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State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings

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COMMENT

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I. INTRODUCTION

Overfiling[1] involves concurrent enforcement of air quality and other pollution standards by state and federal environmental agencies. Initially, after being found in violation, the polluter either negotiates an agreement with the state or is forced to accept the terms established by a court. After this apparent resolution of the case, the federal Environmental Protection Agency (EPA) commences an action against the polluter seeking to impose additional penalties for the same violation that was the subject of the state action.

Overfiling has occurred in conjunction with enforcement of the Clean Air Act,[2] the Federal Water Pollution and Control Act (Clean Water Act),[3] and the Resource Conservation and Recov-

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1. The term "overfiling" is derived from the concept that EPA's action has been filed over, or on top of, a state action. The term has been used in an EPA memorandum, Memorandum, Guidance on RCRA Overfiling, May 19, 1986 (authored by A. James Barnes, Deputy Administrator), and by an administrative judge in a recent order, *In re* Martin Elecs. Inc., No. RCRA-84-45-R at 2 (July 28, 1986) (order for *sua sponte* review). The term "topfiling" can also be used as an alternative to the term overfiling.

2. 42 U.S.C. §§ 7401-7642 (1982 & Supp. II 1984). The Clean Air Act provides for enforcement by state (§ 7412(d)(1)) and federal agencies (§ 7413) as well as citizens (§ 7604). Enforcement procedures differ depending on the pollution source and who is seeking enforcement. This comment will draw upon cases concerning enforcement of violations involving major stationary sources (§ 7413).

3. 33 U.S.C. §§ 1251-1376 (1982). The Clean Water Act contains a declaration of national policy that Congress recognizes, preserves and protects the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." *Id.* § 1251(b). Section 309 states that once the state has a qualified program, it will be charged with initial enforcement responsibilities. The Administrator is given authority to instigate its own action if the state fails to do so within 30 days of receiving notice of the violation. *Id.* § 1319(a)(1).

ery Act (RCRA).[4] Conflicts between enforcement agencies occur in any area where Congress has granted concurrent jurisdiction without clearly defining the boundaries between the state and federal entities.[5]

This comment examines whether the practice of overfiling by EPA assists the agency in achieving its stated civil penalty enforcement policy goals of deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems. Also, suggestions are made as to the proper role of the states and EPA in the enforcement of pollution laws. While many of the authorities used in this comment involve proceedings under the Clean Air Act, the policies discussed apply equally to enforcement actions arising under all three major federal statutes—Clean Air Act, Clean Water Act and RCRA. Therefore, ideas, examples, and concepts will be borrowed from cases and writings considering enforcement proceedings under each statute.

II. BACKGROUND

People have complained about "dirty" air since the advent of the Industrial Revolution. In the late-1800s Londoners protested smoke-laden air, while pollutants from a post-Civil War copper smelting plant laid waste almost 30,000 acres of timberland in Tennessee.[6]

By 1950, individual states had established various pollution control programs, but it was not until 1955 that the first federal legislation was passed dealing with the air pollution problem—the 1955 Air Pollution Control and Technical Assistance Act.[7] This act gave monetary and technical assistance to the

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4. 42 U.S.C. §§ 6901-6987 (1982). RCRA states that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." *Id.* § 6901(a)(4). The purpose statement further notes that the problem has become a national concern. Section 3008 of RCRA also provides that states have 30 days to file an action before EPA will take action. *Id.* § 6928.

5. For example, while the Clean Air Act notes that states have primary responsibility for air quality, *see* 42 U.S.C. § 7407(a), the statute allows EPA to file its own action and requires only that the agency notify the state before doing so. *See id.* § 7413(a).

6. 1 CEQ ANN. REP. 61-62, 70 (1970). This report contains several other examples of the damaging effects of polluted air including the loss of 20 lives in Donora, Pennsylvania, and the "killer smog" of 1952 in London during which the death toll in the city was 1600 above normal. *Id.* at 67.

7. Air Pollution Control and Technical Assistance Act, ch. 360, 69 Stat. 322 (1955) (current version at 42 U.S.C. § 7401 (1982)). This act authorized the Surgeon General to recommend research programs to develop methods of reducing air pollution and to corre-

states. Even so, it became apparent in the 1960s that the individual states lacked the capacity to adequately control air pollution. Attempts were made in 1963[8], 1965[9] and 1967[10] to bolster federal involvement, but essentially all enforcement authority was left to the states.[11]

The 1970 Clean Air Act[12] created a new era of federal involvement in cleaning up the environment. The act requires the federal government to promulgate national standards for designated pollutants.[13] These national standards are intended to prevent corporations from threatening to relocate plants to other states with less stringent pollution standards. Not only did the Clean Air Act create nationwide standards, it gave EPA authority to enforce the standards.[14] Congress, attempting to create a comprehensive program, granted the federal administrator extensive authority to enforce the new provisions of the act.[15] The following excerpts from remarks made by Senator Muskie during the 1970 Clean Air Act debate summarize the new Congressional attitude:

> We learned from experience with implementation of the [earlier] law that States and localities need greater incentives and assistance to protect the health and welfare of all people.
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> . . . .
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> In 1963, the Congress recognized that the Federal Govern-

late studies of current conditions.

8. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963) (current version at 42 U.S.C. § 7401 (1982)). This act provided for grants to existing air pollution control programs.

9. 1965 Amendments to the Clean Air Act, Pub. L. No. 89-272, 79 Stat. 992 (current version at 42 U.S.C. § 7401 (1982)). This act required the setting of national emission standards for motor vehicles and provided monies for studying solid waste disposal methods.

10. The Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (current version at 42 U.S.C. § 7401 (1982)). This act authorized grants to pollution control agencies, fuels research, and established interstate air pollution control agencies.

11. For an analysis of the effect that each of these provisions had on pollution control, see 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.03[1] (1986).

12. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982 & Supp. II 1984)).

13. 42 U.S.C. §§ 7409, 7412 (1982). The Act created a procedure including public comment, whereby the Administrator would establish criteria for promulgating national ambient air quality standards.

14. Congress hoped that by establishing federal enforcement authority the current problem—lack of state action—would be cured.

15. *See generally* 42 U.S.C. § 7413 (1982). The Administrator of EPA is given authority to issue compliance orders, prohibit construction of new stationary sources, commence civil actions, and assess penalties.

> ment could not handle the enforcement task alone, and that the primary burden would rest on States and local governments. However, State and local governments did not respond adequately to this challenge. Enforcement had to be toughened. More tools were needed. The Federal presence and backup authority had to be increased.
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> . . . .
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> . . . Standards alone would not insure breathable air. All levels of government had to be given adequate tools to enforce those standards.
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> The Senate remains convinced that the most effective enforcement of standards would take place on the State and local levels. It was here that the public could participate most actively and bring the most effective pressure to bear for clean air.[16]

The statute contemplates a nationwide cleanup effort to improve public health.[17] In spite of this new federal enforcement authority, the statute also stated that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."[18] Thus, the statute allowed federal and state enforcement of the Act. This dual enforcement program is the source of the overfiling conflict.

III. Examples of Overfiling

Overfiling, or topfiling, is the term used for describing the following scenario: First, the state commences an enforcement proceeding against the operator of a non-complying source; second, after negotiations or a court hearing, a final settlement or verdict is reached between the violator and the state; third, following this resolution, EPA files or threatens to file a complaint[19] against the source for the same violations that were ostensibly resolved by the earlier state settlement or court order.[20]

Two recent cases which illustrate overfiling under the Clean

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16. 116 Cong. Rec. 42,381-82 (1970). Senator Muskie also emphasized the importance of public participation to the success of the program. *Id.*

17. Section 109 of the Clean Air Act contemplates standards being set that will protect the health and welfare of the nation's citizenry. 42 U.S.C. § 7409(b) (1982).

18. *Id.* § 7407(a).

19. EPA designates a case development team which is charged with control of the action, including negotiating settlements. The Clean Air Act does provide for the Attorney General's office to appear on behalf of the Administrator. *Id.* § 7605.

20. The formal agreement need not be officially signed for EPA's actions to be termed an overfile. *See, e.g.*, United States v. SCM Corp., 615 F. Supp. 411 (D. Md. 1985).

Air Act are *United States v. Lehigh Portland Cement Co.*[21] and *United States v. SCM Corp.*[22] *Lehigh Portland Cement* involved a cement plant that violated Iowa's fugitive dust regulations. The Iowa Department of Environmental Quality notified the company of the violations, and on March 5, 1984, the Department and the company entered into a consent decree. One year prior to the consent decree, EPA notified the company and the state concerning the same violations. On April 4, 1984, almost one month after the state and the company had settled, EPA filed an action in federal district court against the company. The company filed a motion to dismiss, but the court ruled against Lehigh finding that the federal action was not precluded by the previous state action.[23]

SCM involved a similar fact pattern. In January, 1983, the state of Maryland notified SCM that based on samples, it was in violation of the particulate-matter, sulfuric acid and visible-emission standards. EPA notified SCM in April of 1984 of additional violations. SCM and Maryland signed a consent decree on January 7, 1985. EPA filed its action in federal district court five days prior to the signing. SCM argued that EPA's complaint should be dismissed based on the abstention doctrine established in *Colorado River Water Conservation Dist. v. United States.*[24] The court rejected the argument, holding that the legislative intent of the Clean Air Act did not establish that state proceedings would present a bar to subsequent federal action.[25]

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21. 24 Env't Rep. Cas. (BNA) 1697 (N.D. Iowa 1984).

22. 615 F. Supp. 411 (D. Md. 1985).

23. 24 Env't Rep. Cas. (BNA) at 1700. The court, in determining whether to abstain from deciding the case due to the previously signed consent decree by the state, looked at three factors: 1) whether a state court decision would moot a constitutional issue, 2) whether a decision would interfere with the state's efforts to enforce a purely state regulatory scheme, and 3) whether a state criminal proceeding was involved. The court found that none of these factors was present and denied the motion to dismiss. *Id.* at 1700-01.

24. 424 U.S. 800 (1976). In *Colorado River,* the United States filed suit in district court to establish its reserved water rights. Under the McCarran amendment, the United States had authorized state courts to adjudicate its water rights in appropriate circumstances. A qualifying suit was filed in state court to determine the water rights of all parties involved. The Supreme Court upheld the district court's application of an equitable abstention from the case despite the case's failure to fall into one of the traditional abstention doctrine categories. The *Colorado River* abstention doctrine is based not on considerations of proper constitutional adjudication but "rest[s] on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.* at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).

25. 615 F. Supp. at 419. The court, after reviewing the extensive provisions for federal enforcement, stated that it "does not believe that Congress, in enacting stiff penal-

In *SCM* and *Lehigh Portland Cement*, the negotiations between the state and the companies were quite extensive and comprehensive. EPA was cognizant of the negotiations yet EPA did not intervene until a final settlement was reached. When EPA did take action, its action was not one of cooperation but of disregard for the previous work of the other parties. EPA filed suit instead of joining the settlement arrived at during the previous negotiations. These cases are but two examples that illustrate how EPA has developed a tendency to overfile on cases where the state has made efforts to reach a fair settlement.

IV. Overfiling's Failure to Assist EPA in Achieving the Agency's Civil Penalty Policies

EPA's stated policy goals in assessing penalties against violators are deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems.[26] While portions of these objectives are furthered by overfiling, the overall effect is to the detriment of these goals.

A. Deterrence

EPA's first stated goal of penalty assessment is to deter people from violating the law.[27] Penalties are formulated to persuade the violator to take precautions in order to avoid future violations and to dissuade others from committing violations. Deterrence[28] is accomplished by removing any economic benefit that the violator may have gained through noncompliance and then requiring an additional monetary payment so that the of-

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ties for air pollution, meant to have those penalties subject to nullification by the states." *Id.* Whether the court properly examined the abstention doctrine is questionable, but beyond the scope of this comment.

26. U.S. Envtl. Protection Agency, *Policy on Civil Penalties and Framework for Statute-Specific Approaches to Penalty Assessment*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 30001 (1984) [hereinafter *Civil Penalty Policy*]. Similar policy objectives have been issued by EPA covering private party settlements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982). Hazardous Waste Litig. Rep. (Andrews) 6,741 (Dec. 17, 1984). Interestingly, EPA recognizes in this document that the agency's action alone will not accomplish CERCLA's cleanup goals; and therefore, the agency issued these new policies to "remove or minimize if possible the impediments to voluntary cleanup." *Id.*

27. *Civil Penalty Policy*, *supra* note 26, at 30001.

28. These policies are to guide the case development team in determining appropriate settlement amounts. *Id.* at 30001; *see also* U.S. Envtl. Protection Agency, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 30002 (1984).

fender's position is worse than if he had originally complied. The plan allows for flexibility in determining the exact dollar amount that will achieve the desired deterrent effect.[29]

Overfiling and the penalty payments it generates assist in creating some deterrence. Often a state will either fail to collect monetary penalties, as occurred in *Lehigh Portland Cement*, or collect only small amounts. By asking for additional monies, EPA is able to ensure that the violator has been fully penalized for noncompliance. However, states often impose penalties through non-monetary measures which tend to have less precedential value than monetary penalties. The same non-monetary penalties may not be imposed on other violators since the circumstances differ at each site. Also non-monetary penalties are not as visible a deterrent as monetary ones. Since non-monetary penalties are relatively hidden, it is only when EPA assesses monetary penalties that a deterrent effect exists for other potential violators.[30]

Another excellent deterrent is the threat of having to negotiate and settle with two separate bureaucracies. Since EPA and the state agencies are both responsible for issuing operating permits, normally it would be beneficial for a company to negotiate in good faith and meet the demands of both governmental bodies. However, even the most cooperative company may be overwhelmed by the effects of trying to meet the demands of two separate agencies,[31] which often have conflicts between themselves.[32]

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29. The minimum penalty should include any economic benefit which the violator gained and a non-trivial additional penalty. *Civil Penalty Policy, supra* note 26, at 30001.

30. EPA may also seek non-monetary penalties including closure of a site. However, EPA may opt not to use this power in an attempt to achieve a greater deterrent effect through monetary penalties and to avoid the usually politically unpalatable decision to close an active site.

31. In all probability, the addition of a second agency will have a synergistic effect and more than double the work involved. Discussing this problem under CERCLA, one set of authors wrote:

> Thus, at any given Superfund site, a company may be forced to deal with EPA's Washington headquarters, an EPA regional office, and a variety of different state officials and agencies. Each entity may have its own view of the appropriate response for the site, enmeshing the [violator] in interagency jurisdictional disputes. The cost of an appropriate legal response to such a governmental barrage is itself more than many small companies are able to bear.

Drabkin, Moorman & Kirsch, *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10168, 10171 (1985).

32. Agency conflict is illustrated in EPA's desire for monetary penalties while state

EPA's desire for strict money damages has been criticized by many, and while producing some deterrent effect, collection of additional monetary penalties inhibits environmental cleanup. For example, in February of 1986, the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) responded to EPA's insistence on money damages by adopting the following position: "EPA should not require the States to develop a monetary penalty policy. EPA must recognize that the ultimate goal of enforcement activities is achieving and maintaining compliance. EPA must further recognize that States have a variety of other enforcement mechanisms which can ensure expeditious compliance."[33] The ASIWPCA further said that tools such as moratoriums, closures, bans, and criminal prosecution are, where appropriate, more effective than monetary penalties in achieving compliance goals.[34] Compliance goals may be met sooner, thus effectuating a cleaner environment.

In light of the above analysis, it is unclear that EPA's strict monetary penalty policy accomplishes its goal of deterrence. EPA could effectively deter polluters through the use of non-monetary penalties as some states have done. For example, Utah entered into a consent decree with Pacific States Cast Iron Pipe Company concerning violations of clean air requirements.[35] In exchange for suspending $50,000 in penalties, Pacific States agreed to install additional control equipment not required by statute.[36] Such an agreement accomplishes the deterrence goal by requiring the violator to spend the requisite number of dollars. However, instead of merely sending the state a check, the violator spends the same amount on additional pollution control equipment beyond that which is necessary to correct the original problem. The additional pollution control provides for a cleaner environment and helps the state achieve its clean air goals. Utah's action demonstrates how non-monetary damages can be

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agencies often prefer more equitable non-monetary remedies. *See infra* notes 33-36 and accompanying text.

33. Ass'n of State and Interstate Water Pollution Control Adm'rs, Position Statement in Reference to (Section 309)—Federal Enforcement: ADMINISTRATIVE, CIVIL AND FELONY PENALTIES—State Policy (Feb. 1986).

34. *Id.*

35. Utah v. Pacific States Cast Iron Pipe Co., No. CV 86-424, slip op. at 3-4 (4th Dist. Ct. Feb. 24, 1986).

36. Failure by Pacific States to comply with the provisions of the decree would result in reinstitution of the $50,000 penalty plus any appropriate additional measures. *Id.* at 4.

tailored to achieve the ultimate purpose of pollution laws—a cleaner environment. Also the state is able to reduce its present levels of pollutants, thus allowing it to attract new industry with less stringent pollution control requirements.

If EPA insists on monetary damages in a situation such as with Pacific States, it restricts a state's ability to impose equitable, non-monetary remedies. If the violator is forced to pay cash, fewer funds will be available to the violator to purchase and install additional pollution control equipment. In addition, any funds paid to EPA will disappear into the bureaucratic morass of the United States Treasury's general fund rather than be allocated to new pollution controls within a state's boundaries. Consequently, the citizens of the state may be left with an environment dirtier than it needs be.

B. Fair and Equitable Treatment of the Regulated Community

Fair and equitable treatment of the regulated community is the second goal of EPA's penalty policy.[37] To achieve such a broad-based goal, assessed penalties must be consistent as well as flexible. Consistent penalties avoid arbitrariness and prevent unnecessary litigation if the agency is called upon to defend each penalty assessed. Factors to be considered in order to ensure consistent application of penalties include degree of willfulness involved, past history of violations, ability to pay, degree of cooperation, and other unique factors.[38]

By requiring monetary penalties through overfiling, EPA is able to establish a basis for comparison in future cases by using concrete dollar figures, thereby resulting in a degree of consistency. Non-monetary penalties are more difficult to apply equally to subsequent cases. For example, the solution available to Pacific States may not be available to another violator since it may not have the additional facilities in which to install new pollution equipment. Thus, a non-monetary penalty assessed to the second source would not be consistent with the one assessed to Pacific States. However, the cost of the non-monetary penalty could be established and used as a basis for assessing the second source.

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37. *Civil Penalty Policy, supra* note 26, at 30002.

38. *Id.* Any mitigation of the penalty is dependent on the violator demonstrating that the violator is entitled to such mitigation. *Id.*

EPA's involvement through overfiling also creates consistency simply because EPA is one agency. Exclusive reliance on individual state action rather than national enforcement could create fifty different penalty standards, resulting in harsher penalties for some violators depending on geographic location. The creation of a uniform standard was one of the determinative motives for the 1970 Clean Air Act.[39]

By expending efforts against violators who have already paid their dues through the state, EPA is exacting double penalties from one source. This double-enforcement comes at a time when enforcement dollars are at a premium. EPA's enforcement budget is one-half of its late-1970s level.[40] Criticized for inadequate enforcement efforts in the early-1980s, EPA has returned enforcement actions to levels equivalent to those registered before 1980.[41] Increased use of the overfiling technique can account for a portion of the agency's ability to maintain enforcement proceedings at a level previously reached with twice the budget. Cost-efficiency is maximized when EPA is able to photocopy the state file[42] containing all of the necessary documentation of the violations, and then draft a complaint based on the state's work and file it in the local federal district court. This process is obviously cheaper and quicker than testing a different company's facility for compliance and gathering the necessary information to bring an action against that source. Thus, overfiling results in more enforcements for the dollar, which from EPA's viewpoint leaves more funds for use against other violators which will help to maintain fair and equitable treatment. However, this would only be true if these additional funds were used to file against sources not currently the subject of a state investigation.

While overfiling may conserve EPA's enforcement resources, it is actually a duplication of effort and wastes limited enforcement dollars. EPA's efforts do not produce additional facts or other pertinent information necessary to bring additional actions

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39. *See supra* note 14 and accompanying text.

40. Reed, *Marking Time: A Status Report on the Clean Air Act Between Deadlines*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10022, 10034 (1985). This article takes a comprehensive look at the Clean Air Act prior to the 1987 renewal date.

41. *Id.* at 10034 n.150. A record number of enforcement referrals of environmental cases were recorded in fiscal year 1986 by the federal government. Hazardous Waste Litig. Rep. (Andrews) 10,247-48 (Jan. 5, 1987).

42. In the spirit of cooperation, state agencies generally share their files with their federal counterparts.

against other pollution sources. Instead, EPA recycles the same data and creates the illusion that it is leading the way in cracking down on the nation's polluters. As a result, while federal and state agencies are pursuing one violator, other known or suspected violators are left outside the enforcement umbrella due to lack of money and insufficient personnel to pursue additional cases. Any money that is collected will end up in the general fund and will not create any additional funds for enforcement purposes.[43] Consequently, the goal of fair and equitable treatment of the regulated community is not achieved as violators are either receiving a double blow or escaping untouched.

C. Swift Resolution of Environmental Problems

Swift resolution of environmental problems is EPA's third major goal.[44] Rapid correction of pollution problems prevents further degradation of the environment and also conserves agency personnel and resources. By quickly settling one case, it is possible for the agency to devote its efforts to other cases.[45] Early correction of violations is encouraged by EPA's willingness to reduce proposed penalties if the violator resolves the problem.

Overfiling fails to promote swift resolution in any measurable way. Federal efforts merely duplicate the state's actions by requiring the violator to go through a second set of negotiations. This new round of negotiations usually produces no additional benefit to the environment since the company will have initiated cleanup efforts in accordance with the settlement with the state.

In addition, the speed and consequently the effectiveness with which a state can act to enforce its pollution control programs is decreased by overfiling. *In Re John Boyle & Co.*,[46] which involved an action under RCRA, explored this point in detail. John Boyle & Co. agreed with North Carolina that the company would install a new groundwater monitoring system and pay $5,000 as a penalty for delaying installation.[47] EPA filed an administrative action alleging inadequacy of the state-ap-

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43. Of course, this may establish an excellent justification for allowing EPA officials to work on a contingent fee basis.

44. *Civil Penalty Policy, supra* note 26, at 30002.

45. *Id.* As a disincentive to delaying compliance, the case development team is directed to adjust penalty figures upward for each delay. *Id.*

46. No. RCRA-85-69-R (July 23, 1986).

47. The monitoring system was needed to assure that hazardous materials were not migrating underground off the company's property.

proved monitoring system. While this action was not one for additional penalties, it is a type of overfiling since EPA filed an action subsequent to the state's settlement with the company. After finding EPA lacked sufficient data to support its position, the court noted that EPA had decreased the state's effectiveness.[48] The court quoted a letter written by Mr. William Meyer, Head of the Solid Waste Management Branch for the State of North Carolina, to Mr. James Scarbrough of EPA in which Mr. Meyer explained the results of continuous EPA interference:

> [D]uring the past six months, we have spent a considerable amount of time assisting EPA in fulfilling their RCRA oversight responsibilities. This groundwater exercise alone is producing a substantial drain on our resources. Furthermore, much of that time has been spent by my groundwater staff, thus diverting them from substantive work which would protect the public health and produce measurable environmental results.[49]

Mr. Meyer's letter illustrates how the duplicative efforts of the state and federal agencies can lead to an inefficient allocation of enforcement resources and an increased time span before resolution, therefore taking the agencies further from their primary responsibility of maintaining a clean environment.

Furthermore, overfiling discourages early settlement. Incentives for a company to negotiate with a state agency will be limited by the knowledge that EPA will still have to be satisfied independently. If the company waits until EPA is involved, a three-way negotiation will develop which would rarely be a model for quick, efficient resolution of any problem, particularly when two of the three parties are government entities. Regardless of the final result, correction of the problem will be postponed until both EPA and the state can find a convenient time to meet. The state could lose its autonomy if EPA imposes its proposals upon the state agency. EPA may threaten to overfile unless the state agrees to impose additional sanctions on the violator. Also possible is a scenario in which the company sits idly by while the two agencies argue over the proper penalties. Neither of these cases results in a swift resolution of the prob-

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48. The court reasoned that there was sufficient data and expert testimony upon which the state could rely. *Boyle*, No. RCRA-85-69-R at 14.

49. *Id.* at 20.

lem since time will be lost while the agencies haggle with each other instead of working with the polluter to solve the problem.

Overfiling also undermines the state's authority and credibility with industry which would handicap efforts to reach quick settlements. To illustrate, the court in *John Boyle* continued to quote from Mr. Meyer's letter as he explained how EPA's interference could cause the state to return pollution control responsibility to the federal government:

> [EPA's action] has also concerned me because it raises issues that potentially would have a negative effect on the ability . . . to exercise justified enforcement discretion based on . . . enforcement strategy in North Carolina, rather than inferred priorities by EPA.
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> If EPA carries through with the proposed orders, [EPA] must be prepared to follow through in the years to come, with adequate compliance oversight and technical review and guidance necessary to meet the requirements of the orders. I must also point out that these actions will tend to seriously undermine the integrity and respect our program has earned in North Carolina; and . . . will have a substantial negative effect in terms of program implementation. The approach currently utilized by EPA appears to have only short-term goals and view and no regard to long-term program stability or credibility.[50]

Mr. Meyer recognized that if EPA begins to take control of a state program, EPA must be prepared to assume the full burden. For example, the Idaho legislature, protesting the dual nature of air monitoring programs, passed legislation that provided for zero funding for its state air quality program.[51] The Speaker of the House noted that the taxpayers should not pay for two programs, one federal and the other state, to accomplish the same objective. Consequently, since Idaho could not remove the federal program, the state program was eliminated. However, the federal program was the state legislature's preferred choice for elimination.[52] After EPA was the sole enforcement authority for eight months, the Idaho state legislature agreed to resume control. EPA Administrator Anne Gorsuch noted that " '[t]he last eight months have proved you can get more for every dollar

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50. *Id.*

51. *Idaho: Legislature Eliminates Air Program by Apportioning No Fiscal 1982 Funds*, 11 Env't Rep. (BNA) 2203 (April 10, 1981).

52. *Id.* at 2203-04.

spent when the state rather than the federal government operates the program.' "[53] Senator Muskie understood that concept in 1970 when he stated that the "most effective enforcement . . . would take place on the State and local levels."[54] EPA should conduct itself in a manner that is supportive of the state's role rather than undermining the state's authority. Otherwise, EPA could be left with fifty state programs to run—the possible additional red tape and time lag this would create stretches one's imagination to extreme limits.

In summary, a major purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources . . . ."[55] EPA overfiling causes greater delays before final settlement is reached as well as a decrease in the efficient allocation of enforcement personnel and money. Such waste fails to enhance the quality of the nation's environment. While some deterrent value may be achieved through overfiling, it is overshadowed by the limiting effect it has on a state's ability to use equitable remedies and by the fact that it allows other violators to escape penalties completely.

D. Other Motivations for Overfiling

While EPA's purpose for overfiling may have some merit, alternative motivations for overfiling exist. Administrative Law Judge Yost in *John Boyle* proposed a possible motivation for EPA's actions—the "bean counting" syndrome.[56] In EPA's system, mid-level supervisors, who appear to make the final decision on whether to bring an action, must meet certain enforcement goals in order to retain their current grade level and perhaps receive salary increases.[57] With the recent budget cuts, these supervisors need to develop a system to maintain their enforcement levels within a smaller budget and yet still have the same number of "beans" to count for their supervisor. Overfiling provides the answer to that particular dilemma by its extensive reliance on the state's previous efforts. But using overfiling to satisfy a budgetary crisis may come at a sacrifice of other more

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53. *Idaho Legislature Approves $190,000 to Resume State Air Control Program*, 12 Env't Rep. (BNA) 1595, 1596 (April 2, 1982).

54. 116 CONG. REC. 42,382 (1970). *See supra* note 16 and accompanying text.

55. 42 U.S.C. § 7401(b)(1) (1982).

56. *Boyle*, No. RCRA-85-69-R at 21.

57. *Id.*

environmentally sensitive goals by leaving other pollution sources unchecked.

V. Proposed Alterations to the Current System

Overfiling fails to advance many of EPA's civil penalty policies. Consequently, some thought should be given to whether overfiling should be continued. Granted, overfiling does serve a useful function when it is used as a support for a state that fails to adequately enforce its pollution programs. However, one possible resolution of the conflict would be for EPA to cease overfiling practices unless there has been a formal finding—such as an administrative hearing in which EPA, the state, and the violator could present arguments concerning the adequacy of the state-approved settlement—that the state's actions are inadequate. By adding another bureaucratic layer, this solution may be more of a problem than an answer, but it does have the redeeming value that the state and the violator have assurances that their settlement agreements will not be unraveled at the whim of one mid-level, federal agency official. Instead, EPA would have to go through a definite procedure before being allowed to institute a separate action. A similar system already exists for violations of section 120 of the Clean Air Act, and these procedures could be adapted for determining appropriate cases for overfiling.[58] The states should be the first line of enforcement because they are best-equipped to handle pollution control programs.[59] By requiring EPA to jump through a few hoops before overfiling, EPA's

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58. *See* 42 U.S.C. § 7420(b) (1982).

> [I]n a unique federal experiment with economic penalties, Congress enacted § 120 to authorize penalties computed to be equal to the violator's economic benefit from non-compliance, on the theory that if sources insisted on delay they would do so "on their own time." Congress hoped to place polluters on the same economic footing as those who had limited their emissions through increased anti-pollution expenditures. It is also hoped that the penalties would increase administrative flexibility in enforcing the Act, by serving as a middle ground between stiff criminal sanctions or shutdown of noncomplying facilities. The penalty must include at least the economic equivalents of capital costs, operating costs, and maintenance expenses avoided as a result of noncompliance (§ 120(d)(2)).

F. Anderson, D. Mandelker & A.D. Tarlock, Environmental Protection: Law and Policy 322 (1984).

59. For a discussion of the effectiveness of state enforcement, see Strohbehn, *The Bases for Federal/State Relationships in Environmental Law*, 12 Envtl. L. Rep. (Envtl. L. Inst.) 15074 (1982).

actions will become supportive in nature rather a detriment to the state's actions.[60]

A second option is that EPA could avoid the additional burdens by becoming involved earlier in the state proceedings. The difficulties of dealing with two separate governmental bodies can be alleviated if clear and honest communication—communication which includes a complete understanding of the objectives and needs of both agencies—exists between the state and EPA.[61] If the state begins negotiations with a complete understanding of the goals EPA desires to achieve, an agreement could be reached sooner. Motivation to settle increases for the company because it would understand that any agreement reached would be final and not subject to overfiling. By presenting a united front, agency resources can be conserved at both levels and agency personnel would be free to pursue actions against other violators, thus increasing the equity and efficiency of the system. Unfortunately, such a system is unlikely in polarized, political arenas; but to the extent that the states and EPA can reduce their differences, the environment will be the benefactor.

Congress could also help by explicitly defining the boundaries between the states and EPA in pollution control enforcement. When the Clean Air Act comes before Congress for renewal in 1987,[62] the legislators should make an effort to clarify their intent concerning the interaction between federal and state environmental enforcement agencies. By providing a clear statement of its intentions, Congress will give EPA, the states, industry, and the courts additional material to interpret the extent to which the states are to be given autonomy in this area. By having a clear jurisdictional statement, state authorities will have defined authority, and both government agencies and industry will enter negotiations with a clearer understanding of the roles each party is to play.

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60. EPA has an informal procedure for working with the states but adherence to its policies is not mandatory. *See* Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Policy Framework for State/EPA Enforcement Agreements (August 1986)(available from EPA).

61. A plan for allowing the states more freedom in implementing the Clean Air Act was proposed in 1973 by an EPA attorney. Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970* 14 B.C. INDUS. & COM. L. REV. 637, 664-66 (1973).

62. National ambient air quality standards are to be met by no later than December 31, 1987. 42 U.S.C. § 7502(c) (1982).

VI. Conclusion

The Clean Air Act as well as the Clean Water Act and RCRA were passed with the intent to protect the environment and human health. To meet these goals, EPA established policy goals to be achieved when enforcing the statutory provisions. EPA chose to focus on deterrence, equitable treatment of the regulated community, and swift resolution of environmental problems for its goals. EPA has used overfiling as a method to reach these policy goals. While overfiling has some deterrent effect, it fails to recognize the needs of individual states to have the authority to fashion equitable non-monetary remedies. Violators are treated unequally by the practice since some endure two actions while others are left unprosecuted. Overfiling undermines the state's authority and credibility and if continued could result in states turning their programs over for EPA to manage, all of which increase the time required to resolve the pollution problem. EPA's goals can be better achieved through increased cooperation with the states, by requiring EPA to go through a set of formal procedures before overfiling, or a clear Congressional statement of the intended method for EPA and state enforcement of the pollution statutes.

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