

R E S P O N S E

Getting Through the Straits: It's Not How Much You Spend, It's Charting the Right Course That Counts!

by LaJuana S. Wilcher

LaJuana S. Wilcher is a Partner at English Lucas Priest & Owsley, LLP.

Professors Flatt and Collins should be commended for seeking to answer one of the most perplexing questions that has plagued environmental protection advocates and regulators in the United States for over 40 years—how to improve compliance with federal environmental laws, and therefore, improve the quality of the environment.¹

Regrettably, Flatt and Collins reach significant policy conclusions and make major environmental enforcement recommendations based upon a single variable or two, after recognizing that many variables will affect the effectiveness of environmental enforcement. They also give too much weight to the variables they researched, interesting though they may be. While a comprehensive analysis may be difficult and time-consuming, major policy recommendations should not be based on one or two factors to the exclusion of others.

This comment will address the factors relied upon by Professors Flatt and Collins to reach their conclusions, assess those factors' value as a foundation for their recommendations, and add some additional recommendations to address how we might move toward improved environmental protection.²

1. Victor B Flatt & Paul M. Collins Jr., *Environmental Enforcement in Dire Straits: There Is No Protection for Nothing and No Data for Free*, 85 NOTRE DAME L. REV. 55 (2009).

2. An interesting twist in the article was the analysis concerning which states had better environmental enforcement, those dominated by (using the authors' terminology) the liberal political elite or those dominated by the conservative political elite. The authors apparently were surprised that conservative political leaders often foster a culture of compliance at levels higher than their liberal counterparts. The best rationale that the authors could surmise for higher CWA penalties in conservative-led states was, curiously, that conservative ideologies allow polluters to have more serious violations, which in turn would support higher fines. That is certainly creative. Is it possible, however, that the conservatives are as committed to the rule of law, or more so, than the liberal political leadership in states? At least the authors recognized that "... the CAA finding may suggest that conservative state ideologies foster better compliance, perhaps through the use of more cooperative methods." All of which raises the question: Is Red or Blue the new Green?

I. The Data

The authors compare the following data sets: penalties assessed against facilities for violations of the Clean Water Act (CWA) and Clean Air Act (CAA) regulatory requirements, as well as the number of quarters (in the two years preceding the inspection date) that facilities were in violation of CAA regulatory requirements. The authors use these data sets to ascertain states' environmental funding levels and reach conclusions about the impact of states' funding for environmental enforcement on improvements in environmental protection. I have several concerns with this approach.

First, there is no demonstration that states fund environmental enforcement as a consistent percentage of the states' overall environmental budgets, either from year to year or among the various states. One state could spend more on environmental programs but less on environmental enforcement, while another could choose to spend a larger portion of its overall environmental spending on environmental enforcement. Per capita environmental spending by states has not been shown to be an adequate surrogate for spending on improved environmental enforcement or for greater improvements in environmental quality.

Second, even the data concerning the environmental spending per state were, in the authors' words, "skeletal."³ The data sets were obtained from different state sources, which used budgetary categories and descriptions differently. To the authors' credit, they attempted to harmonize the data by allocating certain funding categories to environmental spending and others to wildlife, agriculture or other programs that can include the type of environmental funding the authors attempted to measure; until those allocations are confirmed with the states, however, they should not be used to make policy recommendations.

3. *Id.* at 74.

Third, the source data relied upon by Professors Flatt and Collins, culled from EPA and states, appears to be for 2000-2003—over a decade old in many cases.⁴ Significant differences can and probably have occurred in the eight to eleven years since those data were reported to EPA with regard to the penalties assessed by the states selected for comparison purposes. By way of example, Kentucky assessed over one million dollars in civil penalties in 2004 for violations of the state Pollutant Discharge Elimination System (authorized under the CWA). Even though Kentucky was not selected for use in this analysis, states are not static creatures and may have assessed significantly different penalties in the past decade than is shown in the older data utilized to support the conclusions and recommendations of the authors.

Based upon these old data, and armed with estimates of each state's environmental spending, the authors found the greater spending per capita for environmental programs correlated with a decrease in CAA penalties and an increase in CWA penalties. These results are inconclusive at best and contradictory at worst.

The other data analyzed was the comparison of *estimated* spending per capita for environmental programs to the number of quarters that certain CAA facilities were not in compliance. The authors reported that “compared with a state that spends \$28 per capita on the environment, in a state that spends \$68 per capita, the number of quarters a facility is in violation of the CAA decreases by 0.2 quarters.” That appears to mean that for every dollar a state spends per capita over \$28, the number of quarters a facility is in violation of the CAA would decrease by .005 quarters—less than one half of one day per year. Even if that difference is statistically significant, the significance in the level of environmental improvement is not.

In addition, the authors chose to use the only the most populous states for their analysis, and, significantly, failed to make any adjustments based upon the cost of living in each state, which will affect how much a dollar of environmental spending will buy. For example, a state like Tennessee, where the cost of living is relatively low and government employees are paid less than those in states like California or New York, one might find that spending \$28 per capita may yield more environmental protection than significantly more money spent per capita in a state where state environmental employees are paid significantly more. In other words, each environmental protection dollar should result in greater environmental benefits where environmental agencies' employees' salaries are lower.

4. *Id.* at 73.

II. Navigating Through the Straits: How Do We Chart the Course?

Bean counting the number of environmental enforcement cases and the amount of penalties recovered by regulatory agencies provide little empirical data concerning the relationship between environmental enforcement and improvement of the environment. That is likely the reason that the debate continues after all these years. If tracking the money put into state environmental budgets for environmental programs does not necessarily translate to environmental enforcement funding, how can we answer the \$64 billion question posed by Professors Flatt and Collins? How do we improve compliance with federal environmental laws, and therefore, improve the quality of the environment?

Outcome indicators, like reduced emissions or improved water quality, are the lodestars by which we should navigate. To do less is a great disservice to the regulatory agencies, the regulated community, and the citizens of this country. If we are able to write permits with limits measured in parts per quadrillion, we should be able to measure actual water quality improvements. Until we are able to address the challenges associated with measuring environmental quality and improvements effectively, we should not fetter the states with additional directives concerning how they accomplish that which we cannot measure.

III. Times Change, Charts Change

Since EPA was created in 1970, the issues of how to enforce and how to measure enforcement efforts have been major topics of discussion at the Agency and in the public. My experience with the regulated community in a range of roles (federal enforcer, state enforcer, and compliance and defense counsel) has convinced me that the regulated community of today is vastly different than it was in the early days of EPA. In general, municipalities, corporations and individuals from every walk of life know more about compliance and environmental protection than they did thirty or forty years ago, and act upon that knowledge. Popular books such as Professor Daniel Esty's *Green to Gold* document a new corporate culture that recognizes the benefits of complying with environmental laws or going beyond compliance. This result is consistent with the intermediate outcome indicators of enforcement actions described above.

To achieve compliance, we need to focus on why people comply. Compliance stems from behavioral motivation, which may be considered based on the “logic of consequences” or the “logic of appropriateness.” The “logic of consequences” views actors as choosing rationally among alternatives based on their calculations of expected consequences, but the “logic of appropriateness” sees actions as

based on identities, obligations, and conceptions of appropriate action.⁵

I suspect that the “logic of consequences” was a principle governing factor in environmental compliance in the early days of EPA. Today, however, the culture of environmental protection has become ingrained at the individual, municipal and corporate levels. A great deal of decision making is made today, I believe, based upon “the logic of appropriateness.”⁶ Many environmental compliance decision makers and technicians today make decisions to do the right thing because it is the right thing to do, not simply because of the fear of government reprisal.

The time has come to capitalize on the change of attitude that has occurred and to work even harder to complement enforcement efforts. It is time to work collaboratively with the regulated community to solve the remaining environmental problems in the most cost-effective way possible, considering all factors, including today’s economic state.

Indeed, enforcement that is deemed heavy-handed or seems unreasonable can have the effect of causing people to be less enthusiastic about protecting the environment and more skeptical about the value of EPA and state environmental agencies. That attitude is becoming increasingly apparent in the 112th Congress and in the public’s opinion of the need for additional environmental regulation.

IV. And the Answer Is?

There is no single answer to the \$64 billion question posed by the authors, just as there is no single answer to how a sailor should navigate straits. At sea, the sailor must consider the depth of the passage, the speed and direction of the wind, tides and currents, how much the boat draws, the distance to the shore, and changes in the charts at the very least. When at sea, considering only one of these factors will likely result in disaster.

Similarly, there is no single answer to the question of how regulators can best spend taxpayers’ monies to improve the environment. We need to do a better job of educating and assisting those who are regulated, and we need to work with them toward achieving compliance. We need to promulgate regulations that are clearly within the environmental agency’s statutory authority, and we need to keep the regulations as understandable as possible. We need to maintain standard measurements of environmental quality so we can measure environmental improvements from year to year and place to place, if not for any other reason than to be able to congratulate ourselves on the accom-

plishments we have made as a nation, although we always should try to do better. We need EPA and the states to work hand in hand instead of as adversaries, recognizing that states are becoming increasingly frustrated with EPA’s actions to become more dominant in state-issued permits and enforcement. Enforcement actions and resources should focus on cases that will have the greatest environmental benefits. We should seek alternate, cooperative compliance assistance efforts. And finally, we should not believe that simply spending more money will bring about the environmental improvements we all want to see. The issue is much too complex for that. If that were true, we would find that the states that spend the most on environmental enforcement would have the cleanest water and the freshest air, barring significant upstream, upwind contributions.

In sum, the authors have introduced no data that supports the premise that more state *per capita* spending on environmental enforcement improves compliance or the quality of the environment. Common sense tells us that environmental enforcement is an important part of our nation’s laws that preserve, protect and restore the environment. And common sense tells us that some conservative states have stronger environmental programs, and some have weaker ones, and that the strength of the programs will ebb and flow over time.

More important than the per capita levels of spending, I believe, or which political sector is in power, is the culture of compliance that can be fostered through leadership, information, education, and setting sensible priorities. If environmental agencies seek major penalties for minor infractions, the harvest is mistrust and resentment. Things are different now than they were forty years ago, and we must recognize and work with positive changes that have occurred, instead of spending more and more on less and less.

Nothing is free, but throwing money at nothing is not the answer.

5. Dave Grossman & Durwood Zaelke, An Introduction to Theories of Why States and Firms Do (And Do Not) Comply With Law, Proceedings from the Seventh International Conference on Environmental Compliance and Enforcement, April 9-15, 2005, http://www.inece.org/conference/7/vol1/13_Grossman.pdf, (last visited Apr. 15, 2011).

6. This is based upon no empirical data, but instead upon interactions with environmental professionals and staff over the years.