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Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?

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I. INTRODUCTION

Over the past decade and more, there has been a sustained attack on our nation's approach for regulating environmental, health and safety risk. Critics have argued that the current system is inefficient, irrational, and overly rigid and have proposed a raft of solutions for improving our regulatory approach, most prominently greater reliance on cost-benefit analysis. In *Risk Regulation at Risk: Restoring A Pragmatic Approach*, Professors Sidney Shapiro and Robert Glicksman offer a strong, coherent defense for our current system for environmental, health and safety regulation based on the long-standing philosophical tradition of pragmatism. Their book persuasively documents how risk-based statutes enacted by Congress reflect a pragmatic accommodation of widely shared social values, including those that are not economically quantifiable. For example, on the one hand, the book shows how statutes recognize that the protection of human life and the environment has a fundamental value unrelated to economic measurement and, on the other hand, recognize that efficiency matters and that cost should be an important consideration in regulatory policy.[1]

This symposium explores some of Shapiro and Glicksman's ideas for achieving a system of regulation based on pragmatism—one that provides "the maximum level of protection consistent with reasonable cost."[2] They argue that in light of bounded rationality facing policymakers (the time, resources and cognitive constraints that affect institutional decision making in the real world as opposed to under theoretical conditions), it is very difficult for agencies to obtain perfection in their initial decisions or to achieve "comprehensive rationality." One alterna-

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1. SIDNEY SHAPIRO & ROBERT GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 20–22, 46–47 (2003).

2. *Id.* at 147.

tive approach is to adjust decisions incrementally, at the "back-end" of the regulatory process, based on experience and knowledge not available when the initial decisions are made.[3] Under this approach, regulators would adjust general regulatory commitments in light of the specific circumstances of some regulated entities or the availability of new information.[4] Professors Shapiro and Glicksman suggest that this approach can mitigate the unintended adverse economic and social consequences of risk regulation by allowing agencies to accommodate unique or anomalous situations without sacrificing regulatory objectives and by preventing regulatory standards from causing irrational, inefficient, or unfair results in particular cases.[5] They recommend several mechanisms for making regulatory adjustments, including deadline extensions, waivers, negotiated adjustments to regulatory requirements, experimental regulatory programs, enforcement discretion, and periodic regulation review.[6]

A desirable, pragmatic approach recognizes the necessity of administrative discretion and flexibility.[7] But Shapiro and Glicksman recognize that too much discretion can threaten the integrity of the policy making process or the ability to achieve the goals set by legislation, can water down regulatory protections, can create uncertainty for regulators and regulated firms, can provide opportunities for favoritism, and can allow agencies to make decisions without public participation.[8] Back-end adjustments can take place in "the shadow of the law" instead of pursuant to mandated public processes.[9] They contend, however, that these pitfalls can be minimized by specifying by statute or regulation the criteria for making adjustments and by requiring that agencies report on adjustments made, saying agencies "should be required to issue a written explanation of any back-end adjustment decision" that they make.[10] Moreover, while there is no way to guard against agency capture, they argue it can be minimized by mandating that agencies provide opportunities for meaningful public participation in any adjustment process and that the avenues for public participation be comparable to the opportunities

3. Another approach, discussed by others in the symposium, is to provide regulated entities with more flexibility in how they comply with risk reduction requirements. *Id.* at 148.

4. *Id.*

5. *Id.* at 158, 171.

6. *Id.* at 159.

7. *Id.* at 26.

8. *Id.* at 170–72.

9. *Id.* at 173 (quoting Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 319 (1999)).

10. *Id.* at 174.

available when the underlying standards were first adopted.[11] Additionally, back-end adjustments should be judicially reviewable.[12]

The specific question addressed by this Article is to what extent one of the various mechanisms proffered as a potential vehicle for making back-end adjustments—namely, the use of enforcement discretion—is well suited to achieving the authors' goals. In short, is it a viable and effective tool for mitigating either unintended or unwise consequences of regulatory policy? The authors provide little discussion about how they envision this particular technique would be used to achieve back-end adjustment, but they cite as examples the refusal by an agency to enforce de minimis or technical violations and EPA's Supplemental Environmental Project (SEP) policy, in which regulated entities that have violated the law can avoid paying fines by undertaking environmentally beneficial projects.[13] EPA's SEP policy is one for which there is no statutory authorization; the EPA developed it as part of its own efforts to improve enforcement policy.

This Article analyzes these questions largely in the context of environmental regulation. The focus is on the process of back-end enforcement adjustments; I do not explore fully the substantive standards on which such adjustments should be based. Part II discusses how enforcement discretion is used in the current system. Part III analyzes whether it is desirable to give agencies more enforcement discretion in order to accomplish back-end adjustments. Part IV examines the role that judicial review and increased public participation could play in minimizing the possible pitfalls of enhanced enforcement discretion.

II. OVERVIEW OF USE OF ENFORCEMENT DISCRETION IN THE CURRENT SYSTEM

In attempting to answer whether it is desirable to rely on enforcement discretion as a tool for achieving back-end adjustments, it is useful first to assess the realities of current environmental enforcement schemes. Specifically, it is helpful to examine the degree to which there is currently discretion in environmental enforcement, whether such discretion is currently being used to achieve back-end adjustments, and if so, what lessons can be drawn from this experience.

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11. *Id.* at 175.
12. *Id.* at 176.
13. *Id.* at 167–68.

A. *How Environmental Enforcement Is Currently Applied in Practice*

As a starting point, it is helpful to take a step back and ask how most regulatory enforcement is actually applied. Discussion in academic and other circles often contrasts two theoretical enforcement approaches—one based on "deterrence" and the other based on "cooperation." While these distinctions are significant and influence the enforcement policies of states and the federal government, it is also true that in practice, most environmental enforcement systems are a pragmatic combination of the two approaches. This is true to an even greater extent now as a result of recent reforms adopted by the EPA.

Numerous studies of agency enforcement demonstrate that most enforcers use a flexible, hybrid strategy that includes elements of both coercion and cooperation; few rigidly adhere to legalistic procedures. Agencies resolve most violations through informal means and negotiations to bring violators back into compliance.[14] Most instances of noncompliance are met with either no sanctions or only very minor, informal ones.[15] For example, the EPA's 1990 study of its hazardous waste management program noted that of the approximately 5,700 Resource Conservation and Recovery Act (RCRA) enforcement actions conducted in three different areas, approximately 70 percent were informal, using tools such as warning letters and notices of violation.[16]

Moreover, enforcement personnel use a range of tools and strategies, depending on the circumstances they encounter. In their extensive study

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14. *See* Paul B. Downing & James N. Kimball, *Enforcing Pollution Control Laws in the U.S.*, 11 POL'Y STUDIES J. 55, 59–60 (1997) (summarizing numerous studies).

15. CLIFFORD S. RUSSELL ET AL., ENFORCING POLLUTION CONTROL LAWS 25, 37–42 (1986).

16. U.S. EPA, NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY (July 1990). One study of Clean Water Act enforcement found that 70 percent of actions were at the three lowest levels of enforcement (level (0), no action warranted, comment, permit modification request; level (1), telephone calls, meetings, enforcement notice letters; and level (2), warning letters, notices of violations, etc.). SUSAN HUNTER & RICHARD W. WATERMAN, ENFORCING THE LAW: THE CASE OF THE CLEAN WATER ACTS 53–57, 72–73 (1996). Another study of Clean Water Act enforcement in EPA Region II showed that "the single most common agency response to [violations of effluent limits] is to take no formal action against [facilities]" (agency took no formal action in 40 percent of cases, and issued warning letters in another 40 percent of cases). PETER C. YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 278–79 (1991). Another review found that over 80 percent of wetlands violations over a five year period were resolved by the U.S. Army Corps of Engineers without the imposition of any penalty, while over a three year period, over 90 percent of wetlands violations were resolved by EPA without any penalty imposed (two-thirds without formal enforcement action). Richard G. Kozlowksi & Howard Bleichfeld, *Wetlands Enforcement: Lion or Lamb?*, NAT. RESOURCES & ENV'T 62 (Winter 1996). The EPA and the Army Corps of Engineers have joint enforcement authority over wetlands violations.

of Clean Water Act (CWA) enforcement, for example, Professors Susan Hunter and Richard Waterman found a "pragmatic" EPA enforcement process in which agency staff was flexible and employed considerable discretion, and in which they utilized a wide range of diverse enforcement mechanisms (including phone calls, conferences, warning letters, notices of violation, administrative orders and civil penalties).[17] They note that pragmatic enforcement was not an explicit goal of enforcement staff but was a "natural response to the diversity of the surface-water regulatory environment" (such as differences in the nature of water pollution problems, and political, economic, and demographic factors) that led to broad variations in the manner in which the CWA is enforced across EPA's regional offices and in the fifty states.[18]

Another example of enforcement adaptability is illustrated by a study of how regional offices enforced the federal Surface Mining Reclamation Control Act (SMRCA) in the late 1970s. The study found noticeable differences in style: in the eastern regional offices, a program of "vigorous, rule-oriented enforcement" took shape,[19] while in western offices, a more flexible, conciliatory orientation developed.[20] These differences were, in considerable part, a response to the disparate political and regulatory environments in the regions. The eastern region developed a tougher approach because of the prior recalcitrant attitude of many eastern coal miners, the history of ineffective state regulation, the greater anticipated resistance by regulated firms, and the concerns about agency corruption.[21] In the West, there was more consensus about the need for mining regulation (including among the mining community), more of a history of prior regulation, and less of a perceived need to be visibly tough in enforcement.[22]

In their recent case study of compliance among pulp and paper mills in several countries, Professors Kagan, Gunningham, and Thorton found a pragmatic approach to both standard setting and enforcement.[23] They

17. *See* HUNTER & WATERMAN, *supra* note 16, at 50–65; *see also* RUSSELL ET AL., *supra* note 15, at 65 (stating that most regulators allow for discretion in dealing with short-term permit violations).

18. HUNTER & WATERMAN, *supra* note 16, at 50, 63–65, 100, 124, 195.

19. Neil Shover, et al., *Regional Variation in Regulatory Law Enforcement: The Surface Mining Control and Reclamation Act of 1977*, *in* ENFORCING REGULATION 121, 131 (Keith Hawkins & John M. Thomas, eds., 1984).

20. *Id.* at 132–33.

21. *Id.* at 133–37.

22. *Id.*

23. Robert A. Kagan, Neil Gunningham, & Dorothy Thorton, *Explaining Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC'Y REV. 51, 65 (2003).

noted that "regulators tailor facility-level permits and informal orders to individual mills' inputs, technologies, surrounding environmental exigencies, and investment cycles (e.g., delaying stricter permit requirements for old facilities until a scheduled upgrade of its production processes)."[24] They concluded:

> Far from inflicting a technology-forcing, one-size-fits-all set of regulatory requirements on all regulated firms, as critics of regulation often suggest, a close examination of the permits of pulp mills reflects a governmental propensity, in all jurisdictions we studied, to tailor requirements to the technological and economic constraints of particular regulated entities.[25]

The EPA has moved toward more explicitly articulating a pragmatic enforcement approach at a formal policy level as well. During the 1990s, it began placing greater emphasis on compliance assistance and compliance incentive methods and on integrating these tools with traditional enforcement methods.[26] Thus, the EPA began actively implementing compliance assistance programs in the mid-1990s, developing ten compliance assistance centers and thirty sector notebooks, and expanding compliance assistance tools such as hotlines, workshops, on-site visits, audit protocols, and checklists.[27] It also adopted several policies to encourage self-policing activities by regulated entities, including a policy that provides incentives for voluntary environmental audits[28] and a policy to encourage compliance among small businesses.[29]

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24. *Id.*

25. *Id.* at 84.

26. *Environmental Regulation, State Innovative Compliance Strategies Implementation and EPA Response: Hearings Before the House Subcomm. on Oversight and Investigations Comm. on Commerce*, 105th Cong. (1998) (prepared statement of Eric Schaeffer, Director, Office of Regulatory Enforcement, EPA), *available at* http://www.epa.gov/ocir/hearings/testimony/062398.htm.

27. *Id.*

28. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (April 11, 2000), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-8954-filed. The policy seeks to promote auditing and other internal review processes by granting enforcement leniency to firms that voluntarily disclose and correct violations that they discover. *Id.* at 19,619–20. Unlike many state laws, however, it does not provide immunity for violations voluntarily disclosed as a result of such self-policing programs, nor does it create a privilege from disclosure for materials generated by such programs. *Id.* at 19,623–24.

29. Small Business Compliance Policy, 65 Fed. Reg. 19,630 (April 11, 2000) superceding 61 Fed. Reg. 27,984 (June 3, 1996)), *available at* http://www.epa.gov/compliance/incentives/smallbusiness/index.html. Under the policy, the EPA will forego penalties entirely when a small business makes a "good-faith" effort to comply with environmental requirements. This is defined to include situations where a small business voluntarily

The EPA also announced a preference for an "integrated" compliance assurance approach—one that combines enforcement with compliance assistance and/or compliance incentives. As summarized in one analysis, such approaches "are intrinsically rooted in the view that noncompliance is rooted both in economic and institutional causes. In principle, the strength of integrated approaches is the synergy that results from attacking multiple sources of noncompliance simultaneously, using an approach customized to the characteristics of a particular regulated community."[30] An example of an integrated approach is combining an offer of compliance assistance to a particular regulated sector with a public threat of increased inspections. In one such initiative directed at steel "minimills," one EPA regional office announced that facilities would have six months within which to conduct self-audits and disclose violations under EPA's self-audit/disclosure policy. After those six months, multimedia inspection teams would inspect all nonauditing facilities and take appropriate enforcement action.[31]

The EPA, as Professor Dan Farber notes, also "created," without any explicit statutory authority, a new type of enforcement mechanism that might be viewed as a "kinder, gentler" "stick"—the Supplemental Environmental Project (SEP).[32] Under EPA's SEP policy, violators can reduce the size of a penalty they would otherwise be required to pay by reaching an agreement with the EPA to implement "environmentally beneficial projects which the [alleged violator] is not otherwise legally required to perform."[33] Environmentally beneficial projects "must im-

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discovers a violation (whether due to an audit, on-site compliance assistance, or other means), promptly discloses the violation to the EPA, and corrects it within six months (more time is permitted if pollution prevention technologies are involved). *Id.* at 19,632–34. Small businesses are defined under the policy as companies employing one hundred or fewer persons on a companywide basis. *Id.* at 19,632.

30. Mark Stoughton, et al., *Toward Integrated Approaches to Compliance Assurance*, 31 ENVTL. L. REP. 11266, 11267–68 (2001).

31. *Id.* at 11273–78. EPA staff reported to investigators that they believed these initiatives resulted in positive changes in attitude, increased understanding, and increased compliance by regulated entities. They had not documented quantifiable improvements in compliance rates, however. *Id.* at 11278 n.89. They also reported their belief that these approaches were more cost effective than either traditional enforcement alone or compliance assistance alone. *Id.* at 11278 n.90.

32. Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 309–10 (1999). Final EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24,796 (May 5, 1998), *available at* http://www.epa.gov/compliance/civilprograms/seps/index.html. Professor Breger describes the SEP policy as an "extensively articulated effort to approximate individuated regulation in settlement agreements." Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 337 (1996).

33. Final EPA Supplemental Environmental Projects Policy, *supra* note 32, at 24,798.

prove, protect, or reduce risks to public health or the environment at large" and can include pollution prevention, facility assessments and audits, compliance promotion, or other activities.[34]

In short, the existing reality of environmental enforcement is that enforcers do not rigidly or uniformly enforce the law in a one-size-fits-all approach. Rather, enforcement is carried out pragmatically, with enforcers employing a variety of means to attain compliance. As discussed below, this flexible approach is facilitated by the fact that the current enforcement process contains tremendous discretion at numerous decision points.

B. Discretionary Points in the Current Enforcement Process

More so than with any of the other back-end adjustment mechanisms discussed by Professors Shapiro and Glicksman, the enforcement process is filled with discretionary decision points at literally every stage of the process. Indeed, as Professor Robert Kuehn has aptly noted, "few areas of the law invest more discretion in agency employees or are more hidden from the public's view and oversight than an agency's enforcement actions."[35] This discretion is amplified because there are far more regulated entities than resources available to police all of them. One survey of Clean Water Act enforcement, for example, found that most enforcement staff see themselves as having quite a bit of discretion in a variety of enforcement tasks. For example, over 40% reported having "a great deal" or "total" discretion in carrying out inspections; 49% reported having discretion in issuing administrative orders; 42% reported having discretion in issuing notices of violation; and 60% reported having discretion in issuing warning letters (including 15% who said they had total discretion in this task).[36]

Of the innumerable discretionary decision points in the enforcement process, consider, for example, the discretion involved in determining which facilities to inspect. Most environmental statutes do not mandate any type of inspection schedule (or even that inspections occur). Of the hundreds of thousands of facilities subject to environmental require-

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34. *Id.* Settlements involving SEPs must, however, recoup economic benefit, plus at least a small percentage of gravity-based penalties. *Id.* at 24,801. Moreover, in general, 80 percent of the cost of a SEP can be used to offset penalties. *Id.* at 24,802.

35. Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT, 625, 640 (1994).

36. HUNTER & WATERMAN, *supra* note 16, at 89.

ments, only a small portion of even the largest facilities are inspected each year.[37] Moreover, there are different levels of inspections, reflecting different degrees of comprehensiveness. Many agencies target facilities for inspection based on their past history of noncompliance, complaints from the community, or potential for environmental harm; others inspect facilities more randomly. Other research has found that political factors such as community affluence and the probability of plant closure are positively related to likelihood of inspection[38] and that resource constraints influences the stringency of EPA inspections.[39] Obviously, if a facility is not inspected or is inspected less rigorously, it is far less likely that it will be found in violation of regulatory requirements and sanctioned.

If a facility is found in noncompliance, an agency then has the discretion to respond in multiple ways, ranging from doing nothing, to informal actions (such as a phone call, a warning letter, a site visit, or a notice of violation), or to formal actions (administrative, civil, or criminal enforcement). Even determining when a facility is in noncompliance can be a subjective, discretionary process. Indeed, because of the relatively relaxed *mens rea* requirements for criminal liability under most environmental statutes, many violations of environmental requirements, in theory, could be prosecuted administratively, civilly, or criminally. The EPA has adopted various guidance documents to help inform the exercise of its investigative and prosecutorial discretion. But these documents are not binding on the agency. Moreover, many states do not have such formal policies. Ultimately, the decision about whether to enforce and what type of enforcement action to take turns on highly subjective factors and "'rests entirely in [the] discretion' of the enforcer."[40]

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37. *See* Eric S. Schaeffer, *Encouraging Voluntary Compliance Without Compromising Enforcement: EPA's 1995 Auditing Policy*, *in* CONFERENCE PROCEEDINGS, 4TH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 451, 453 (1996) (indicating that "[b]y one estimate, at least 700,000 facilities are subject to one or more federal environmental laws, while the federal government and states together conduct fewer than 100,000 inspections per year"); Al Iannuzzi, *Self-Regulation—Has Its Time Come?*, 33 ENVTL. L. REP. 10917, 10918 (2003) (citing an EPA report that over two year period, 34 percent of facilities considered "large sources" were inspected, and of these, less than 1 percent received an inspection in all three media—air, water, and hazardous waste).

38. Eric Helland, *The Enforcement of Pollution Control Laws: Inspections, Violations and Self-Reporting*, 80 REV. ECON. & STAT. 141, 152 (1998).

39. Eric Helland, *The Revealed Preferences of State EPAs: Stringency, Enforcement, and Substitution*, 35 J. ENVTL. ECON. & MGMT. 242, 258–60 (1998).

40. Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105, 119 (2003) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

And there is some empirical evidence that non-statutory factors influence enforcement choices. One study of Clean Water Act enforcement by the EPA found that the higher the unemployment rate in a state, the fewer violations the EPA referred for judicial enforcement.[41] Another analysis of over 300 Clean Water Act, Clean Air Act (CAA), and RCRA penalty actions found that the EPA was less likely to criminally charge very large firms and government agencies than smaller or medium sized firms. Moreover, small firms were more than twice as likely as large firms to face criminal sanctions even after taking into account the harm from a violation.[42]

Any decision to actually assess penalties entails additional, substantial discretion. Many environmental statutes provide for an enormous range of penalties, ranging from $0-$25,000 per day per violation (the amounts actually are higher now with inflationary adjustments mandated by federal law). The EPA has developed penalty policies to guide its discretion, but these policies nonetheless leave substantial room for judgment calls, such as determining the potential harm from noncompliance, a company's "good faith" efforts to remedy a violation, a violator's culpability, and other mitigating factors. Two commentators explain the role of discretion in enforcement as follows:

> [T]he specificity of [EPA and state penalty policies] seems to imply that enforcement decisions are made only by objective, analytical criteria. This is not true. Both EPA and state agencies will not pursue many cases that meet the articulated criteria for enforcement for a variety of reasons, including limited enforcement resources, questions regarding the likelihood of success in the litigation . . . and the inability of the violator to pay a substantial civil penalty . . . . [T]he adjusting factors are the most subjective. How willful or negligent was the violation? How cooperative was the violator? These factors can be viewed favorably or unfavorably depending on the sensibilities and predispositions of the government employee doing the calculation.[43]

Not surprisingly, environmental penalties vary widely between the EPA and the states, as well as among the states. An EPA study of RCRA en-

41. HUNTER & WATERMAN, *supra* note 16, at 120.

42. Firestone, *supra* note 40, at 146, 158.

43. Bill S. Forcade & Elizabeth D. Anderson, *How to Minimize Civil Penalties in Environmental Enforcement*, 30 ENVTL. L. REP. 11031, 11034, 11036 (2000). One study of administrative penalties filed by the EPA showed that for firms with large parent companies, firm size significantly impacted the amount of sanctions assessed. Kelly Lear-Nordby, An Empirical Examination of EPA Administrative Fines (Jan. 1999) (unpublished manuscript, on file with author).

forcement in thirteen states found a "wide variation" in the average size of penalties assessed.[44] A study of CAA enforcement in several states likewise noted that average penalties assessed ranged from over $68,000 in Michigan to under $2,500 in California.[45] Non-statutory factors appear to influence penalty determination as well. One study comparing state administrative enforcement under RCRA found that unemployment rates significantly affected the size of penalties.[46] Another analysis determined that the EPA levied higher fines in states whose citizens participated in environmental organizations at greater rates and also in states and congressional districts that had members of Congress who had EPA oversight responsibilities.[47] And as discussed in more detail below, there is some evidence, albeit mixed, that penalties assessed in minority communities are systematically lower than in white communities.

Finally, decisions about funding enforcement programs, and allocating enforcement resources are both of considerable import and are highly discretionary. As discussed below, enforcement resources have been stretched thin in recent years, meaning that even more discretionary enforcement choices have to be made.

C. *Current Use of Enforcement Discretion to Make Back-End Adjustments to Regulation*

Although not explicitly discussed in such terms, many agencies already informally employ extensive enforcement discretion to make back-end adjustments. Specifically, they use their discretion to effectively overlook individual violations, obtain agreements by regulated entities to go beyond compliance, reorder priorities, or fine-tune regulatory policy. The discussion below highlights a few of the many instances in which this occurs. [48]

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44. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES, Rep. No. 19, E1DSF6-11-0002-7100146 at 19 (1997), *available at* http://www.epa.gov/oigearth/reports/1997/rpentbl.htm.

45. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSISTANCE PROGRAMS, Rep. No. EIGAE5-05-0169-7100306, at 26–7 (1997), *available at* http://www.epa.gov/oig/reports/1997/7100306.pdf.

46. Mark Atlas, *Law of the Lands: Analyzing State Environmental Enforcement Stringency* (on file with author).

47. James T. Hamilton, *Going By the (Informal) Book: The EPA's Use of Informal Rules in Enforcing Hazardous Waste Laws*, *in* 7 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION, AND ECONOMIC GROWTH 109 (Gary D. Libecap ed., 1996).

48. Professor Farber has made a similar argument about environmental law more generally, contending that slippage between regulatory standards and the actual conduct of regulated parties is

An example of using the enforcement process to excuse individual violations is *Citizens for a Better Environment-California v. Unocal Oil Co.*,[49] a Clean Water Act case in which California sought, through the enforcement process, to postpone additional limits on the discharges of selenium from several refineries that it was reluctant to implement in the first place.[50] Under section 307(a) of the Clean Water Act, states are required to identify waters for which water quality standards are unlikely to be achieved due to the discharge of toxic pollutants from point sources, including selenium, and to identify "individual control strategies" for the point sources causing such pollution, which are designed to achieve water quality standards within three years.[51] Acting in 1989, California initially failed to identify several portions of upper San Francisco Bay as impaired by selenium and failed to specify oil refinery selenium discharges as a substantial cause of the selenium pollution. In response, the EPA designated these portions of the Bay as "impaired waters" due to selenium pollution and attributed that selenium substantially to the discharges from the six Bay Area refineries, including Unocal's refinery. The EPA also indicated that it planned to issue its own individual control strategies for the refineries. At this point, California listed these portions of the Bay as impaired and amended the Clean Water Act permits of Unocal and the other refineries, setting newer, more stringent discharge limits to become effective in three years and less stringent interim limits until that point. Unocal and the other refineries filed suit in state court to challenge these limits (and other related matters). While several of the refineries eventually reduced their discharge levels to comply with the final limits, Unocal (and two others) contended that they could not comply due to technological constraints. This argument was sympathetically received by the state; it settled the refineries' lawsuit by agreeing to extend the stricter discharge limits for an additional five years. In return, the refineries agreed to pay the state $ 2 million. In doing so, the state effectively modified the Clean Water Act's rules on controlling toxic pollution in impaired water bodies for Unocal and the other two refineries.[52]

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pervasive. Farber, *supra* note 32, at 300 ("Regulatory slippage is as central to environmental law as water resistance is to aquatic life—a ubiquitous condition that limits efforts at movement and shapes the design and development of everything it surrounds.").

49. 83 F.3d 1111 (9th Cir. 1996). A more detailed discussion of the factual issues underlying the case can be found in the district court opinion at 861 F. Supp. 889 (N.D. Cal. 1994).

50. *Citizens for a Better Environment*, 83 F.3d at 1114.

51. 33 U.S.C. §§ 1317(a), 1314(l)(1)(B) (2000).

52. Citizen groups successfully argued, however, that the state's settlement should not preclude

Another example concerns efforts by the State of California to expand fossil fuel capacity during California's energy travails in 2000 and 2001 through reliance on so-called "peaker plants." These simple cycle power plants often have little or no pollution controls, and some burn heavily polluting fuels such as distillate oil; as a result, they are limited in the hours that they can operate. The State, however, proposed that such "peakers," including one operated by Mirant Corporation in a predominantly African-American community in San Francisco, be allowed to operate for longer hours than permitted by their permits. The EPA and the local Bay Area Air Quality Management District then tried to immunize these violations by signing administrative enforcement agreements that called for mitigation payments in lieu of compliance with the permit's requirements. Community groups eventually were successful in forcing Mirant to abide by its permit limits.[53]

On the other hand, sometimes agencies use the enforcement process to impose broader or more stringent requirements than what is required by law. For example, under EPA's SEP policy, mentioned above, the agency has traded penalties in exchange for pollution prevention programs or other "beyond compliance" efforts that a regulated entity otherwise would not be required to undertake. Likewise, OSHA sometimes will settle an enforcement action directed at an individual facility by getting an employer to agree to undertake corporate-wide measures that go beyond compliance.[54]

In other instances, agencies use the enforcement process to ignore categories of violations. This selective inattention can have the same effect as revising legislative or regulatory requirements, as Professor Ash Bhagwat notes:

> [I]n the modern administrative state, a huge number of industries are characterized by pervasive regulation, where almost any activity of the regulated entities occurs within a web of regulatory requirements. When an agency overseeing such an industry enforces one part of a regulatory scheme but not another, or exempts particular entities from regulatory requirements, it is effectively amending comprehensive regulatory schemes.[55]

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a private enforcement action for penalties under the Clean Water Act. *Citizens for a Better Environment*, 83 F.3d at 1116–18.

53. Alan Ramo, *California's Energy Crisis—the Perils of Crisis Management and a Challenge to Environmental Justice*, 7 ALB. L. ENVTL. OUTLOOK J. 1, 20–21 (2002).

54. Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 403 (2003).

55. Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 179–80 (1996)

One specific illustration of this is the EPA's enforcement history under the new source review (NSR) program of the Clean Air Act. The program requires that new major stationary sources or existing sources undergoing major modifications obtain a permit and install stringent technology-based controls.[56] Activities that constitute "routine maintenance, repair, and replacement," however, do not trigger new source review.[57] For many years, numerous large sources, such as power plants, under the guise of conducting such "routine" activities, performed major overhauls and major replacements to extend the lives of the plants.[58] EPA enforced this requirement inconsistently or not at all.[59] Consequently, the new source review requirement was routinely evaded.

Under the Clinton Administration, the EPA decided to make noncompliance with NSR a major priority. It initiated a series of investigations and enforcement actions against utilities for violating NSR requirements, filed a number of civil suits, and issued dozens of notices of violations.[60] It effectively breathed life back into these requirements.

President Bush, by contrast, has taken the position that the NSR rules are inefficient and discourage new investment. In 2002 and 2003, the Administration issued a package of reforms for the program, including changes to the routine maintenance, repair, and replacement exemption. Under these changes, many of the previously unlawful modifications would have been permissible. As settlement negotiations in several previously filed cases against utilities stalled, former EPA enforcement officials charged that political pressure from the White House, as well as the announcement of the rule changes, undermined their bargaining position.[61] The Administration subsequently announced that it was dropping

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(citations omitted).

56. Facilities in nonattainment areas must achieve the Lowest Achievable Emission Rate (LAER). *See* 42 U.S.C. § 7503(a)(2) (2000) ("[T]he proposed source is required to comply with the lowest achievable emission rate."). Facilities in attainment areas must adopt Best Available Control Technology (BACT). *See id.* § 7475(a)(4) ("[T]he proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility.").

57. 40 C.F.R. § 52.21(b)(2)(iii)(a) (2004).

58. Utility managers at industry conferences were specifically counseled to describe their activities as "routine maintenance" rather than "modifications" to stay off EPA's radar screen. James A. Lofton, *Environmental Enforcement: The Impact of Cultural Values and Attitudes on Social Regulation*, 31 ENVTL. L. REP. 10906, 10912–13 (2001).

59. *Id.* at 10913.

60. *Id.*

61. Darren Samuelsohn, *Bush's NSR Reforms Harming Enforcement Cases, Former EPA Official Says*, ENV'T & ENERGY DAILY (Feb. 9, 2004); Letter from Eric V. Schaeffer, Director, Office of Regulatory Enforcement, to Christine Whitman, Administrator, U.S. Environmental Protection Agency (Feb. 27, 2002).

investigations against approximately fifty facilities whose activities would not run afoul of the new reforms, even though, according to the EPA's longstanding position, their actions were unlawful at the time they were undertaken. The effect of this non-enforcement stance is in many ways the same as a retroactive repeal of the NSR standards. As one EPA lawyer told the *New York Times*: "If you say, 'I'm not going to enforce the law at all,' that is doing rule-making without a rule-making process."[62] More recently, EPA Administrator Leavitt announced that the EPA would in fact continue to prosecute companies for NSR violations.[63]

A slightly different illustration is the systematic reluctance of the Occupational Safety and Health Administration (OSHA) to criminally prosecute employers for workplace accidents and deaths. Under the Occupational Safety & Health Act (OSH Act), it is a criminal offense to cause the death of a worker by willfully violating safety requirements.[64] According to an investigative report by the *New York Times*, from 1982 to 2002, OSHA determined that 1,242 worker fatalities were the result of willful safety violations by employers.[65] Yet in ninety-three percent of these cases, OSHA declined to refer the matter for criminal prosecution.[66] Moreover, the investigation found that, since 1990, OSHA has agreed as part of settling some enforcement actions to recharacterize violations as "unclassified" rather than willful.[67] There is no reference to "unclassifed" violations in the OSH Act or its implementing regulations. Rather, according to the investigation, the term was developed (by defense lawyers and later accepted by OSHA) as a way to preclude possible criminal prosecution and is now included in OSHA's field manual.[68]

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62. Christopher Drew & Richard A. Oppel Jr., *Lawyers at E.P.A. Say it Will Drop Pollution Cases*, N.Y. TIMES, Nov. 6, 2003, at A1.

63. *Government Resumes Enforcement Actions Under Clean Air New Source Review Program*, 35 ENV'T REP. 197 (Jan. 30, 2004).

64. 29 U.S.C.A. § 666(e) (2003).

65. David Barstow, *U.S. Rarely Seeks Charges For Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1.

66. *Id.* The analysis also noted that in the year 2001 alone, EPA obtained 256 years of jail time for criminal violations. *Id.* at A29. For the twenty year period 1982 to 2002, OSHA obtained 30 years of jail time. *Id.*

67. *Id.*

68. The policy of substituting unclassified violations for certain willful or repeat violations was announced in a 1991 memo, which authorizes the changes if an employer "decides to correct all violations but wishes to purge himself of the adverse public perception attached to a willful or repeated violation classification and is willing to pay all or almost all of the penalty and make other significant concessions." *See* Memorandum from Patricia Clark, Director, Directorate of Compliance Programs, to Regional Administrators (Aug. 14, 1991), *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS & p_id=20360 (last visited Nov. 4, 2004).

Thus, OSHA effectively has altered the statutory classification of violations to make its enforcement scheme more lenient.

In some instances, the enforcement process is used to effectuate broader policy changes. One example is the EPA's use of enforcement discretion to modify the scope of liability under Superfund, (the Comprehensive Environmental Response, Compensation and Liability Act, or CERLCA). Through administrative guidance and policy documents, the EPA announced over a number of years that it would not pursue cost recovery actions against several categories of parties, effectively exempting them from potential liability under CERLCA. These categories of parties include residential property owners, very small ("de micromis") generators, "lending institutions that do not actively participate in their debtor's waste management decisions," prospective purchasers of "brownfield" sites, and generators of municipal solid waste.[69]

Another example involves California's Proposition 65, a voter initiative that requires businesses to provide "clear and reasonable" warnings prior to exposing individuals to chemicals that pose a significant risk of cancer or reproductive harm and that has no administrative compliance mechanism (it is enforced only through civil and citizen enforcement actions).[70] During the mid-1990s, the California Attorney General brought a series of important actions against the manufacturers of various products containing lead, including brass faucets, tableware, and calcium supplements. In these cases, significant questions such as what concentration of lead in the product met the statutory threshold, what the appropriate testing method for determining this should be, what warnings were appropriate, and in the case of calcium supplements, whether the lack of an immediately available supply of lead-free calcium justified a longer compliance period, were resolved through enforcement actions.[71] Likewise, as a result of other enforcement positions, the Attorney General's Office has set policy as to whether, in calculating permissible exposures to listed reproductive toxins, it is appropriate to average exposures over

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69. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 256 (4th ed. 2003). For a highly critical argument that EPA uses the enforcement process to revise and extend environmental laws and regulations, see JAMES V. DELONG, OUT OF BOUNDS, OUT OF CONTROL: REGULATORY ENFORCEMENT AT THE EPA 41–55 (2002).

70. CAL. HEALTH & SAFETY CODE, § 25249.6 (West 1999).

71. *See* Reynolds Holding, *Tentative Accord in Faucet Suit: 7 Makers Would Phase out Lead in New Products*, S. F. CHRON., Aug. 30, 1995, at A19; *Court Approves Prop 65 Limits for Lead in Calcium Supplements*, 5 FOOD LABELING NEWS 39, July 2, 1997, *available at* 1997 WL9737656; e-mail from Edward Weil, Deputy Attorney General, California Attorney General's Office, to author (Feb. 9, 2004) (on file with author).

time, a key determinant in when warnings are required for such chemicals.[72] The Attorney General's position has become the de facto rule for many in the regulated community in determining compliance.

In summary, under the current system, agencies enforce environmental law pragmatically and flexibly. They are able to do so because of the enormous discretion that exists at all stages of the enforcement process. While not formally declaring it as such, agencies currently use their discretion to make back-end adjustments ranging from overlooking individual violations to effecting policy changes. As discussed further below, the lessons learned from this experience raise questions regarding the desirability of increasing enforcement discretion to achieve back-end adjustments.

III. IS IT DESIRABLE TO GIVE AGENCIES MORE ENFORCEMENT DISCRETION IN ORDER TO FACILITATE BACK-END ADJUSTMENT?

The book by Professor Shapiro and Glicksman brings to the fore the general question of whether entrusting agency personnel with more discretion is desirable policy. While it is far beyond the scope of this article to examine this issue in detail, it is worth highlighting a few general points before discussing the idea of enhanced enforcement discretion.

The benefits of giving greater flexibility to enforcers and regulators are well known.[73] Rules are, by their nature, general and over-inclusive. They cannot be drafted with adequate precision to deal with all possible situations that an agency will encounter in implementing the rules. Strict adherence to rules may result in economic inefficiency, either because compliance costs are greater than resulting social benefits or because compliance is not a cost-effective means for achieving a regulatory objective or leads to unfairness, such as when a firm has to shoulder a grossly disproportionate share of regulatory costs.[74] "Discretion allows

72. E-mail from Susan Fiering, Deputy Attorney General, State of California, to author (Feb. 3, 2004) (on file with author).

73. *See generally* Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277 (1982).

74. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 58–62 (1982) (listing situations in which the mismatch "between uniform rules and diverse circumstances" produces unreasonable results); *see also* Farber, *supra* note 32, at 316–17 (arguing that enforcement discretion could lead to more efficient outcomes in which the costs and benefits of pollution control will be roughly matched, rather than making the level of pollution control independent of individual circumstances).

decisions to be tailored to the [individual] circumstances of each particular case."[75] As Professor Carl Schneider has further explained:

> Sometimes a rule will, applied to a particular case, produce a result that conflicts with the rule's purpose. Discretion can allow the decision-maker to promote the rule's purpose. Sometimes a rule will, [when] applied to a particular case, produce a result that conflicts with our understanding of what justice demands. Discretion can let the decision-maker do justice. And sometimes the circumstances in which a rule must be applied will be so complex that no effective rule can be written. Discretion frees the decision-maker to deal with that complexity.[76]

The drawbacks are also familiar. The exercise of discretion by regulators can undermine the legitimacy of rules and increase the potential for decisions to be based on bias or illegitimate factors.[77] It can result in decisions that are based on less information and deliberation and that are not as carefully reflected on as an underlying rule.[78] Discretion can "engender inefficiency by encouraging the unnecessary consideration of each decision afresh."[79] It can violate the basic assumptions that like cases should be treated alike and that participants should be treated fairly. It can lead to less predictability for regulated entities by creating doubt as to what the rules of the game are. Furthermore, it can result in less transparency in decision-making. While rules are public in nature (publicly debated on and disseminated), discretion is usually exercised in private and less widely disseminated.[80] Professor Kenneth Culp Davis famously warned against the dangers of affording prosecutors, government regulators, and enforcement personnel too much enforcement discretion in his book, *Discretionary Justice*: "[t]he discretionary power of

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75. Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, *in* THE USES OF DISCRETION 47, 67 (Keith Hawkins ed., 1992); *see also* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 436–37 (1999). ("Rules, after all, are necessarily imperfect; they cannot take into account every factor relevant to the appropriate disposition of a matter facing the agency . . . . It is hard to argue against empowering regulators with greater flexibility to better serve the purposes underlying regulation.") [hereinafter Siedenfeld, *Bending the Rules*].

76. Schneider, *supra* note 75, at 61.

77. *Id.* at 68–69; *see also* Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, *in* THE USES OF DISCRETION, *supra* note 75 at 11, 15–16; Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, *in* THE USES OF DISCRETION, *supra* note 75, at 361, 371.

78. Schneider, *supra* note 75, at 72.

79. Lacey, *supra* note 77, at 371.

80. Schneider, *supra* note 75, at 74–77.

public officers . . . to be lenient is . . . susceptible to many kinds of abuse, including the worst sort of discrimination, favoritism, or caprice, and may be extremely damaging to private interests."[81]

Against this general backdrop, this section discusses some specific concerns about using the enforcement process to fine tune regulatory policy, particularly in light of our current experiences with the use of existing enforcement discretion to make back-end adjustments.

A. Are We Asking Too Much from Enforcement Staff?

A threshold set of questions deals with the practicalities of entrusting enforcement staff with greater policy-making responsibility. Are enforcement personnel best suited to make back-end adjustments? Do enforcement personnel have adequate resources to assume the added responsibility, or will this unduly tax existing enforcement personnel, who are already stretched to the limit (and beyond)?

Scholars who have advocated for a flexible enforcement approach note that fine-tuning through the enforcement process depends on having skilled, highly-professional agency personnel to adapt and shape rules to the individual circumstances of regulated entities.[82] For Professors Bardach and Kagan, for example, the model is staff with experience in regulated industries. The professors acknowledge that greater flexibility requires additional time, knowledge, and money (including the need to document any instance of under enforcement).[83]

It is far from certain, however, that enforcement staff are the best equipped to make back-end adjustments. One concern is the nature of their expertise: enforcement staff may be best trained to deal with technical questions of monitoring and compliance but not best suited to deal with larger policy questions, such as the cost-effectiveness of various regulatory approaches. A second, related concern is perspective. Enforcement staff often, although not always, work separately from the agency staff members who set standards or write permits. Enforcement staff may not have the same appreciation for the environmental and public health costs and trade-offs that underlie regulatory requirements. A third concern is simply the pressure and time constraints under which

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81. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 231–32 (1969) (footnotes omitted).

82. Keith Hawkins & John M. Thomas, *The Enforcement Process in Regulatory Bureaucracies*, *in* ENFORCING REGULATION, *supra* note 19, at 3, 13.

83. Bardach & Kagan, *supra* note 74, at 155–60.

most enforcement decisions are made. Enforcement staff often have considerably less time for deliberation and reflection than those involved in the enactment of underlying rules (or even formal applications for regulatory waivers or negotiated exemptions such as Project XL) and may have a more one-sided informational base.[84] As Matthew Zinn has observed:

> While an enforcer may be better placed than a rulemaker to understand the compliance costs of particular firms, that officer will likely have less information about the public costs of pollution: she will not have available the broad public input and time for reflection available in notice and comment rulemaking. To ask agencies to make such decisions on a case-by-case basis during enforcement may assume considerable capacity that the agency lacks and may leave the agency at the mercy of an industry's superior knowledge of its own processes. [85]

On the other hand, in his detailed case study of water pollution control in Great Britain, regulatory scholar Keith Hawkins found that a system of informal bargaining and negotiation between inspectors and regulated entities was very effective at achieving compliance.[86]

Another major question mark is resources; in the current-day environment, resources for government enforcement are in short supply. Consider, for example, state spending on environmental protection. An analysis by a state/EPA task force in the late 1990s estimated that there was a gap of $735 million to $960 million between state spending on water quality programs and state needs for fully implementing the Clean Water Act.[87] In Fiscal Year 2002, thirty of forty-two states responding to

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84. This point was underscored by Dave Cozad, a supervising EPA attorney who participated in this symposium. He noted that state agencies and EPA often lack the expertise about individual industries that is necessary to make individualized, back-end adjustments, and that if more back-end adjustments occurred, agencies would have to rely heavily on information provided by regulated entities. David Cozad, *Responsive Remarks to Articles Presented at the* Kansas Law Review *Symposium on* Reforming Environmental Law: Can Regulation Be More Adaptive?, 52 U. KAN. L. REV. 1401 (2004).

85. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 102–03 (2002). Professor Kagan, by contrast, argues that regulatory agencies have time to gather information and engage in further dialogue with executives, engineers and employees in regulated entities to gauge the seriousness of violation (in contrast with police who must make assessments about leniency on the spot), although he acknowledges that risks from regulatory violation may be uncertain. Robert A. Kagan, *On Regulatory Inspectorates and Police*, *in* ENFORCING REGULATION, *supra* note 19, at 37, 56–57.

86. *See* KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 110–54 (1984).

87. ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS,

a survey indicated that they cut their environmental budgets by an average of 6%.[88] In Fiscal Year 2003, overall state spending on environmental protection and natural resources programs dropped by another 1.6%.[89] A recent survey I conducted of state Clean Water Act permitting programs found that numerous states had been forced to freeze or cutback compliance, enforcement, and other staff.[90] Even before this period of budget difficulties, a number of states were having to choose between devoting adequate staff to compliance assistance programs or traditional enforcement activities because of resource shortfalls.

The EPA also has seen its enforcement resources stretched thinner in recent years. For its first three years in office, the Bush Administration cut back EPA's proposed budget before submitting it to Congress.[91] From 2001 to 2003, EPA's enforcement and inspection staff declined by over 12% .[92] The EPA estimates that it will conduct almost 25% fewer inspections in fiscal year 2004 than it did four years earlier.[93] A 2003 Knight-Ridder study found that most indices of enforcement activity for the major environmental statutes had dropped in the first three years of the Bush Administration.[94] Since September 11, 2001, numerous criminal investigators from the EPA have been assigned to help work on

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STATE WATER QUALITY MANAGEMENT RESOURCE ANALYSIS: INTERIM REPORT ON RESULTS (April 1, 2002), *available at* http://www.asiwpca.org/programs/docs/gap.pdf. The analysis covers only state management activities, not spending on infrastructure improvements. A review of the Gap Analysis by the National Academy of Public Administration concluded that its estimate of the resource gap is sound, and if anything, is probably low because it does not include the costs of new and expanding water programs and may also underestimate the costs of state employees. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, UNDERSTANDING WHAT STATES NEED TO PROTECT WATER QUALITY 1 (2002).

88. R. Steven Brown, *Coping With the Budget Crunch: When the Axe Falls—How State Environmental Agencies Deal with Budget Cuts*, ECOSTATES, Winter 2002, at 16, 17, *available at* http://www.sso.org/ecos/publications.htm (last visited Mar. 27, 2004).

89. R. Steven Brown & Michael J. Kiefer, *ECOS Budget Survey: Budgets are Bruised, But Still Strong*, ECOSTATES, Summer 2003, at 10, 15, *available at* http://www.sso.org/ecos/ (last visited Mar. 27, 2004).

90. Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of a Public Spotlight*, 55 ALA. L. REV. 775, 790–794 (2004).

91. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROTECTION AGENCY, CONGRESSIONAL REQUEST ON EPA ENFORCEMENT RESOURCES AND ACCOMPLISHMENTS, Rep. No. 2004-S-00001, at 9 (Oct. 10, 2003).

92. *See* ROBERT PERKS & GREGORY WETSTONE, NATURAL RES. DEF. COUNCIL, REWRITING THE RULES, YEAR-END REPORT 2002: THE BUSH ADMINISTRATION'S ASSAULT ON THE ENVIRONMENT 26 (Jan. 2003), http://www.nrdc.org/legislation/rollbacks/rr2002.pdf.

93. FY 2005 EPA ANN. PERFORMANCE PLAN & CONG. Justification 69, http://www.epa.gov/octopage/budget/2005/apgmfinal.pdf (last modified Mar. 19, 2004).

94. Seth Borenstein, *Far Fewer Polluters Punished Under Bush Administration, Records Show*, COMMON DREAMS NEWSCENTER (Dec. 9, 2003), http://www.commondreams.org/headlines03/1209-02.htm (last visited Apr. 6, 2004).

homeland security investigations and also to provide protective services when the EPA Administrator travels.[95]

These factors raise concerns about the ability of enforcement staff to handle additional, complex decision-making responsibilities.

B. Will Enforcement Discretion Be Conducted Outside the Public Realm and Unduly Diminish the Public's Role in Setting Policy?

One of the potent objections raised by Professor Davis to enforcement discretion is the lack of transparency traditionally accompanying most decisions:

> [A]dministrative choices to enforce or not to enforce are often made by a single officer, usually unsupervised, usually unchecked, almost always without a systematic statement of findings, almost always without a reasoned opinion, usually without any reporting to anyone of pressures or extraneous influences, and almost always without opportunity for the public to observe what is done or undone or with what motivations. [96]

Professors Shapiro and Glicksman are insistent about insuring a meaningful opportunity for public participation in back-end adjustments. As discussed below, there are serious questions about how feasible it is to do this. Even if one could fashion an expanded role for the public in the enforcement process, it is doubtful whether public interest environmental and/or community groups would take advantage of such opportunities and participate in enforcement decisions.

As elaborated in more detail below,[97] the context in which back-end enforcement adjustments occur does not encourage public involvement. Enforcement decisions are decentralized, have low visibility, and are relatively limited in scope and impact (to individual sites or facilities). Involvement by regional or national environmental groups often will not generate significant public attention or membership benefits for them. It

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95. CONGRESSIONAL REQUEST ON EPA ENFORCEMENT RESOURCES AND ACCOMPLISHMENTS, *supra* note 91, at 15.

96. Davis, *supra* note 81, at 167. *See also* Farber, *supra* note 9, at 319 ("Slippage erodes [guarantees of transparency and accountability]." Many actions in which important policy is made "operate outside of full public view" and "do not contain the usual opportunities for public input or the normal mandates for deliberative decisionmaking. They take place, in other words, very much in the shadow of the law, not in the light of public deliberation.").

97. *See infra* Section IV.B.

is thus far less cost-effective for such organizations to participate in enforcement decisions than in centralized legislative or rule making activity. Local community groups may be much more interested in the outcome of specific enforcement actions, but there is no guarantee that such groups will be present in every community in which regulated entities operate. Moreover, many local groups will lack the resources and/or technical expertise to participate fully in the enforcement process. Unfortunately, technical expertise tends to be especially lacking in low income communities of color, where a disproportionate share of polluting facilities are located.

As Professor Rena Steinzor has noted in her study of Project XL, another flexible regulatory initiative, a back-end adjustment process may lead to a reduced role for the public in fashioning policy:

> Citizens concerned about environmental quality have organized national groups to represent their interests in the context of industry-wide rules developed by legislatures or regulatory agencies. The organization of such groups is crucial because the diffuse impact of many environmental problems means that individual citizens do not have an adequate stake in the outcome of such debates to inspire their participation. Changing the terms on which environmental groups influence the policy-making process, not to mention the costs they face in doing so, by shifting regulation from the federal and state to a site-specific level will severely limit their ability to participate, leaving that task to local citizens who may or may not have similar expertise.[98]

C. *Will Greater Enforcement Discretion Lead to Capture or Special Interest Domination?*

A related concern with affording agencies greater enforcement discretion is that it may lead to agency capture or special interest domination. As Professor Mark Seidenfeld notes, "[a]s regulators' discretion increases, so does the potential for special interest groups to influence agency policy."[99] He reasons as follows:

> [a]lthough evidence suggests that traditional capture mechanisms are not a pervasive problem today, that does not mean that domination is not a potential threat or that particular interest groups no longer exert

98. Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 144 (1998).

99. Seidenfeld, *Bending the Rules*, *supra* note 75, at 459.

> undue influence on agency decisionmaking. . . . Nonetheless, within niches of an agency's policy domain, firms in regulated industries and interest groups with strong central staffs still occupy a favored position in regulatory and political structures that allows them an advantage in influencing agency decisions. They have the incentive and means to monitor what the agency does on a day-to-day basis. They often have information without which a regulatory agency cannot do its job.[100]

Scholars have noted the general dangers of special interest ascendancy inherent in environmental law because of its complexity and the intangible nature of many benefits realized by environmental regulation.[101] These risks are heightened during the enforcement process. Most enforcement decisions, such as who to inspect, what type of enforcement response is appropriate, or when to assess penalties, are opaque—much more so than the development of regulatory policy.[102]

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100. *Id.* at 462–64. Professor Howard Latin similarly argues that it is virtually inevitable that agencies will consider social and economic impacts in their decisions (whether the law allows them to or not), and that their desire to avoid criticism and controversy will increase their responsiveness to industry points of view. Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1649 (1991). This is because "[i]ndustry representatives appear regularly in agency proceedings and can usually afford to offer detailed comments and criticisms on possible agency decisions, while environmental groups intervene on an intermittent basis and the unorganized public seldom participates at all. This routine asymmetry will increase agency responsiveness to industry criticisms." *Id.* at 1673. Moreover, agency staff and industry representatives must work together on a continuing basis to implement environmental control programs—permit compliance, site inspections, and so forth. These continuous contacts with regulated parties are likely to sensitize agency personnel to the problems and priorities of industry employees. For a contrary and more optimistic view, see DANIEL A. FARBER, ECO-PRAGMATISM 197 (1999). Professor Farber contends that we can trust the EPA to exercise any additional discretionary authority responsibly, noting that "political actors have learned by now that the public responds angrily to efforts to undermine the environment." *Id.*

101. *See* Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1548–49 (1999).

> Almost any government action creates winners and losers, and contending interests will vie to end up on the positive side of the ledger. But the complexity and opacity of many environmental issues and the public's difficulty in perceiving its own interest make the risk of special interest manipulation much more severe in the environmental realm than in other fields of regulation or government activity. Simply put, the average citizen knows if he or she is getting adequate roads or schools and even has a sense of whether the government regulation of banks seems appropriate. In many environmental circumstances, however, no comparable basis for judging the adequacy of outcomes exists. Does the government standard for residue of the pesticide allidochlor on corn at a level of 0.05 parts per million protect human health? Are particulate levels in the air of 15 micrograms per cubic meter safe? Should radionuclides in drinking water be eliminated? The public has no way to judge. In this non-transparent world, the threats of special interest manipulation and public choice failures are very real and often very large.

Id.

102. *See* Zinn, *supra* note 85, at 128 ("Enforcement is most inscrutable . . . when an agency brings no enforcement action at all. Those decisions are invisible outside the agency, because no one

Moreover, as noted above, enforcement actions are diffuse; the public typically lacks the resources or motivation to participate in typically low-stake, individual actions. At the same time, the enforcement process brings regulators and regulated entities in close and frequent contact, including in circumstances in which regulators may work more as educators and consultants than inspectors or punishers and seek to solve problems jointly to bring facilities into compliance.[103] As one commentator has explained, the "confluence of obscurity and familiarity allows agencies and regulated firms to move closer together."[104] In one study, three quarters of CWA enforcers surveyed took into account "extenuating circumstances" when enforcing the law; almost half said they considered the state of the local economy.[105] Another study, by contrast, found that more experienced inspectors for the Office of Surface Mining and Reclamation and inspectors with more critical views of the regulated industry issued more notices of violation.[106]

Critics have charged that under existing approaches, enforcement staff are susceptible to special interest influence and use the enforcement process to blunt more vigorous citizen enforcement efforts. Professor David Hodas, for example, has argued that many state enforcement actions are "prompted by the state's and polluter's desire to preempt citizen suits after the polluter receives a 60-day" notice of intent to sue.[107] The states preclude "citizen suits by entering into mild enforcement consent orders" with extended compliance schedules and de minimis penalties.[108] I observed this dynamic during the early 1990s when I was practicing with the California Attorney General's Office, which had lead enforcement authority for Proposition 65, the anti-toxics initiative discussed above. The Attorney General during this time, Dan Lungren, was widely

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else may know that violations have occurred and that the enforcement agency has decided to take no action.").

103. Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1222 (1998).

104. Zinn, *supra* note 85 at 126–27; *see id.* at 126–32 (describing reasons why risks of capture are particularly high in environmental enforcement context, including close proximity of regulators and regulated firms, asymmetric participation in enforcement proceedings by regulated firms and public interest groups; opacity of proceedings; and considerable opportunities for exercise of discretion).

105. HUNTER & WATERMAN, *supra* note 16, at 90–92.

106. David M. Hedge, et al., *Regulatory Attitudes and Behavior: The Case of Surface Mining Regulation*, 41 W. POL. Q. 323, 329 (1988).

107. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1622 (1995).

108. *Id.* at 1621–22.

perceived to be pro-business and unfriendly to environmental concerns. On at least two or three occasions when environmental groups filed 60-day notices of intent to sue to enforce Proposition 65, the potential defendants literally pleaded with the Attorney General's Office to file suit and oust the citizen enforcers.

Consider also *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[109] a case that the Supreme Court eventually decided on standing grounds.[110] In that case, Laidlaw violated its Clean Water Act permit governing mercury discharges several hundred times over the course of five years.[111] After a citizens group filed a 60-day notice based on the violations, the state Department of Health and Environmental Control initiated enforcement proceedings.[112] The state's normal practice in this situation was to file administrative enforcement actions, and it intended to do so after receiving the notice. But in response to the specific request of defendant's counsel in this case, the state instead filed a judicial action in order to preclude the citizen action from going forward.[113] The state and Laidlaw then settled the matter in an "exceedingly fast" manner, without an opportunity for the citizen groups to intervene, and on terms highly favorable to the defendant. The low penalty imposed did not attempt to capture the economic benefit obtained from noncompliance; no injunction required Laidlaw to comply with its permit, although there was a requirement that it make "every effort" to comply; and the state released liability for future violations without stipulated penalties (contrary to its usual policy).[114] Not only were the complaint and consent order filed on the last day of the 60-day notice period, but Laidlaw's counsel actually drafted both the complaint and the order, filed the lawsuit, and paid the court filing fee that day.[115] (The district court hearing the matter ruled that the state's action did not constitute "diligent prosecution" so as to bar a citizen enforcement action against Laidlaw.)[116]

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109. 890 F. Supp. 470 (D.S.C. 1995), *vacated*, 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

110. *Friends of the Earth, Inc.*, 528 U.S. at 180–89.

111. *Friends of the Earth, Inc.*, 890 F. Supp. at 475–77.

112. *Id.* at 477.

113. *Id.* at 478–79.

114. *Id.* at 478–80.

115. *Id.* at 479.

116. *Id.* at 498. There are numerous other examples of what appear to be "defendant-friendly" enforcement actions filed by government agencies to preclude citizen enforcement. *See, e.g.*, Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 WL 220464, at *13–14 (W.D. Mo. Feb. 23, 2000) (finding that broad release of all potential

Another recent Clean Water Act case likewise illustrates the risks of capture, in this instance the capture of an individual regulator. The underlying activity in this matter was a wetlands fill project conducted without a permit. The court found that the Corps of Engineers employee assigned to determine whether the fill was illegal solicited input from his personal friends who worked for one of the defendants, wrote memos disparaging counsel for plaintiffs who had filed a citizen enforcement action, and then determined that the defendants had not violated the law, even though he consulted no regulatory guidance, inspected no part of the site, and had no experience or training on the issue.[117]

Thus, providing regulators with additional enforcement discretion could exacerbate the already-existing tendency toward special interest influence or domination. Professors Shapiro and Glicksman are keenly aware of this problem, and their suggested remedy is additional public participation and judicial review.[118] As discussed below, these solutions may not be fully effective in practice. But to give Shapiro and Glicksman their full due, if the adjustment process they envision successfully works to increase public scrutiny of, and involvement in, enforcement decisions, it could not only safeguard the integrity of the adjustment process, but it could also counteract some of the current tendencies toward capture/special interest domination and thus be an improvement over the existing system. As noted earlier, most enforcement decisions, like the settlement negotiated in *Laidlaw*, are made in private, with little

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claims that could have been brought by state does not constitute diligent prosecution where state did not actually prosecute claims, no penalties were paid by defendant, and no legal obligations were imposed on the defendant beyond complying with existing law); Culbertson v. Coats Am., Inc., 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (finding state agency did not diligently prosecute defendant's violations of copper and zinc limits when its actions "fundamentally consist[ed] of a series of extensions of compliance deadlines such that" defendant was not required "to meet the copper and zinc standards of its NPDES permit")

117. No. Cal. River Watch v. City of Healdsburg, No. C-01-04686 WHA, 2004 U.S. Dist. LEXIS 1008, at *42-47 (N.D. Cal. Jan. 23, 2004). Another example involves Smithfield Foods, a Virginia company that committed over five thousand violations of its CWA discharge permit from 1991 to 1996, which contributed to the closure of shellfish harvesting in the Pagan River. Virginia had first chosen not to impose any penalties on the company, then sought penalties in amounts far lower than requested by EPA. At the time, Smithfield was contributing to the governor's political action committee, and also repeatedly threatened to leave Virginia if state regulators were too strict. EPA eventually "overfiled" against Smithfield, charging that the case was part of a pattern in which Virginia attempted to insulate violating industries from Federal enforcement by bringing very light enforcement actions. *See Hearing on the Enforcement of Environmental Laws: Federal State Relations Before the S. Comm. On Env't and Pub. Works*, 105th Cong. (1997) (statement of Lois Schiffer, Assistant Attorney Gen., Env't and Natural Res. Section, U.S. Dep't of Justice), *available at* http://epw.senate.gov/105th/doj_6-10.htm.

118. SHAPIRO & GLICKSMAN, *supra* note 1, at 27–28, 193–97.

or no public input. Agencies do not have to disclose when and why they refrain from enforcement, exercise enforcement leniency, or otherwise account for their exercise of discretion. So while greater special interest influence is one possible outcome of expanded enforcement discretion to make adjustments, enhanced agency accountability is another.[119]

D. Will Greater Enforcement Discretion Lead to Biased or Inconsistent Enforcement or the Perception of Greater Bias in the Enforcement Process?

As the discretion afforded to regulators increases, so does the potential for biased or inconsistent enforcement. There is considerable evidence showing that enforcement personnel exhibit systematic biases when they make discretionary decisions. As Professor M. Baumgartner has summarized, across all sorts of regulatory contexts, legal officials are influenced by factors such as the moral respectability of citizens whose cases they deal with, the social status of the parties involved in a case, and how well the parties knew each other before a dispute developed (or crime occurred). She concludes: "[l]eft to their own devices, agents of the law routinely favor some sorts of people over others. Discretion, in practice, amounts to what is commonly known as discrimination."[120] Indeed, there is substantial evidence of racial discrimination against African Americans in the criminal justice system, including racially disproportionate sentences for drug and other offenses, higher rates of institutionalization and a greater likelihood of being charged with more serious offenses for juveniles, and other differential treatment.[121] Evidence likewise has shown for decades that discrimination in police practices is systemic and widespread, even in police departments known to be highly professional.[122]

Regulatory enforcement differs from enforcement in the fields of criminal justice and social welfare in that the targets of enforcement ac-

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119. *Id.* at 148.

120. M. P. Baumgartner, *The Myth of Discretion, in* THE USES OF DISCRETION, *supra* note 75, at 157. *See also* Keith Hawkins, *Using Legal Discretion, in* THE USES OF DISCRETION, *supra* note 75, at 43 ("[I]t is clear from a large number of studies that assessments of moral character made by legal decision-makers are one of the most pervasive and persistent features in shaping the exercise of discretion.")

121. MICHAEL K. BROWN, ET AL., WHITEWASHING RACE 139–47 (2003). Being black, other things equal, doubled the chance of going to federal prison for a cocaine-related offense and added an average of forty months to the sentence. *Id.* at 144.

122. *Id.* at 149.

tivity are typically corporations, not individuals. Thus, there may be less concern about bias based on personal or demographic characteristics. Nonetheless, the potential for bias remains. Enforcers may choose to respond to violations differently based on the race or social status of a community in which the violations occur; they may take more seriously the complaints of wealthier, more professional citizens; or they may act more or less leniently depending on the status or "moral respectability" of a regulated entity.

In the environmental area, there is mixed evidence about whether enforcement is discriminatory. A 1992 report by the National Law Journal (NLJ) analyzing all civil judicial enforcement cases resolved by the EPA from 1985 to 1991 found that penalties for violations of federal environmental laws were 46% lower in minority communities than in white communities ($153,067 vs. $105,028).[123] It found, however, that a community's income level was not a reliable predictor of the size of penalties. The study also found racial disparities in the EPA's response to contaminated waste sites.[124] Two subsequent studies of the cases reviewed by the NLJ, however, have questioned the 1992 study's conclusions. Professor Evan Ringquist found that the results varied depending on how one grouped the historical data.[125] Mark Atlas also reevaluated the cases analyzed by NLJ using some different methodologies and found no disparities in low income or minority communities.[126] But a

123. *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1. Specifically, average penalties imposed under the Resource Conservation & Recovery Act were 500% lower; under the Clean Water Act, 28% lower; under the Clean Air Act, 8% lower; under the Safe Drinking Water Act, 15% lower; and in multimedia actions involving enforcement of several statutes, 306% lower.

124. *Id.* A 1995 report found that in Virginia, facilities in communities in which more than half of the population was African American were inspected less frequently than other facilities, and when violations of applicable environmental laws were found, the average length of time to bring the facility into compliance was longer in these communities. J. LEGIS. AUDIT AND REVIEW COMM'N OF THE VA. GEN. ASSEMB., SOLID WASTE FACILITY MANAGEMENT IN VIRGINIA: IMPACT ON MINORITY COMMUNITIES (VA. 1995).

125. Professor Ringquist first confirmed the study's findings that penalties from 1985–1991 were higher in white areas, but also found that penalties were higher in poor communities. He also examined civil judicial enforcement actions filed by the EPA dating back to 1974, and concluded that from 1974 to 1985, penalties were higher in minority and poor communities, and that during the entire period from 1974 to 1991, there was little difference in average fines between white and minority areas (and that penalties were higher in poor areas). Evan J. Ringquist, *A Question of Justice: Equity in Environmental Litigation, 1974–1991*, 60 J. POL. 1148, 1160–62 (1998).

126. Mark Atlas, *Rush to Judgment: An Empirical Analysis of Environmental Equity in U.S. Environmental Protection Agency Enforcement Actions*, 35 LAW & SOC'Y REV. 633, 633–35 (2001). Specifically, Atlas used geographic concentric rings around facility locations as the units of analysis, rather than facility zip codes. *Id.* at 661–62. He also made changes based on what he determined were mistakes in the EPA's original enforcement database. *Id.* at 659. Atlas found that the income

more recent study of air polluting facilities in New Jersey found disparities in enforcement.[127] The study found that air emitters tended to concentrate in poor neighborhoods containing high minority concentrations and that facilities in such areas had higher rates of significant violation than in other areas, but lower rates of state administrative orders issued and lower penalty amounts.[128]

To the extent that there already are enforcement biases, granting agencies more discretion could exacerbate them. The back-end adjustment process may further contribute to unequal enforcement outcomes for two reasons. First, low-income communities of color may lack the resources and expertise to participate in the individualized enforcement determinations contemplated by back-end adjustments. This point, further developed below, is true for all members of the public impacted by enforcement decisions, but the lack of resources is likely to be particularly acute for certain communities. The second relates to the nature of enforcement decisions, which are more informal and even less structured than informal rulemaking. The informality and open-endedness of the process may disadvantage minority communities relative to rulemaking or adjudication. Studies of unregulated and informal processes find that they are characterized by substantial gender and race discrimination, possibly because people with prejudices are more likely to act on their attitudes in informal, as opposed to formal, settings.[129]

Even if a back-end adjustment process does not increase bias in enforcement, the notion that agencies have even more open-ended discretion could lead to the *perception* of greater bias, especially among minority groups. Indeed, one reason why the National Law Journal study mentioned above had such a powerful impact when it was released is that it resonated with deeply-held beliefs in minority communities that laws are enforced unfairly against them—concerns highlighted by racial profiling, bias in the administration of the death penalty, and other law enforcement practices.

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level of an area had no meaningful effect on penalties, and that while a community's race affected penalties, it was in the opposite direction of what the NLJ found, i.e. penalties *increased* as the proportion of minorities in an area increased. *Id.* at 676–77.

127. Jeremy Mennis, *Race and the Location and Regulation of Air Polluting Facilities in New Jersey*, (Report prepared for Camden Regional Legal Services, Aug. 3, 2003) (on file with author).

128. *Id.*

129. Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L. J. 3, 67–69 (1998); *see also* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375–90 (discussing theories of prejudice and how prejudice influences conflicts and the settings in which conflicts are resolved).

A different concern about unfair enforcement is that back-end adjustments could result in inconsistent enforcement against regulated entities.[130] On the one hand, the essence of enhanced discretion allows regulators the flexibility to depart from generally applicable rules so that firms in the same category can be treated differently. On the other hand, "[o]ne of the most desired features of any enforcement system is consistency—[that] similarly situated enterprises should be treated consistently. Such consistency is essential to ensuring the credibility of an enforcement program and widespread voluntary compliance."[131] Indeed, one of the stated goals of the EPA's penalty policies is the "fair and equitable treatment of regulated entities."[132] In environmental law, consistent treatment is particularly crucial so that regulated entities believe they are competing on a level playing field, given the significant investments required to meet environmental requirements.[133]

Will back-end adjustments create a perception among regulated entities of disparate treatment? If so, will this undermine the extent of voluntary compliance? In part, the answers to these questions will depend on the criteria devised for granting enforcement discretion and on whether regulated entities believe the adjustments are being granted in a principled way. At the very least, it seems likely that enforcement staff will face considerable pressure from regulated entities to provide them with the same type of adjustments granted to their competitors.[134]

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130. *See* Cozad, *supra* note 84 (noting that granting additional discretion to individual agency staff will mean that decisions more likely will be based on individual values, beliefs and biases, and voicing concern that there will be less consistency, fairness, and predictability in decisions); *cf.* Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 336 (1996) ("The difference between two hypothetical Brownfields settlement agreements may depend as much upon the attitude of the EPA negotiator or the persuasive ability of industry officials as on the objective characteristics of each site. The danger, then, is that flexibility could mean 'relaxed standards rather than adapting compliance to circumstances.'").

131. Rechtschaffen, *supra* note 103, at 1223. An oft-quoted maxim of enforcement practice coined by Chester Bowles, a member of the 1941 wartime Office of Price Administration, holds that "20 percent of the regulated population would automatically comply with any regulation . . . 5 percent would attempt to evade it, and the remaining 75 percent would go along with it as long as they thought the 5 percent would be caught and punished." Bardach & Kagan, *supra* note 74, at 65–66 (citing CHESTER BOWLES, PROMISES TO KEEP: MY YEARS IN PUBLIC LIFE 1941-1969 25 (1971)).

132. ENVIRONMENTAL PROTECTION AGENCY, POLICY ON CIVIL PENALTIES (1984), *available at* http://www.wildlaw.org/Eco-Laws/civ-pen.htm.

133. EPA attorney Cozad points out that because of the substantial resources involved in demonstrating that a facility is entitled to a back-end adjustment, resources that smaller firms typically do not have, larger facilities are likely to disproportionately benefit from such an adjustment process. Cozad, *supra* note 84.

134. *See id.* (observing that if an agency grants enforcement leniency to one entity in industry, such as exempting a cattle feed lot from Clean Water Act requirements, many other entities in industry are likely to seek similar relief).

E. Will Greater Enforcement Discretion Create a Risk of Weakening Enforcement?

While the back-end adjustment process advocated by Professors Shapiro and Glicksman is a nuanced and incremental one, past experience with enforcement discretion suggests that it can be quite difficult to keep discretion from being used to weaken enforcement, even where there are ostensible safeguards in place. In this regard, it is instructive to consider the record of state enforcement performance.

Most federal environmental statutes operate under a "cooperative federalism" framework. Under this system, the federal government sets national standards and is ultimately responsible for ensuring achievement of these requirements, but states can receive authorization from the EPA to implement the program under EPA oversight. To obtain authorization, states must enact standards at least as stringent as federal law and demonstrate that they have adequate personnel, enforcement authorities, and other capacity to administer the program.[135] States also agree, as part of specific authorization agreements with the EPA, to carry out specific enforcement activities and follow EPA enforcement guidance. States now administer over 75% of the major federal delegable environmental programs, and 65% of all delegable programs.[136]

In practice, many states depart significantly from the EPA's stated policies and expectations. For example, many states do not conduct inspections as often or as thoroughly as the EPA requires and fail to identify and report significant violators to the EPA.[137] In many instances,

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135. *See, e.g.*, 33 U.S.C. § 1342(b) (2001); 40 C.F.R. § 123.22–.41 (2003) (describing authorization requirements for state administration of CWA permitting program).

136. R. Steven Brown, *The States Protect the Environment*, ECO STATES, Summer 1999, at 3, *available at* http://www.sss.org/ecos/publications/statesarticle.htm (last visited Apr. 21, 2004).

137. A review by EPA of CAA enforcement by six states in four of EPA's regions found that despite performing over 3300 inspections during the period in question, the states reported only eighteen significant violators to the EPA. When the Inspector General audited 430 of the 3300 inspections, it identified an additional 103 significant violators. Other regional offices reported similar under reporting by the states. *Hearing on the Enforcement of Environmental Laws: Federal State Relations, Before the S. Comm. on Env't and Pub. Works*, 105th Cong. (1997) (statement of Nikki L. Tinsley, Acting Inspector Gen., U.S. Envtl. Prot. Agency), *available at* http://epw.senate.gov/105th/tinsley.htm. A 2001 EPA audit of Clean Water Act enforcement found that in a number of states "many serious toxicity violations were not classified as 'significant' and thus were not subject to corrective or enforcement actions," and that "[n]umerous other major and minor facility violations went unreported." The report also found that the states examined needed to improve the quality of their inspections to ensure that facilities were accurately reporting monitoring data. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, WATER ENFORCEMENT: STATE ENFORCEMENT OF CLEAN WATER ACT DISCHARGERS CAN BE MORE EFFECTIVE, Rep. No. 2001-P-00013, at 23–24, 27 (2001).

enforcement actions taken by the states are not "timely and appropriate"—characteristics that, according to deterrence theory underlying the EPA's enforcement policies, are necessary to deter future violations. When penalties are imposed by states, according to a host of studies, they frequently are inconsistent with the EPA's penalty policies. Many states fail to recover economic benefit when assessing penalties—a core element of deterrence theory designed to insure that companies do not gain from noncompliance and that there is a level playing field among regulated entities.[138] One study of RCRA civil penalties from 1986 to 1999, for example, found that in forty out of forty-two states analyzed, RCRA penalties imposed by states were lower than those imposed by the corresponding regional EPA office and that, holding other variables constant, state RCRA penalties are about half the amount that the EPA would impose in similar circumstances.[139] (States authorized to carry out federal occupational safety and health programs also generally assess lower penalties per violation than does the federal government.)[140] Finally, rates of noncompliance with environmental laws (the great majority of which occurs under the states' watch) are substantial—typically estimated to be in the range of twenty to forty percent.[141]

In theory, departures from the EPA's guidance by states are supposed to be remedied by the EPA in its role of overseeing state programs. In practice, however, the EPA has had only limited success in moving state performance more in line with EPA expectations.[142] Studies show

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138. The 2001 Clean Water Act audit found that state "penalties [for significant violations] were sometimes insufficient to prevent further violations, and were not always collected." The audit noted that this may have contributed to a large number of recurring violations, pointing out that "[o]ver one-third of the states reported that over half of their major facilities with significant violations in 1999 also had recurring significant violations in fiscal 2000." OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, *supra* note 137, at 43.

139. MARK ATLAS, SEPARATE BUT EQUAL?: AN EMPIRICAL COMPARISON OF STATE VERSUS FEDERAL ENVIRONMENTAL ENFORCEMENT STRINGENCY 11, 17 (Ass'n for Pub. Pol'y Analysis & Mgmt. Ann. Res. Conf., Nov. 2, 2000) (copy on file with author). The "similar circumstances" refers to situations when EPA is enforcing RCRA in states that have not been delegated authority to implement RCRA in lieu of EPA, rather than when EPA is enforcing RCRA in an authorized state, i.e. essentially acting in an oversight capacity.

140. FREDERICK B. SISKIND, U.S. DEP'T OF LABOR, 20TH CENTURY OSHA ENFORCEMENT DATA (2002), *at* http://www.dol.gov/asp/media/reports/osha-data/toc.htm.

141. David Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 966–67 (2001); *see* U.S. ENVTL. PROT. AGENCY, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, A PILOT FOR PERFORMANCE ANALYSIS OF SELECTED COMPONENTS OF THE NATIONAL ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM 1, 7, 11–12 (Feb. 2003) (finding that the rates of significant noncompliance with the CWA among 6,600 major facilities were approximately twenty-five percent and that these rates have effectively remained steady since 1994) (on file with author).

142. *See* Farber, *supra* note 32, at 303–04 (1999) (noting states that have been authorized to

that the EPA oversight of state programs has been inconsistent and not particularly effective.[143] Some oversight tools, such as "overfiling" and withdrawing authority for poorly performing states, are so politically charged and resource intensive that they are scarcely used by the EPA.[144] Moreover, "EPA has rarely if ever actually withdrawn a state's authorization."[145]

The bottom line is that state agencies have considerable leeway in how they enforce the federal environmental laws that they have been authorized to implement. While some states have been vigorous in carrying out enforcement, in many others, discretion and the lack of effective oversight has led to weakened enforcement.

Although not enforcement discretion in the traditional sense, related concerns emerge from the Bush Administration's recent use of the litigation process to effect significant policy changes. In a number of cases involving federal public lands, such as the wilderness designation process on Bureau of Land Management (BLM) lands, enforcement of the Forest Service's roadless rule in Tongass National Forest, and the ban on snowmobiles in Yellowstone National Park, the Administration has settled lawsuits filed by pro-development states or industry groups on terms very favorable to the challengers, reversing or weakening environmental protections in the process.[146] Although all of these settlements are being challenged on the merits, they highlight the far-reaching nature of policy changes that can be effected by enforcement-like discretion.

F. Does Providing More Enforcement Discretion Undermine the Symbolic Importance of Enforcement?

There is an inherent tension between flexibility and discretion and the rule of law. But discretion is widely accepted as a necessary accommodation to the effective administration of the law. Many reform proposals calling for greater discretion—regulatory waivers, exceptions, or contractual agreements—have gained considerable acceptance because of the desirability of using such mechanisms to achieve more efficient or

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implement federal environmental programs often deviate openly from statutory requirements, without any meaningful response from EPA).

143. *See* CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP 117–19, 168 (2003) (discussing the relationship between state enforcement and EPA).

144. *Id.* at 339–40.

145. *Id.* at 330.

146. Tom Turner, *Unsettling Development*, 20 Envtl. F. 32, 33–37 (Jan./Feb. 2003).

fairer outcomes, even though they can undermine statutory requirements if stretched too far.

Is granting greater enforcement discretion different from these other proposals for regulatory flexibility because of the symbolic importance of enforcement? Should we be more reluctant to openly permit compromises or departures in enforcement proceedings because of the broader messages that this conveys to the public? The enforcement of legal requirements has important symbolic values. It gives voice to the public's desire to regulate and sanction undesirable behavior. It assures the public that violators do not escape punishment.

The message imparted by enforcement actions reaffirms for the public that environmental statutes are important and that transgressions are to be taken very seriously. This message is consistent with the public's expressed strong disapproval of noncompliance with environmental requirements—a desire evidenced by the harsh sweeping penalties for noncompliance and the potent enforcement tools contained in all of the major environmental statutes. The public has consistently indicated its strong support for vigorous environmental enforcement. Surveys show, for example, that the public favors "more strongly enforcing federal environmental regulations" by overwhelming margins (75% to 21% in 2003, 77% to 20% in 2001).[147] Other polls similarly find that large majorities of the public believe either that current environmental laws need to be toughened or that better enforcement is needed.[148]

I think enforcement resonates so strongly with the public because it is central to ensuring the legitimacy of the law. Enforcement is perceived as fundamental to the orderly working of the legal regime. Thus, enforcement may be different in kind from other back-end regulatory adjustments. I do not mean to suggest that enforcement discretion is in-

147. Gallup Organization, March 3–5, 2003, Q9, available in LEXIS, News & Business Library, Public Opinion Online File, Accession No. 0428056 (polling 1,003 adults nationwide); Gallup Organization, March 5–7, 2001, Q 19, LEXIS, News & Business Library, Public Opinion Online File, Accession No. 0380807 (polling 1,000 adults nationwide).

148. A 2001 survey, for example, found that 81% of the public believes either that our environment laws are not strong enough and tougher laws should be enacted (25%) or that current laws are tough enough but they are not enforced, and that they should be strictly enforced (56%). Tarrance Group & Greenberg Quinlan Research, Inc., *LCV Education Fund: Frequency Questionnaire, November 12–19, 2000*, Q 27, *at* http://www.greenbergresearch.com/publications/reports/fqlcrefpoll11120.pdf (last visited Apr. 7, 2004) (polling 1200 registered voters). By contrast, 16% believe either that current laws and enforcement are fine (13%) or laws and enforcement are too strict and should be relaxed (3%). *Id.* Very similar results were found in a poll four years earlier. Belden and Russonello, *The Ecology*, Feb. 29–March 12, 1996, Q 37, LEXIS, News & Business Library, Public Opinion Online File, Accession No. 0286490 (polling 2,005 adults).

appropriate; to the contrary, eliminating enforcement discretion would be unworkable and unwise. But careful thought should be given to whether greater reliance on enforcement discretion in order to achieve back-end adjustment risks undermining the important expressive values that the public attaches to environmental enforcement.

G. Summary

As outlined in the previous sections, providing regulators with additional enforcement discretion to fine tune regulation raises a number of potential concerns, including placing possibly unrealistic burdens on enforcement staff, diminishing the public's role in setting environmental policy, contributing to special interest domination, increasing bias or inconsistency in enforcement (or at least the perception of bias), weakening enforcement outright, and undermining the symbolic importance of enforcement. Professors Shapiro and Glicksman anticipate most of these types of concerns and suggest that they can be ameliorated through effective judicial review of agency enforcement discretion and increased public participation in these discretionary decisions. The next section discusses some of the substantial challenges in implementing these strategies in the area of enforcement discretion.

IV. THE ROLE OF JUDICIAL REVIEW AND PUBLIC PARTICIPATION

What role can judicial review and public participation play in addressing the pitfalls outlined above and in guarding against possible abuse resulting from increased enforcement discretion? This section addresses these two issues in turn.

A. Can We Devise an Effective System of Judicial Review?

Can decisions to refrain from enforcement—the type of enforcement discretion contemplated by the book's back-end adjustments—be overseen effectively by the courts? What process will be used, and what standards will be provided? Can we effectively separate enforcement decisions based on agency allocation of resources and setting of priorities, matters which courts are unlikely to review, from decisions not to enforce based on policy determinations? Devising judicially reviewable rules guiding the exercise of enforcement discretion is possible, but it would be a challenging undertaking.

The starting point in this discussion is the Supreme Court's decision

in *Heckler v. Chaney*.[149] In *Heckler*, state prisoners who had been sentenced to die by lethal injection petitioned the Food and Drug Administration (FDA), arguing that the drugs being used by the states were not approved for use in human executions and therefore violated the Food, Drug and Cosmetic Act.[150] They requested that the FDA investigate these alleged violations and take enforcement action against the states.[151] When the FDA refused, the prisoners filed suit to compel the agency to take enforcement action.[152]

The Supreme Court ruled that the FDA's decision not to take enforcement action was not subject to judicial review under the Administrative Procedure Act (APA) because it qualified as an action "committed to agency discretion by law" under section 701(a)(2).[153] The Court explained that an agency's decision not to prosecute or enforce is a decision generally committed to an agency's absolute discretion.[154] The Court cited several reasons for this:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[155]

The Court left open the possibility that Congress could override the presumption against non-reviewability by "provid[ing] guidelines for the agency to follow in exercising its enforcement powers . . . or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."[156] It also suggested that review of agency inaction might be possible where the agency's nonenforcement decision was un-

149. 470 U.S. 821 (1985).
150. *Id.* at 823–24.
151. *Id.* at 824.
152. *Id.* at 825.
153. *Id.* at 837–38.
154. *Id.* at 830.
155. *Id.* at 831–32.
156. *Id.* at 832–33.

constitutional, was "based solely on the [agency's] belief that it lacks jurisdiction," or where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[157] In a similar vein to *Heckler,* the Supreme Court recently made clear that an agency's failure to comply with a general statutory directive is not judicially reviewable. Specifically, the Court found that a challenge to the Bureau of Land Management's failure to take action to protect public lands from off-road vehicle damage was not reviewable under a statutory mandate to manage wilderness study areas "so as not to impair their suitability" for preservation as wilderness.[158]

Since *Heckler*, a number of courts have relied on its exceptions (and expanded them) to limit *Heckler*'s reach.[159] Courts have, for instance, found reviewable an agency's failure to take enforcement action based on an allegedly erroneous statutory interpretation or other legal conclusion, although not uniformly so.[160] Courts also have established that agency regulations, as well as statutory language, can provide a sufficient standard for meaningful review.[161] Numerous cases have found

157. *Id.* at 833 n.4 (citing Adams v. Richardson, 480 F.2d 1159 (1973) (en banc)).

158. Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004).

159. *See* Bhagwat, *supra* note 55, at 157, 163–64; Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 776–77 (1990).

160. *See, e.g.*, Friends of the Cowlitz v. Fed. Energy Regulatory Comm'n, No. 99-70373, 2001 U.S. App. LEXIS 28368, at 14, 26 n.15 (9th Cir. June 14, 2001) (stating a court can review an agency's summary dismissal of a complaint based on the agency's legal conclusion that agreement between licensee and state wildlife agency was private agreement that couldn't be enforced, but lacked jurisdiction to review FERC's decision not to take enforcement action or initiate investigation in a suit by citizens based on FERC's failure to take action in response to complaint against licensee based on operations of hydrolectric project); Edison Elec. Inst. v. Envtl. Prot. Agency, 996 F.2d 326, 333 (D.C. Cir. 1993) (upholding a challenge to an EPA enforcement policy indicating that it would give relatively low priority for RCRA storage prohibition against generators of mixed waste); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock, 783 F.2d 237 (D.C. Cir. 1986) (challenge to the Department of Labor's interpretations that activities at issue are not unlawful, one basis of nonenforcement decision, is reviewable). *But see* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 676 (D.C. Cir. 1994) (challenge to Maritime Administrator's interpretation that carrier did not need waiver to operate foreign-flagged vessels was unreviewable because it was a decision to forego enforcement in one particular instance, not general enforcement policy).

161. The D.C. Circuit has held, for instance, that "[j]ust as Congress can provide the basis for judicial review of nonenforcement decisions by spelling out statutory factors to be measured by the courts, so an agency can provide such factors by regulation. When an agency chooses to so fetter its discretion, the presumption against reviewability recognized in *Chaney* must give way." Center for Auto Safety v. Dole, 846 F.2d 1532, 1534 (D.C. Cir. 1988) (per curiam); Mass. Pub. Interest Research Group v. NRC, 852 F.2d 9, 16 (1st Cir. 1988). *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §17.7, at 1275 (4th ed. 2002) (providing examples of when an agency rule can pro-

such sufficient standards to rebut the *Heckler* Court's presumption of non-reviewability.[162]

On the other hand, where statutory or regulatory language is even arguably ambiguous or does not sufficiently constrain decision-makers from considering factors other than those enumerated, courts have found nonenforcement to be unreviewable. For example, section 309(a) of the Clean Water Act appears to require EPA to take enforcement action to remedy statutory violations.[163] The majority of courts, however, have found this duty to be discretionary and unreviewable.[164] The courts have

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vide "law to apply").

162. Bhagwat, *supra* note 55, at 163–64. *See, e.g.*, Doyle v. Brock, 821 F.2d 778, 782 (D.C. Cir. 1987) (upholding a union challenge to the Secretary of Labor after he declined to file a suit to set aside a union election and holding that the Labor Management Reporting and Disclosure Act ("LMRDA") imposes a mandatory duty of enforcement if probable cause exists to believe a violation has occurred); Cardoza v. Commodities Futures Trading Comm'n, 768 F.2d 1542, 1550 (7th Cir. 1985) (court found reviewable a challenge to the Commodities Futures Trading Commission's ("CFTC") failure to review a disciplinary action imposed by the Board of Trade of the City of Chicago; while statute left the issue of when to review a disciplinary action undertaken by a member exchange to the judgment of the agency, the agency had furnished sufficient standards with which to review the agency's decision by adoption of regulation guiding its consideration of such challenges); New York Public Interest Research Group v. Whitman, 321 F.3d 316, 324 (2d Cir. 2003) (court found reviewable EPA decision not to object to draft Clean Air Act permits issued by New York after EPA determined that the permits were deficient, under statutory provision that if a permit contains provisions that are determined by the EPA as not in compliance with the law, the EPA shall object to the permit); *see also* Nat'l Wildlife Fed'n v. Envtl. Prot. Agency, 980 F.2d 765, 767–68 (D.C. Cir. 1992) (invalidating a regulation that allowed EPA to refuse to initiate withdrawal proceedings once it has made the determination that the state no longer satisfies conditions for state primacy as inconsistent with Safe Drinking Water Act, which imposes a mandatory duty on EPA to act if requirements for primacy are not met). Although it did not involve review of an agency enforcement decision, *Arent v. Shalala*, 70 F.3d 610, 614 (D.C. Cir. 1995), is also instructive. There, the D.C. Circuit found sufficient standards to review the Food and Drug Administration's regulations defining "substantial compliance" under the Nutrition Labeling and Education Act's voluntary industry guidelines. The Act defined substantial compliance with reference to the number, size, and market shares of noncomplying retailers, and provided that substantial compliance was not met if a "significant number of retailers failed to comply."

163. This section provides that "whenever, on the basis of any information available to [it]," EPA finds that a state-issued NPDES permit is violated, EPA either "shall" issue an administrative compliance order or bring a civil enforcement action against the violator, or "shall" issue a notice of violation to the state and the violator. If the Agency chooses the second option, and the state has not initiated enforcement action within thirty days, EPA "shall" issue an administrative compliance order or commence civil enforcement. 33 U.S.C. § 1319(a)(1) (2001). In the event of any other relevant violation of the Act, the EPA "shall" issue a compliance order or bring a civil enforcement action. *Id.* § 1319(a)(3).

164. *E.g.*, Sierra Club v. Whitman, 268 F.3d 898, 904 (9th Cir. 2001); Dubois v. Thomas, 820 F.2d 943, 949–50 (8th Cir. 1987); Sierra Club v. Train 557 F.2d 485, 491 (5th Cir. 1977). *But see* S.C. Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 134 (D.S.C. 1978) (stating that § 309(a)(3) imposes a nondiscretionary duty"); Save the Valley, Inc. v. Envtl. Prot. Agency, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000) (holding that EPA had mandatory duty under § 309(a)(2) to initiate proceedings to withdraw authority from Indiana to enforce the Clean Water Act once it finds that violations of permit conditions or limitations are so widespread that they appear to result from failure of the

noted (1) that one of the enforcement options provided in section 309(a)(3) is to "bring a civil action in accordance with subsection (b),"[165] (2) that subsection (b), in turn, only authorizes, rather than requires, EPA to bring suit,[166] and (3) that the use of the language of authorization reveals a congressional intent to give the EPA discretion to bring enforcement actions, rather than mandating such actions.[167] Likewise, in *Center for Auto Safety v. Dole*,[168] the court held that the denial by the National Highway Transportation Safety Administration (NHTSA) of a citizen's petition to reopen an enforcement investigation against an automobile manufacturer for alleged safety-related defects in its product was not subject to judicial review.[169] The regulations at issue required an official evaluating a citizen petition to conduct a technical review, and, if she or he found a "reasonable possibility" that a safety-related defect exists, to grant the petition.[170] The court stated that the "reasonable possibility" standard did not rule out agency consideration of non-safety related factors, such as the availability and allocation of resources.[171]

Thus, Congress or agencies could, in theory, develop policies, by statute or regulation, that articulate when enforcement leniency is appropriate in order to overcome the *Heckler* presumption against judicial review of enforcement discretion.

Assuming that such standards are developed, the other elements of a judicial review process could be more easily devised. To facilitate public and judicial review, agencies could be required to provide advance written notice and a statement of reasons whenever they make a back-end

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state to enforce permit conditions).

165. 33 U.S.C. § 1319(a)(3) (2001).

166. It provides that EPA "is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." *Id.* § 1319(b).

167. *Whitman*, 268 F.3d at 904; *Dubois*, 820 F.2d, at 949–50. In *City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981), the Fifth Circuit likewise refused to find that analogous language in the Clean Air Act created a mandatory duty for EPA to act. *Id.* at 1374. The court was interpreting § 113(a)(1), which provides that "[w]henever, on the basis of any information available to the Administrator, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding[,]" and subsection (a)(2) which provides that "[w]henever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan . . . are so widespread that such violations appear to result from a failure of the State in which the plan or permit applies to enforce the plan or permit effectively, [he] shall so notify the State." 42 U.S.C. § 7413(a)(1), (2) (2001).

168. 846 F.2d 1532 (D.C. Cir. 1988) (per curiam).

169. *Id.* at 1535.

170. *Id.* at 1534.

171. *Id.* at 1535.

adjustment based on these policies.[172] In any judicial challenge to such a decision, the court would evaluate whether the agency acted properly based on the articulated criteria.[173] The standard of review presumably would be the traditional one under the APA for informal agency action, which is a deferential one.[174]

A separate issue is the substantive criteria that should govern the exercise of enforcement discretion. Defining these criteria is hugely important. Disputes and ambiguity over which projects should qualify for inclusion in EPA's Project XL, for example, have consumed much energy since the project's inception.[175] On the other hand, it is clearly not possible to specifically define all or even most of the circumstances in which fine-tuning is appropriate; if it were, then these could be set out in an initial statute or regulation without the need for later adjustment. Although it is beyond the scope of this article to fully examine what the substantive criteria should be, the questions below are some of those that should be considered and that hint at the complexity of the task.[176]

What countervailing benefits are necessary to justify adjustments: emission reductions that offset any permit exceedances; the installation of environmentally beneficial new technology not possible by complying with existing requirements; an alternative approach that is more cost effective; or other benefits?

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172. *See* Breger, *supra* note 32, at 349 (describing waiver provision in the 1996 revisions to the Florida Administrative Procedure Act which requires that an agency decision on a waiver petition include a statement of facts and reasons).

173. *See* Bhagwat, *supra* note 55, at 182–85. In Professor Bhagwat's formulation, the remedy for improper agency decisions would be a remand to agencies to take a second look, rather than to actually order agency action, which Professor Bhagwat suggests would raise potential separation of powers issues, and could interfere with agency decisions about allocation of its resources. *See also* Seidenfeld, *supra* note 75, at 491 (discussing benefits of "process" review of exercises of agency discretion, noting that as currently practiced, "process" review evaluates the reasons the agency gives for its action as an indirect means of ferreting out non-deliberative decisions).

174. 5 U.S.C. § 706 (2001); *see* SHAPIRO & GLICKSMAN, *supra* note 1, at 174 (advocating that standards for back-end adjustments should be deferential towards the agency); Breger, *supra* note 32, at 347 ("The notion of increasing regulatory flexibility by empowering agency officials with added discretion requires, of necessity, significant judicial deference to agency exercise of that discretion. There is no point in fostering administrative discretion if that discretion is checked by a heightened level of judicial review.").

175. *See* Steinzor, *supra* note 98, at 125–26.

176. *See generally* Aman, *supra* note 73, at 280 (suggesting typology of reasons for which agencies grant exceptions to rules of general applicability, including hardship, fairness and policy exceptions); Robert Glicksman & Sidney Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004) (noting categories for which Congress permits back-end adjustments in health, safety and environmental law, including lack of adverse impact on the environment, hardship or technological unavailability, fairness, and conflicts between environmental and other social policy values).

Should adjustments be authorized for good faith compliance efforts? For regulations that are especially complex and recently adopted? For firms whose individual compliance costs are grossly disproportionate to those of other regulated firms in the relevant category? In cases where compliance with a rule will produce relatively little environmental benefit because of the location of a firm?

Should there be an absolute floor limiting enforcement discretion such that adjustments are not permitted for more than a certain number of violations, or for violations more than a certain percentage above the permitted level, or for violations that result in more than a given risk level to the public, or for violations occurring in communities already burdened by a disproportionate share of polluting facilities?

Should discretion be reserved only for entities with superior compliance records? With superior records only at a given facility in question or at all of the facilities operated by a firm?

The standards also would have to identify the categories of decisions that are *not* subject to judicial review. These should include decisions based on resource constraints, conflicting agency priorities, an assessment of the likelihood of success on the merits of a case, the choice of alternative enforcement methods used to achieve compliance, and so forth.[177] As *Heckler* and other cases indicate, courts are extremely wary about second-guessing enforcement decisions based on these criteria. The Ninth Circuit, for example, in rejecting the argument that the CWA imposes a mandatory enforcement duty on the EPA, explained that "[t]he EPA has many plants to monitor and must be able to choose which violations are the most egregious. It would be unwise for the judiciary, generally untrained in biology or chemistry and uninformed about the level of violations at other water treatment plants, to attempt to set the priorities for the EPA's enforcement efforts."[178] Other decisions reflect a simi-

177. According to Professor Bhagwat, this would "balanc[e] the need for agency autonomy in administrative matters with the need for judicial supervision of policymaking and rulemaking." Bhagwat, *supra* note 55, at 183. He argues that in hybrid justification cases, the reviewing court must separate out the different components of the agency's reasoning in selecting the standard of review. *See id.* at 183–84.

178. Sierra Club v. Whitman, 268 F.3d 898, 903 (9th Cir. 2001). *See also* Dubois v. Thomas, 820 F.2d 943, 947–48 (in dismissing the argument that section 309(a) "imposes a mandatory duty [on EPA] to investigate and make findings as to alleged violations," the court explains that "EPA could be compelled to expend its limited resources investigating multitudinous complaints, irrespective of the magnitude of their environmental significance. As a result, EPA would be unable to investigate efficiently and effectively those complaints that EPA, in its expertise, considers to be the most egregious violations of the FWPCA. Only if the Administrator has discretion to allocate its own resources can a rational enforcement approach be achieved."); City of Seabrook v. Costle, 659

lar desire to avoid interfering with agency prioritization and resource allocation choices.

But what if a decision is based in part on resource/case assessment grounds and in part on the back-end adjustment rules? For instance, suppose an agency decides not to inspect or prosecute violations it uncovers against a category of industrial stormwater discharges. Suppose that it made this decision in part because it is stretched thin for staff (a justification entrusted to agency discretion) and, in part, because most of the dischargers are small businesses (a justification based on the adjustment policy). Suppose, however, that enforcement leniency is inconsistent with the adjustment policy because several of the exempted facilities are recidivists and because a few are located near fishing piers and thus could expose individuals to pollutants above the safety threshold permitted under the adjustment policy. Can a court meaningfully review such a decision? How will it separate the weight accorded to factors that are reviewable and factors that are unreviewable? Will it be overly deferential out of fear of interfering with agency enforcement prerogatives?

Conversely, will the articulation of some criteria for exercising enforcement discretion empower courts to intrude on decisions traditionally entrusted entirely to agency discretion? Under the guise of searching to see if an agency was pretextually relying on unreviewable criteria in forgoing enforcement, will courts end up second-guessing agencies about resource or case evaluation issues?

As the above discussion indicates, there is an inherent tension between, on the one hand, maintaining sufficient flexibility to allow regulators to make back-end adjustments, including adjustments based on new information and unexpected circumstances, and, on the other hand, facilitating judicial review by anticipating in advance all the types of adjustments that might be made and the standards by which regulators should make them. Balancing these considerations is a task that can be accomplished, but it will require considerable skill and thought to do so.

F.2d 1371, 1374–75 (5th Cir. 1981) (in refusing to find that analogous language in the Clean Air Act created a mandatory duty for the EPA to act, the court explains that "[t]he branches of government charged with the investigation of violations of the law and with enforcement of the law have traditionally been afforded broad discretion in carrying out these duties . . . . One of the principal bases for the doctrine is judicial recognition that enforcement agencies have only limited resources at their command. The enforcement agencies are duty-bound to allocate those resources in the interest of the general public as they perceive it, not in the causes deemed most important by individual citizens.")

B. *Will Increased Public Participation Opportunities Address the Potential Pitfalls of Increased Enforcement Discretion?*

Professors Shapiro and Glicksman condition their support of back-end adjustments on the premise that the opportunities for participation afforded interested persons are equivalent to those that govern adoption in the first place.[179] While such opportunities may be more readily available with respect to other mechanisms identified for achieving back-end adjustments—such as waivers, deadline extensions, etc.—it would be considerably more difficult to fashion such a public role in enforcement decisions, especially if that role is to be comparable to the public's role in the rulemaking process. There are a number of reasons for this.

As noted above, there are innumerable discretionary decision points that can determine whether and how enforcement action is taken. It is not practicable, however, to afford the public routine opportunities to comment on all of these decisions—i.e. which facilities should be subject to inspection, what level of penalties should be assessed, and so forth. In some cases, the critical dialogue between the regulator and regulated will occur not in a formal setting but in a facility during the course of an inspection, such as when an inspector discusses observed violations with an environmental manager. This informal consultation/bargaining can be decisive in determining an agency's enforcement response.[180] But it is not realistic for the public to accompany enforcement personnel on routine inspections because interested environmental groups lack the resources to do this, regulators might complain that the public's presence could interfere with their duties, and regulated entities usually are very resistant to allowing this type of access to the public. Could the public be afforded a role in formal negotiations between agencies and regulated entities? That, at least, seems workable, although it could delay enforcement actions and make them more costly. Also, there would have to be some means for an agency to identify *ex ante* the cases in which it is considering invoking its added back-end authority and invite the public to participate.

Perhaps what Shapiro and Glicksman have in mind is simply to provide advance notice of a proposed back-end adjustment and the opportunity for public comment. This would be comparable to notice and com-

179. SHAPIRO & GLICKSMAN, *supra* note 1, at 175.

180. *See* HAWKINS, *supra* note 86, at 110–54 (noting reliance of inspectors on system of informal negotiation and persuasion).

ment rules for proposed regulations, as well as some existing requirements in the enforcement process. The Clean Water Act, for example, provides for public notice and comment on proposed administrative penalties,[181] and most environmental statutes require advance public notice of proposed settlements entered into by the federal government.[182] But this does not seem truly equivalent to the participatory rights afforded at the initial rulemaking stage. In the adjustment context, the decision has already been made, there is less opportunity to explore the agency's decision-making process, and much less of an opportunity to research the relevant issues and develop a record. A typical rulemaking process takes years and entails all sorts of informal meetings and conversations among the interested parties, while the adjustment process presumably would be done relatively expeditiously. Professor David Dana has made a similar point in discussing the role of the public in environmental contractarian regulation (in which an agency and a regulated entity negotiate facility specific requirements). He notes that since such regulation results from bilateral negotiations between regulated entities and the government, environmental groups are at best relegated to reacting to (rather than participating in the principal development of) site-specific plans.[183]

Moreover, on a practical level, back-end enforcement adjustments have the potential to diminish the public's role in setting policy because the costs of monitoring them are high. Unlike standard setting or rulemaking, enforcement actions are numerous and decentralized. As a general matter, the incentives for participating in the enforcement process are sharply skewed in favor of regulated interests and against the public.[184] While regulated entities are highly motivated to participate because of the high costs they may face from an enforcement action, public interest groups typically realize only minor gains from any individual action since each typically is limited to an individual site or facility, is

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181. 33 U.S.C. § 1319(g)(4)(A) (2003).

182. *See, e.g.*, 42 U.S.C. § 7413(g) (2003) (providing that a consent order or settlement agreement under CAA requires at least thirty days notice in Federal Register). No court hearing is required.

183. David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 52–53.

> It may well be more difficult for environmentalists and environmentally oriented citizens to influence the formation of contractarian environmental regulation than it is for them to influence the formation of command-and-control environmental regulation. As a result, the content of contractarian regulation may be more in tune with the cost-saving agenda of regulated entities than with the agenda of environmentalists.

Id.

184. Zinn, *supra* note 85, at 128–29.

low-visibility, and is unlikely to generate significant publicity. As Professor Mark Seidenfeld has observed in the context of other back-end adjustment approaches, participation by public interest groups is therefore likely to be limited because it "does not promise notoriety that national group leaders can parlay into increased membership. Nor does such participation generate revenues for a participating group."[185] At the same time, he notes, local environmental advocates often lack both the time to commit to the endeavor and the expertise needed to participate meaningfully in the process.[186] This disparity in participation incentives will remain true to a considerable extent even if there is only a limited universe of enforcement adjustment cases for environmental groups to monitor because there are asymmetric stakes in any individual enforcement decision. The bottom line is that for environmental and public interest groups constrained by limited resources, participating in the enforcement process is likely to be cost-ineffective as compared to involvement at the regulatory or legislative level.[187]

Scholars have noted these difficulties in the context of other flexible regulatory mechanisms, including Project XL and other environmental contractarian regimes and negotiated rulemaking. While not precisely comparable to back-end enforcement discretion, they share a basic similarity: both adjust generally applicable regulatory standards to achieve a superior result based on an individual facility's circumstances. Professor Steinzor, for example, notes that the lack of technical assistance usually precludes meaningful community involvement in the XL process "in the debate over the highly technical issues involved in determining which regulatory exemptions to grant, evaluating what environmental benefits will be achieved, and predicting what adverse effects might be condoned in the project. Without adequate technical support, most local community representatives have great difficulty evaluating the long-term implications of a proposal . . . ."[188] Professor Brad Mank similarly has contended that "[m]ost members of the general public and most environmental groups are not equipped to evaluate the complex issues

185. Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 474 (2000) [hereinafter Seidenfeld, *Empowering Stakeholders*].

186. *Id.* at 474–77.

187. Zinn, *supra* note 85, at 129–30; *see* Dana, *supra* note 183, at 52–53 (noting much greater resource demands on environmental groups in having to participate in multiple, decentralized processes rather than centralized lawmaking or rule making actions).

188. Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 ENVTL. L. REP. 10527, 10534 (1996).

raised by many XL projects."[189] Both Steinzor and Mank call for material assistance to help promote community involvement—either by compensating participants directly for their time or by providing technical assistance to citizens who wish to participate in XL projects or challenge site-specific exceptions to national regulations.[190] EPA attorney Dave Cozad voiced similar worries in his presentation at this symposium. He pointed out that there tends to be very little participation by the public or environmental groups when the EPA grants variances or other regulatory exceptions.[191]

One response to this argument is that public interest groups regularly participate in the environmental enforcement process through citizen suits, which have steadily grown over the past twenty-five years.[192] But citizen suits differ in at least three important respects from back-end adjustments. One, most citizen suits are relatively simple and inexpensive to prosecute. Citizens usually can base their actions on a company's permit violations, without having to litigate issues of environmental harm and the cost-effectiveness of alternative regulatory mechanisms. Two, citizen suits can generate significant publicity and, sometimes, important legal precedent.[193] Three, there are significant potential rewards for bringing citizen suits. Citizen groups frequently negotiate settlements that result in defendants spending money on environmentally beneficial projects in lieu of some portion of civil penalties. Likewise, plaintiffs may be able to obtain attorneys fees if they prevail. Thus, in most in-

189. Bradley Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 ECOL. L.Q. 1, 60 (1998); *see id.* at 60–61 (noting high transaction costs for local groups in terms of organizing, raising money, and educating decisionmakers in individualized or local proceedings, and that "[l]ocal community groups may not have the time or resources to participate effectively in complex negotiations to develop alternative compliance strategies"); *see also* Siedenfeld, *Empowering Stakeholders*, *supra* note 185, at 479 ("Even if representatives of local groups happen to have the time to invest in regular monitoring and fine-tuning of [XL agreements], they almost invariably do not have the expertise to collect their own data on the facility's performance or even to review company data critically.").

190. *See* Steinzor, *supra* note 98, at 145 (arguing that private citizens should receive compensation for participating in site specific XL negotiations. "Without it, public interest representation in site-specific negotiations will be possible only in isolated and rare circumstances, and even then, only for those citizens who face no economic barriers to participation"); *see also* Bradford C. Mank, *What Comes After Technology: Using an "Exceptions Process" to Improve Residual Risk Regulation of Hazardous Air Pollutants*, 13 STAN. ENVTL. L.J. 263, 340–43 (1994) (arguing that the government should be required to provide technical assistance to citizens who wish to challenge requests by industry for site-specific exceptions to national regulations).

191. *See* Cozad, *supra* note 84.

192. James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, 33 ENVTL. L. REP. 10704, 10704 (2003).

193. *See id.* at 10705–06 (noting that "[t]hree out of every four judicial opinions stemming from the nation's principal environmental enforcement laws involves, at its core, a citizen suit.").

stances, citizen enforcement cases are less resource intensive and more attractive than participation in the back-end adjustment process.

At the same time, and perhaps of greater import, a back-end adjustment process likely would undermine the role of private enforcement of regulatory requirements—a means by which citizens shape policy both through their direct enforcement and the pressure that sixty-day notices of intent to sue exert on regulators. This is because for fine-tuning of regulatory policy to work through discretionary enforcement decisions, these decisions would have to be given conclusive effect barring citizen suits. Otherwise, a regulated entity would remain subject to citizen suits seeking to enforce standards "on the books"—rather than those decided through a back-end process—because most citizen suit provisions only bar private enforcement actions if the government is diligently prosecuting an alleged violation (or under the CWA, if an agency has issued a final administrative order assessing a penalty).[194]

Thus, the theoretical benefits of providing greater public participation will not be realized if real world incentives keep community and environmental groups from participating in the back-end adjustment process.

V. CONCLUSION

This Article is not intended to be a broadside against the use of discretion in the enforcement process. To the contrary, I believe that discretion in enforcement is not only inevitable but also desirable and that efforts to foreclose enforcement discretion—either by mandating forgiveness or mandating sanctions for certain types of violations—generally are undesirable. As I have also argued above, there already is enormous discretion in the enforcement process, and it currently is used to effectuate back-end adjustments, although not formally characterized as such.

But formalizing and expanding the use of enforcement discretion to make back-end adjustments is an idea that should be approached very cautiously. Such an adjustment process raises a number of concerns

194. *See, e.g.*, 33 U.S.C. § 1365(b)(1)(B) (2003) (barring citizen suits under CWA if agency is diligently prosecuting an action to require compliance); *id.* at § 1319(g)(6)(A)(iii) (barring citizen suits under CWA if final administrative order issued and violator has paid the penalty). *See* Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 ECOL. L. Q. 1, 27–29 (1998) (noting that it is unlikely that an agreement between EPA and a regulated entity not to take enforcement action for actions that violate statutory requirements would bar a citizen suit).

about imposing unrealistic additional burdens on enforcement staff, decreasing public involvement in policy setting, allowing greater special interest domination in the regulatory process, and increasing bias or inconsistency in enforcement (or the perception that such is occurring). While incorporating provisions for judicial review and public participation into the back-end adjustment scheme in theory can address some of these concerns, there are serious questions about how effective they would be in practice and, in particular, how often community groups and public interest organizations would take advantage of these opportunities. Experimenting with enforcement discretion on a small scale may prove these worries to be unfounded, but as Professors Shapiro and Glicksman argue elsewhere, "before displacing [the traditional approach] on a much larger scale, the proponents of such a change should bear the burden of demonstrating that practical experience with [additional enforcement discretion] justifies such a shift."[195]

195. SHAPIRO & GLICKSMAN, *supra* note 1, at 154.