The Implementation Gap in Environmental Law

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“Between the idea
And the reality
Between the motion
And the act
Falls the Shadow”

• T.S. Elliott
INTRODUCTION
From Statutes to Outcomes

• The process of translating statutory directives into concrete action is complex.
• Often a mismatch between directive and outcome.
• Sometimes the process simply breaks down. Permits are weak or sources fail to comply.
• But sometimes the mismatch reflects creative strategies for achieving environmental outcomes.
Pollution Regulation Process

Congressional Directives

- Clean Air Act
- Clean Water Act

EPA Regulations

- NAAQS/BAT Regs.
- BCT/BAT Regulations

Permits and Individualized Mandates

- Major sources: permits
- Others: SIPs, state permits
- State Permits
Roadmap of Talk

• Part I explain the implementation system for pollution control and addresses implementation failures – weak permits or non-compliance by sources.

• Part II discusses creative implementation – deviation from Congressional expectations in order to achieve better environmental outcomes.

• Finally, some brief concluding thoughts.
IMPLEMENTATION FAILURES
The Complexity of Compliance

- Enforcement and sanctions are one reason why polluters comply, but not the only one.
- Other factors:
  - Pressure from supply chain (e.g., Walmart)
  - Investor pressure (studies of relating pollution to stock market performance)
  - Company image with consumers.
  - Company culture (Kagan study of papers mills)
Enforcement Mechanisms

• Monitoring and self-reporting requirements
• Enforcement methods
  • Court or administrative proceeding against polluter by state agency
  • Court or administrative proceeding against polluter by EPA (“overfiling”)
  • Citizen suits
Potential Sanctions

• Civil penalties
• Administrative compliance orders
• Judicial injunctions
• Criminal proceedings
Example: BP Oil Spill

- An exceptional case, but illustrates the potential seriousness of sanctions.
- Criminal action against BP settled for $4 billion.
- EPA civil penalty action settled for $20 billion.
Empirical Evidence on Compliance

• Variations in enforcement and fines between states. Higher state budgets = higher fines for water. (Flatt & Cohen 2009)

• Higher state budgets are associated with higher compliance rates for air pollution. (Flatt & Cohen 2009).

• Air pollution has decreased since the passage of the Clean Air Act and Clean Water Act, despite economic and population growth. Water pollution trends are unclear.
“Next Generation” Compliance

• EPA project to improve enforcement effectiveness.
• Shift toward electronic information systems.
• Use of data analytics and enforcement targeting.
• Installation of advanced monitoring technology.
• Incorporation into settlement decrees.
CREATIVE IMPLEMENTATION
Why Creative Implementation

• Unexpected methods are sometimes used to achieve environmental goals.
• These methods may deviate from the original expectations of Congress.
• Yet they may achieve Congressional goals more effectively, especially if there have been unforeseen problems.
Recasting Regulatory Standards

• Health-based water standards transformed into technology standards for toxic substances via consent decree

• Emissions trading to address interstate air pollution (*EME Homer* case)

• Mitigation requirements for wetlands and headstreams
Climate Change and the Clean Air Act

- EPA has been creative in adapting the statute to deal with climate change.
- The Supreme Court has been partly supportive but has also created roadblocks.
Creative Use of Enforcement

• Supplemental environmental projects in consent degrees
• Use of criminal penalties in BP case to fund research, restoration, and the liability trust fund.
• Settlements requiring environmental management systems (EMSs)
CONCLUSION
Costs and Benefits of Implementation Flexibility

• On the one hand, implementation flexibility allows under-enforcement of laws and non-compliance by polluters.
• On the other hand, it also allows the creation of new forms of implementation based on changing circumstances.
• Given that standards will never transform automatically into outcomes, we need to maximize the benefits of flexibility and minimize the costs.
A Cliché Recommendation – But a Valid One

• Empirical data about compliance and the effects of various strategies on environmental quality is still limited.
• We really do need a lot more empirical research here!
• Without more data, intelligent reform is difficult.
Future Directions

• EPA’s “Next Generation Compliance” is a step toward making better use of new technology and social science to devise better enforcement strategies.

• With new appointments, the Supreme Court may help strengthen EPA’s ability to achieve its mission in more creative ways.

• As always, however, the political winds are uncertain. The whole picture could shift under President Trump! Time will tell.
thank you