peculiar local needs in a given jurisdiction. An example is found in the environmental control system of California. Although responsibility for controlling many types of pollution has been preempted by the federal government,23 the United States political system offers several ways for local jurisdictions, whether municipalities or states, to articulate the intensity and direction of their preferences. In California, due to a relatively unevolved mass transportation system, the phenomenally intensive use of automobiles and the local geographic conditions,24 state government has imposed vehicle emission standards which are stricter than the corresponding federal standards.25 Enforcement of those standards is quite strict.26


24. E.g., the inversion in the Los Angeles region giving rise to air quality deterioration by a reversal of the normal atmospheric temperature gradient.


Some types of environmental degradation, either because of the complexity of the subject matter or the difficulty in enforcement, may require a special mix of compliance strategies. In the area of noise abatement enforcement, for instance, the strategy of the United States federal government for enforcement of new product noise control regulations consists of a three-pronged approach: product verification, selective enforcement auditing (SEA), and in-use controls. The interesting aspect of this enforcement scheme is the SEA feature which involves the testing by a manufacturer or the Environmental Protection Agency, pursuant to an administrative request, of a statistical sample of products from a particular category or configuration. Testing would determine whether those products conform to the noise standards and provides the basis for further enforcement actions, such as recall and cease-to-distribute orders, if non-conformity exists. The Noise Control Act specifies that any person who knowingly or willfully distributes in commerce a regulated new product not conforming with the new product regulations is subject to a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or both. A similar, though less stringent set of enforcement strategies may be found in the area of water and air quality control in the European Economic Community. Since permanent monitoring is prohibitive because of cost and manpower requirements, some member states require industry to monitor its own discharges. Here again, several administrations utilize the periodic sampling technique to obtain data on violations.

A second enforcement factor is the complexity of the technology necessary to abate the pollution problem. Many kinds of environmental deterioration can be brought under control using existing technology. However, the cost of that technology is often prohibitive. Another problem is determining whether the state of the art of that technology is sufficiently developed to be economically reasonable. Legislative deadlines for achieving specific standards may be perceived as necessary to prevent further deterioration, but care should be exercised that such deadlines are realistic and thus enforceable. Unrealistic "forcing" of technology by legislation designed to influence its development may unwittingly result in falsely arousing public expectations and locking-in

30. E.g., United Kingdom. See S. EREMAN, supra note 22, at 171.
legislators politically. The offshoot of this process results in the law being enforced unevenly or not at all when a deadline arrives. Even where deadline provisions are not part of legislation or regulation, measures should be included to provide for the progressive adaptation of technical advancements as they develop so that attainable progress is not unnecessarily postponed.

There is controversy over the advisability of uniform statutorily enforceable standards, such as those which have been proposed by the European Economic Community. Opponents of these uniform standards consider it impractical or unfair to push the state of the art too far ahead of its time by the vehicle of technology-forcing legislation. By way of example, they argue that industrial emissions should be based on the principle of "best practical means." This implies that government should establish guidelines in the form of a band, with a maximum indicating levels above which there is a need for immediate action, and a minimum below which action is probably not worthwhile. Such guidelines would, however, presumably have no statutory force.

Present statutory or administrative standards in at least several Western European jurisdictions reflect a flexible, experimental approach to environmental enforcement and controls. In the Federal Republic of Germany, for example, most emission and immission enforcement standards are regulatory in nature. Such administrative controls, while binding on the enforcement authorities, are nevertheless subject to judicial standard-setting where the reasonableness of the standards is challenged.

In France, recent legislation designed to control stationary sources of pollutants subjects such sources to authorization by the local prefect. The operator of the facility applies for authorization at the time an application is made for a construction permit. The prefect may, at its discretion, order time-dependent control measures. The prefect, in addition, has broad powers to enforce compliance with its standards where the facility has not complied within stated time lim-

33. See Federal Emissions Protection Act § 48 BImSchG (Allgemeine Verwaltungsvorschrift).
34. See Gutachten zur Gesantheilastung der Wirtschaft, MATERIALIEN ZUM UMWELTPROGRAMM DER BUNDESREGIERUNG ZU DRUCKSACHE VI/2170 at 614.
Thus administrative action is the prefect’s prerogative. Administrative controls may be made more or less burdensome depending upon the nature of the particular operations.

The system introduced by the German Federal Emissions Protection Act\(^{37}\) suggests a variety of flexible standard-setting approaches along with specific technology-forcing requirements in specific instances. The system introduced by the French Classified Establishments legislation\(^{38}\) suggests a similar, two-tiered standard-setting approach for activities that fall within and without the various classifications. As classifications may be revised from time to time and are subject to broad administrative interpretation, technology-forcing is counter-balanced by the administrative authorities’ perception of the seriousness of the deleterious industrial activity and, presumably, by constantly changing local conditions.

A third enforcement factor is the nature of the polluter, individual or corporate, and the economic power of the polluter. As a particular industry gets larger, so too do the possibilities of using a series of enforcement measures to ensure ultimate compliance. A rather small enterprise has less maneuvering room in terms of the resources available to it to quickly meet compliance demands. Government attempts to enforce deadlines and timetables for various types of environmental control or small enterprises often fail. On the other hand, with larger firms, government can exert its enforcement powers with greater flexibility and, significantly, with greater economy and efficiency. For example, as a warning to industrial polluters the United States Environmental Protection Agency has "listed" a large enterprise for "continuing or recurring noncompliance with water standards" at its facilities.\(^{39}\) The effect of the listing, which was the first under federal water pollution control regulations, is to exclude the facility from using "any new, renewed or extended federal contract, subcontract, grant, subgrant, loan or subloan, which amount exceeds $100,000."\(^{40}\)

A fourth category of enforcement factors includes the economic

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36. \textit{Id.}, chapt. VII, art. 23.
38. \textit{Supra} note 30.
39. Del Monte de Puerto Rico, Inc., a subsidiary of Del Monte Corporation, and Star-Kist Caribe, Inc. This listing resulted because of continued violations of a timetable for construction or submission of plans for compliance that would make the facility eligible for a new National Pollution Discharge Elimination System Permit. Authority for the listing procedure is derived from Sec. 309(c) of the Clean Water Act of 1972, as amended (1977).
and social ramifications of enforcing pollution controls. Insuring environmental quality has become a major issue of public policy. Control of the environment is the responsibility of government, since the private sector is inadequate to deal with the costs and benefits of environmental degradation. This is so because many types of degradation and pollution are what economists call "externalities." The costs of pollution, for example, usually are not paid for by the polluter. Similarly, the benefits of controlling pollution do not accrue solely or even primarily to the person or entity that institutes the control measures. The only way in which these costs and benefits can be sensibly allocated is through a form of political action, and the unique vehicle through which it can be carried out is government. In many instances, the money and the technology are presently available to control strictly most of the environmental pollutants about which we have some knowledge.

A potentially serious conflict exists between economic development and enforcement of environmental laws and regulations. There also exists the inevitable conflict between those large enterprises subject to enforcement and the enforcement authorities. The underlying tension between the regulated and the regulators is a natural and foreseeable phenomenon. The tension is easily exacerbated by the sometimes extreme positions taken by both government and regulated entities.

The variances between the spirit and letter of the law and its enforcement have been frequently placed under the general rubric "implementation gaps," taken to mean lax enforcement in the environmental regulatory area. These implementation gaps usually relate to critical problems in enforcement tied to financial and economic considerations, scientific and technical difficulties, and the extent of power to be granted administrative authorities as these relate to the assessment and imposition of penalties for environmental damage. Apart from these types of implementation gaps, there are other problems such as the inadequate bureaucratic experience and the legislative and administrative structure in many jurisdictions.

41. See, e.g., Interview with Maurice F. Strong (July 13, 1976), 2 ENVT'L Pol'y & L. 66, 68 (1976).
IV. CLASSIFICATION OF ENFORCEMENT MECHANISMS

While there is a fair amount of overlap in the use of one or more enforcement mechanisms, it is possible to broadly draw the following five categories: (1) civil remedies, (2) criminal sanctions or penalties, (3) administrative quasi-judicial measures, (4) fiscal measures and (5) voluntary restraints. The civil remedies and administrative measures constitute the more traditional processes.

Civil remedies comprehend the entire range of compensatory and injunctive remedies known to both the common law and civil law systems. Such actions are ordinarily brought by individuals and, more recently, by various environmental associations, for a specific loss or damage suffered. As a practical matter, enforcement of environmental law through the vehicle of the private civil suit has never been a viable remedy and probably will not be such in the foreseeable future. At best, the private lawsuit approach as a means of ensuring environmental enforcement has been haphazard or uncertain. First, the individual plaintiff must have a specific interest or sufficient monetary or nuisance value to justify his cause of action. Second, many types of environmental interests will not ordinarily be vindicated by individual plaintiffs since a private interest will not necessarily correspond with a more general public interest. The remedy of abatement, a common law remedy which allows a party injured by a private nuisance to destroy or remove the nuisance at his own instance, may be one of the most widely used vehicles among the common law remedies for individual plaintiffs. While it is true that environmental organizations, representing a broader public interest, are seeking to increase the effectiveness of their role in environmental defense, by taking their arguments to court, it is also true that narrowly drawn standing requirements in various jurisdictions may effectively operate as a bar to the assertion of otherwise legitimate claims. While the standing to sue requirements may vary significantly from one jurisdiction to another, it is nevertheless a basic requirement everywhere that a court must be reasonably satisfied that a given association plaintiff is a proper party to assert a particular claim. The class action mechanism, generally designed for those instances when it would be impractical to achieve comparatively small

44. On the position of public interest organizations in the United States, see Gregory, Standing to Sue in Environmental Litigation in the United States of America, IUCN Envt'l Pol'y & L., Paper, No. 2 (1972).
recovery in numerous lawsuits, has similar restraints associated with the proper identification and the representativeness of the class. Even where the class action constitutes a theoretically viable approach in vindicating environmental interests, courts have recently made use of this type of judicial access device much more difficult. In addition, in many jurisdictions the class action is unknown.

Administrative measures include the whole panoply of governmental requirements which directly or indirectly ensure compliance with environmental regulation. Where the legislative basis covers a sufficiently broad range of activity, administrative measures constitute one of the mainstays of environmental enforcement. However, administrative measures are effective only when they are evenly and equitably applied.

The most basic type of administrative device is the permit process, including authorization procedures, suspension or closure. A very significant piece of recent coastal zone legislation in the State of California has, at its enforcement nucleus, a permit process which implements the law. Government may also enforce its mandates by means of the controls exercised by administrative authorities over the provision of grants to publicly or privately operated treatment or processing facilities.

Other financial controls exercised by administrative bodies include strict loan requirements, loan approvals, research or pilot project allowances, and special terms and conditions in government contracts. Preferential purchasing by public entities is yet another administrative mode of exacting compliance with environmental regulation.

Criminal sanctions and interrelated civil penalties in the environmental enforcement context have been the subject of much controversy. Civil penalties may be distinguished from criminal penalties in

45. See generally Mosk, Finding a Direction for Our Environment, 3 BARRISTER at 16 (Spring 1976).
46. Each plaintiff in a class action must satisfy the $10,000 jurisdictional amount to maintain the action under federal rule 23(b)(3). Any plaintiff who does not satisfy it must be dismissed from the case. Zahn v. International Paper Company, 414 U.S. 291, 301 (1972).
47. E.g., Australia. The Australian legal system does not provide for class actions. Another inhibiting feature of the law is that the losing party usually pays court costs and the legal costs of the opponent. Davies, Updating Civil Court Procedures for the 80's, 49 AUSTL. L.J. 380, 385 (1975).
49. E.g., compliance with water quality standards, noise emission control, etc.
50. E.g., purchase of fuel-saving vehicles or quieter engines.
51. See Kovel, A Case for Civil Penalties: Air Pollution Control, 46 J. URB. L. 153 (1969)
that although the former may have an element of punishment for an injury or wrong done, they lack an important feature of criminal punishment: the possibility of imprisonment and establishment of a criminal record in that regard. The criminal sanction, in environmental control as in other areas, purports to force compliance through both the threat of imprisonment and the social stigma of the criminal label. However, because many criminal\(^52\) penalty provisions provide for a fine and/or imprisonment of a convicted violator, an accused may frequently receive no more than a fine.

Penal sanctions are, by their nature, discretionary in degree. Thus criminal sanctions for environmental violations produce uncertain results which are no more consistent than the results reached in civil proceedings. However, if regulatory controls or licensing systems are backed by criminal penalties which are usually applied at the initiative of public agencies, there is a much better chance for consistency in enforcement and specific result.

In the context of environmental law, criminal sanctions exist in various forms. A brief overview will serve to indicate what types of conduct are proscribed under various laws. First, criminal provisions may involve the violation of authority orders or directives, where the pertinent legislation has delegated a broad range of powers to an environmental unit. Thus, an authority may issue an order prohibiting construction, installation or establishment of an air containment source which does not meet air quality regulations promulgated by the authority. It is important to note that criminal penalties in this area do not attach to conduct other than willful violation\(^53\) of an authority order.\(^54\)

\(^{52}\) See H. Packer, The Limits of the Criminal Sanction 32-36 (1968).

\(^{53}\) In Anglo-American jurisdictions, "[T]he word 'willful'... is elastic and is of somewhat varied signification according to the context in which it is found and the nature of the subject matter to which it refers." At times it may mean no more than a willingness to do the particular deed, but in certain connections it has been held to mean "not merely 'voluntary,' but with a bad purpose." Its import in one case was given as "corruptly, with fraudulent intent, designedly and with improper motives." "[T]he requirement often imposed because of the use of the word 'wilful' is] that the act be done, not only with an evil intent, but also 'without reasonable grounds for believing the act to be lawful.'" (Citations omitted.) R. Perkins, Criminal Law 933 (2d ed. 1969).

\(^{54}\) E.g., the Ontario (Canada)-Ministry of the Environment in mid-1975 issued a clean-up order under Section 43 of the Environmental Protection Act, ordering a firm to properly
A similar type of criminal provision may directly prohibit a narrowly defined type of environmental degradation or conduct such as a particular kind of pollution. These provisions may take the shape of regulations issued by an authority or, alternatively, specific statutory prohibitions drafted by the legislature itself.\(^5\) Legislative provisions may, however, also include specific prohibitions which do not require willfulness as an element of the environmental violation; once the prohibited act occurs, even if unintentionally, strict criminal liability attaches.\(^6\)

Another category of criminal prohibitions may consist of a single "universal" provisions which broadly proscribes environmental degradation or pollution in general, as opposed to narrowly defined prohibitions.
tions. Usually, willful intent to violate this type of provision is unnecessary to secure conviction: a violation here is generally a "strict liability" offense, punishable by a fine and/or imprisonment. This genre of statute is relatively new. It is generally not in force in Western European jurisdictions but can be found in several American states. These statutes, extremely broad as they are, frequently obviate the need for prosecution under the more specific statutory provisions inasmuch as most types of pollution will come within their purview.

The application of the various criminal provisions described above in the corporate setting will vary greatly in different jurisdictions. For example, despite the fact that commercial waste represents a key environmentally deleterious factor and, despite the existence of criminal provisions to counter this pollution source, the criminal sanction has only infrequently been put to use. A principal problem in this regard has been the inability or, alternatively, the unwillingness of enforcement agencies to isolate and charge high corporate officers for a particular environmental crime. There is a similar hesitation to charge an employee who may have no policy-making responsibility in the corporation. Additionally, problems arise in ascertaining culpability when the management of the firm is complex and when decision making is fragmented and decentralized. While simply being a corporate official is generally not enough to invoke criminal liability, it is clear that if the officer "participated" in criminal behavior in some significant manner he should be held liable in most instances.

Thus criminal enforcement in the environmental field operates at a secondary level to administrative and preventative sanctions which are designed to abate new sources of pollution and to regulate pre-existing industries by the issuance and withdrawal of licenses and permits. The

57. See Neb. Rev. Stat. § 81-1506(a) (1971), Neb. Rev. Stat. § 81-1506(a) (Cum. Supp. 1973); Fla. Stat. Ann. § 403.121(1)(a) (West 1973); Alaska Stat. § 46.03.710 (1971). These statutes contain words to the effect that no person shall pollute or add to the pollution of the air, land, or water of the state (e.g., Alaska Stat. § 46.03.710 (1971)).

58. Generally, Western European legislation adheres to the principle that only "natural persons" as opposed to "legal persons," i.e., corporations or other statutorily created entities, are subject to criminal liability. In Denmark and the United Kingdom, a "legal person" is recognized for purposes of criminal liability. Legislation is being considered in Switzerland and France which would recognize legal persons in criminal matters. S. Breman, European Environmental Law 487 (1977). Criminal enforcement in the form of indictments against corporate entities is a well settled practice in the United States. See, e.g., United States v. Velsicol Chemical Corporation, No. C-75-462 (Tenn. Nov. 10, 1976), [1976] 9 Envr. Rep. Cases 1723 (BNA).

59. For some background on the situation in France (tending to pinpoint penal responsibility on officers) and the U.K. (tending to be less strict) see Should the Boss Go to Jail, 69 New Scientist 347 (1976).
criminal sanction constitutes a supplemental remedy intended by most jurisdictions to augment rather than supplant either civil or administrative enforcement mechanisms. In Western European jurisdictions, preference has been shown for the traditional per diem or flat fine for proscribed activity. In some jurisdictions, the administrative penalty is legislatively combined with incarceration penalties. This is the case under Germany's Federal Environmental Protection Act (1974) and the Belgium Act on Protection of Surface Waters (1971), in both of which prison sentences are made available along with the usual administrative sanction of fines. The trend in Western Europe is to more stringent custodial penalties and experimentation with new criminal penalty approaches. These include renewed examination of the desirability of introducing corporate criminal liability and criminalization of environmental negligence. Also under consideration are new procedural devices, including special courts and prosecutors, intervention by community organizations in legal proceedings, maintenance of a "criminal register" of polluting businesses, and elimination of amnesty for serious offenses.\(^6\)

A perceptible trend has developed in recent years to employ financial measures and more particularly tax measures as instruments to enforce environmental law and regulation. Fiscal measures serve many purposes including the generating of revenue to defray the administrative expenses of carrying out environmental legislation\(^6\) and

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60. A formal resolution, flowing from a five-year study of the "contribution of Criminal Law to Protection of the Environment" by the Committee of Ministers of the Council of Europe, proposed a number of provisions for consideration and possible adoption by member states. *See Council of Europe, Final Activity Report on the Contribution of Criminal Law to Protection of the Environment of the European Committee on Crime Problems, No. CD/PC (77)3 at 1 (1977).* *See also European Committee on Crime Problems, Council of Europe Activities in the Field of Crime Problems 39-40 (1977).*

61. The discovery of mercury in the effluents of several Michigan businesses in 1970 led to the passage of the so-called "Truth in Pollution" bill. The declared intent of the bill was "to require the registration of manufacturing products, production materials and waste products where certain wastes are discharged: [and] to provide for surveillance fees upon discharges to the waters of the state in order to provide for investigation, monitoring and surveillance necessary to prevent and abate water pollution..." Pub. Act No. 200, 1970 Regular Session, Section 1, amending the title of Michigan's water pollution control law, codified as *Mich. Comp. Laws Ann.* § 323.13 (1975). As the law clearly declares, the purpose of Michigan's surveillance fee is to fund increased monitoring. As such, it is in the nature of a user fee. Section 323.13(d) additionally provides that fees be progressive on the basis of volume and strength of the discharge.

This provision has led some to speak of surveillance fees as "disincentives." Michigan's surveillance fees are, however, essentially a vehicle for funding increased monitoring. The monies so collected are earmarked for inspections and laboratory testing, and the like. They
the encouragement or discouragement of types of conduct deemed to be positive or negative from the viewpoint of the common good. The principal incentive device is the accelerated write-off for pollution control facilities and the principal disincentive device consists of effluent and related pollution charges.

Any discussion of the categories of enforcement and mechanisms must necessarily and finally direct itself toward the question of voluntary restraints. This discussion has focused primarily on the formal authority of central government and its related subunits to enforce environmental controls. But in order to fully appreciate the enforcement process, it is now necessary to look behind the legal power itself and briefly review the objectives toward which this power is normally directed. One can argue that the raison d'être of central government enforcement action is ultimately to force polluters to cease and desist through government legal action or the threat thereof. Further, the notion that self-regulation and the profit motive are necessarily antithetical leads to the proposition that only significant government intervention will effectively ensure environmental quality. In a free market economy, it is readily assumed that a conflict will exist between a producer's self-interest and environmental standards, whether internally set by industry or imposed by government guidelines. None of these assumptions is sound.

First, it can be said of every jurisdiction that all environmental control agencies, whether central government, regional or local, are obliged to recognize that legal proceedings against corporate entities and individuals can never serve as the principal aim of a compliance program. Judicial proceedings take a phenomenal toll in government resources from the standpoint of money and personnel expended. No

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were the subject of a study by the United States Environmental Protection Agency as possible models for other United States jurisdictions to supplement their budgets in lieu of federal air and water program funding. See EPA Explores User Fee System as Means of Financing Pollution Control Agencies, [1974] 5 ENVIR. REP. CASES 277 (BNA).

62. On the affirmative side are grants, rebates or reductions of taxes ordinarily collective, i.e., a fiscal incentive discouraging activities deemed environmentally harmful. Taxes, while sometimes having mixed characteristics, i.e., inducing certain behavior, on the one hand, and raising revenue on the other, are distinct from disincentives in that the former have revenue-raising functions. See generally Irwin & Liroff, Economic Disincentives for Pollution Control: Legal Political and Administrative Dimensions (Environmental Protection Agency Rep. No. EPA-600/5-74-026, July 1974).

63. For a review of fiscal approaches to environmental quality, see Zalob, Tax Incentives for Pollution Control, INT'L TAX REP. Feb. 21, 1977, at 7.
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governmental authority has sufficient resources to pursue more than a fraction of cases which could be litigated. Additionally, the results of judicial proceedings and formal hearings cannot easily be predicted so that there is often inconsistent enforcement because the acceptable standard is not clearly delineated. Thus in the area of environmental law as in other fields of law, enforcement must be predicated on voluntary conduct to achieve the stated purpose. The Toxic Substances Control Act (1976) in the United States requires the administration to promulgate rules to assure that manufacturers maintain records and submit such reports as are reasonably necessary, including a listing of health and safety studies conducted by or for the manufacturer. Nonetheless, the fact that administrative agencies must rely on voluntary restraints should not cloud the fact that the success of environmental schemes may well hinge upon the efficacy of the enforcement agency in prosecuting violations.

Second, there is a strong incentive for internal regulation by industry itself. Industry views increased legislation and regulation as something to be averted. The principal objection of industry members to further legislation and regulation is the potentially rigid interpretation and uneven application of the rules which might ensue. Industry will normally pressure its own members to reach some kind of association standard so as to discourage outside regulation. With the exception of Ireland, the English environmental regulatory system relies in greater degree than any other European Economic Community member upon a series of complex, non-legislative, intra-industry standards for environmental protection. Despite minimal environmental legislation, there exists in England a comprehensive web of regulation within the institutional setting of industry itself. Where internal industrial regulations are deemed insufficient to respond to the public interest, legislation will be necessary to control environmental abuses.

Finally, the general dependence on informal negotiations in preference to legal proceedings is clearly evidenced in the pattern of enforcement activities which has emerged in those jurisdictions which have sophisticated environmental control systems. While compliance

64. Toxic Substances Control Act, 15 U.S.C. § 2607(a)(1) (1976). Other specific data as to which reporting may be required is listed in 15 U.S.C. § 2606(a)(2). Small producers (a category still to be defined by the EPA) are exempt from these reporting duties except as specifically required by the Administrator. Id. at § 2607(a)(3).

65. The British environmental regulatory set-up may be divided into four tiers: individual industry standards, standards of industrial associations and/or the British Standards Institute (BSI), the Codes of Practice, and law and regulations promulgated thereunder.

66. In the United Kingdom, for example, the Pesticides Safety Precautions Scheme
must generally rely on voluntary action, such voluntary compliance has the important effect on preventing environmental hazards and ultimately degradation before it occurs. All the available evidence points to the fact that only through prophylactic action can there be any realistic hope of reaching and sustaining the objective of a clean and decent environment. For example, many local jurisdictions employ a permit scheme to ensure that new construction will comply with antipollution regulations. Permits can be an effective tool, though they are no better than the standards they are designed to carry through. Planning and zoning controls also can be and have been used effectively to prevent both air and water pollution.67

V. CONCLUSION

Everywhere today, the entire enforcement effort is in a transitional stage. There have been notable successes and corresponding failures. Compliance with environmental standards depends on a large number of interrelated factors, both governmental and nongovernmental. But the major supervisory responsibility rests with central government authorities because it is only at that level where controls over uniformity and fairness can be sensibly maintained.

Stricter, more even enforcement is a necessary adjunct to existing environmental law and regulation—"implementation gaps" should be avoided. Stricter enforcement, however, constitutes a major challenge for government and also places heavy burdens on the administrative apparatus. One commentator, in assessing the relatively high adminis-

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Administrative costs of toxic substances legislation in the United States, has stated:

Finally, it should be recognized that the intensive regulation of one industrial sector, as by the Toxic Substances Control Act, represents an expenditure of governmental resources which might alternatively have been applied in a less rigorous form for a broader scope of environmental risks. 68

Although the general framework of environmental control is set at the executive levels of central government, the basic issues of standard-setting and compliance, which may be generated outside of central government, will determine the degree to which environmental degradation is controlled.

The next few years will indicate whether existing environmental legislation and current enforcement techniques can bring about a significant improvement in environmental quality or whether still more stringent efforts are needed. There may well be a stepped up use of criminal and civil penalties both in terms of character and degree and a corresponding cutting back on voluntary compliance schemes. Certainly there exist the statutory tools in many jurisdictions which give central government the framework within which it can pursue direct enforcement against individual violators. Where the regions and localities are increasingly inadequate to the task, we may well anticipate that enforcement will steadily and most surely become a central government function. Moreover, national administrations should increasingly recognize that the environment versus development conundrum is in fact a non-issue 69 and that lax enforcement and the associated implementation gaps must ultimately be squarely confronted and resolved in favor of continuing meaningful environmental controls.


69. For a rebuttal of the general “growth versus environment” argument, see Editorial, 2 ENVT'L POL'Y & L. 49 (1976).