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# ENVIRONMENTAL ENFORCEMENT AT THE TURN OF THE CENTURY

By  
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*Since the mid-1980s, Congress and state legislatures have passed numerous environmental protection statutes. Agencies will have to cope with the increased workload created by these statutes by developing new enforcement techniques and strategies. A comparison with the Dutch enforcement system shows that increasing the role of local governments will help promote new enforcement schemes. Other methods for coping with the new workload will include increased reliance on criminal penalties, citizen enforcement efforts, field citations, strategic planning, and administrative penalty orders.*

## I. INTRODUCTION

Since the mid-1980s, the context within which environmental enforcement is conducted has changed. A vast array of new programs has been enacted affecting tens of thousands of facilities, many of which are small businesses such as service stations and print shops. These new programs are beginning to supplant the older environmental programs that concentrated on far fewer, larger pollution sources as the principle focus for many environmental enforcement officials.<sup>1</sup> This increased emphasis on the issues associated with the large numbers of smaller facilities is likely to continue.

This new context for environmental enforcement will demand major alterations in the way enforcement is carried out. Some new enforcement techniques designed to respond to the

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1. U.S. EPA ENFORCEMENT IN THE 1990's PROJECT—REPORT AND RECOMMENDATIONS OF THE LOCAL GOVERNMENT'S ROLE IN ENVIRONMENTAL ENFORCEMENT WORKGROUP 1 (1991).

rapidly increasing caseload have already become routine. These techniques include administrative penalty orders and criminal enforcement. Other techniques, such as strategic planning methodologies and the use of field citations, are just beginning to be incorporated into enforcement programs. Finally, states and the federal government are only now exploring the possibility of an expanded role for both local governments and citizens in enforcing state and federal environmental laws.

In Section II, this Essay examines the new context for environmental enforcement. Section III discusses the developing responses to the enforcement problems raised by the new environmental programs. Finally, Section IV outlines a scenario for environmental enforcement at the turn of the century.

## II. THE NEW CONTEXT FOR ENVIRONMENTAL ENFORCEMENT

The latter part of the 1980s witnessed a remarkable expansion of environmental programs. This expansion resulted from the passage of new programs as well as the implementation of programs that had been authorized earlier in the decade. At the same time, the number of facilities subject to environmental regulation increased geometrically. While total numbers are hard to quantify on a national basis, the magnitude of the change can be appreciated by looking at the numbers in one state—Minnesota. In the early 1980s, a few thousand facilities were subject to regulation in Minnesota under the major federal and state environmental laws. Today, close to 100,000 facilities are covered by state laws alone.<sup>2</sup>

One of the major programs that was not fully implemented until the mid-1980s is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>3</sup> Although CERCLA was passed in 1980, its progress was slowed during the next several years due to shifting support for the program and interruptions in funding. It was not until after the passage of the Superfund Amendments and Reauthorization Act of 1986

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2. Conerton & Paddock, *The Need for a Principled Expansion of the Role of Local Government in Environmental Enforcement*, 16 WM. MITCHELL L. REV. 949, 977 (1990).

3. 42 U.S.C. §§ 9601-9675 (1988).

(SARA)<sup>4</sup> that the program stabilized and was fully developed.<sup>5</sup> The increase of the Superfund from \$1.6 to \$8.2 billion and the stronger emphasis on cleanups by persons responsible for releases of hazardous substances greatly expanded the scope of the CERCLA program.<sup>6</sup> CERCLA has demanded and will continue to demand a great deal of governmental resources at both the state and federal level. More than thirty thousand sites nationwide have been identified as possible candidates for Superfund cleanup.<sup>7</sup>

In addition to expanding the CERCLA program, SARA introduced an entirely new program, the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>8</sup> EPCRA was designed to upgrade planning for chemical emergencies,<sup>9</sup> as well as provide citizens with information identifying facilities that store and release hazardous materials in their communities.<sup>10</sup> EPCRA has opened the door for substantially greater citizen involvement in decisions related to management of hazardous substances by companies. It has made available a great deal of previously inaccessible information concerning the storage and release of substances. More than ten thousand facilities<sup>11</sup> must comply with the reporting requirements of EPCRA and the parallel Minnesota Hazardous Chemical Emergency Planning and Response Act.<sup>12</sup>

Another program expanding the reach of environmental law, the Resource Conservation and Recovery Act (RCRA), was passed in 1976.<sup>13</sup> However, like the CERCLA program, the RCRA hazardous waste program did not reach its full scope until the mid-1980s when the regulatory requirements were extended to small

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4. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at scattered sections of 26 U.S.C. and 42 U.S.C.).

5. See U.S. EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM, at i (1989).

6. *Id.* at 1-6.

7. *Id.* at 2.

8. Pub. L. No. 99-499, §§ 300-330, 100 Stat. 1613, 1728-58 (1986) (codified at 42 U.S.C. §§ 11001-11050 (1988)).

9. See 42 U.S.C. § 11003 (1988).

10. See *id.* §§ 11022(e), 11023.

11. Conerton & Paddock, *supra* note 2, at 977.

12. MINN. STAT. §§ 299K.01-.10 (Supp. 1991).

13. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6991i (1988)).

quantity hazardous waste generators<sup>14</sup> following the passage of the Hazardous and Solid Waste Amendments of 1984 (HSWA).<sup>15</sup> This change focused a major part of a U.S. Environmental Protection Agency (EPA) regulatory program on small facilities such as body shops, dry cleaners, print shops, and service stations. As many as thirty thousand hazardous waste generators in Minnesota are subject to regulation under RCRA.<sup>16</sup>

HSWA also created the underground storage tank (UST) program.<sup>17</sup> The UST program was established to address two problems. First, like CERCLA, the UST program requires owners of underground storage tanks to take corrective action for any releases from their tanks.<sup>18</sup> Second, the law directs EPA to develop regulations establishing performance standards for new tanks<sup>19</sup> and requirements for leak detection, record keeping, and closure of tanks.<sup>20</sup> A very large percentage of the facilities covered by the UST program are gasoline stations. There are more than thirty-three thousand regulated USTs in Minnesota.<sup>21</sup>

The 1986 amendments to the Safe Drinking Water Act<sup>22</sup> expanded environmental regulation by adding a large number of chemicals to the list of required testing parameters for public water supplies.<sup>23</sup> The amendments also required states to develop new programs to protect public water supplies from contamination by establishing protection areas and identifying alternate water supplies.<sup>24</sup> These two changes substantially enlarged the

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14. Small quantity generators are persons who generate between 100 kilograms and 1000 kilograms of hazardous waste in a month. 42 U.S.C. § 6921(d) (1988). One-hundred kilograms is the equivalent of approximately 220 pounds or one-half of a 55 gallon drum.

15. Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified as amended at 42 U.S.C. §§ 6991-6991i (1988)).

16. PROGRAM EVALUATION DIV., OFFICE OF THE LEGISLATIVE AUDITOR, MINNESOTA POLLUTION CONTROL AGENCY 164 (1991) [hereinafter OFF. OF THE LEGIS. AUDITOR].

17. See Pub. L. No. 98-616, § 601, 98 Stat. 3221, 3277-88 (1984) (codified as amended at 42 U.S.C. §§ 6991-6991i (1988)).

18. 42 U.S.C. § 6991b(h).

19. *Id.* § 6991b(e).

20. *Id.* § 6991b(c).

21. Conerton & Paddock, *supra* note 2, at 977.

22. Pub. L. No. 99-339, 100 Stat. 642 (1986) (codified at 42 U.S.C. §§ 300f-300j (1988)).

23. See 42 U.S.C. § 300g-1(b).

24. See 42 U.S.C. § 300h-7.

public drinking water supply program. There are seventeen thousand public drinking water supplies in Minnesota that may be subject to regulation under the Safe Drinking Water Act.<sup>25</sup>

Congress broadened the Clean Water Act (CWA) in 1987.<sup>26</sup> The Act now mandates that EPA and states establish effluent and water quality limits for toxic pollutants.<sup>27</sup> The complex rules necessary to implement the water toxics program at the state level are just beginning to go into effect.<sup>28</sup> The rules will require regular monitoring for a much wider range of constituents in waste water discharges.

In 1987 and 1988, beaches along the east coast of the United States were closed because medical waste had washed ashore. The public outcry in response to these events led to the passage of the Medical Waste Tracking Act of 1988, which represents yet another expansion in environmental law.<sup>29</sup> The Act established a demonstration medical waste tracking program for the states of New York, New Jersey, and Connecticut.<sup>30</sup> Other states, including Minnesota, have adopted their own medical waste regulatory programs.<sup>31</sup> These medical waste programs draw many medical facilities into the environmental regulatory system for the first time. About six thousand facilities<sup>32</sup> are regulated under the Minnesota Infectious Waste Control Act.<sup>33</sup> The statute covers most doctor's, dentist's and veterinarian's offices, and all hospitals and nursing homes in Minnesota.

The massive Clean Air Act Amendments of 1990 (1990 Amendments)<sup>34</sup> are the most recent addition to the national envi-

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25. See Wellhead Protection Policy Ad Hoc Workgroup, Minutes 2 (Nov. 14, 1990).

26. Pub. L. No. 100-4, 101 Stat. 1 (1987) (codified at 33 U.S.C. §§ 1251-1376 (1988)).

27. 33 U.S.C. §§ 1313(c)(2)(B), 1317.

28. Minnesota's water toxics rules were adopted on November 5, 1990. 15 Minn. Reg. 1057 (Nov. 5, 1990).

29. Pub. L. No. 100-582, 102 Stat. 2950 (codified as amended at 42 U.S.C. §§ 6992-6992k (West Supp. 1989)).

30. 42 U.S.C. § 6992a.

31. See, e.g., Minnesota Infectious Waste Control Act, MINN. STAT. §§ 116.75-116.86 (1990).

32. Conerton & Paddock, *supra* note 2, at 977.

33. MINN. STAT. §§ 116.75-.83 (1990).

34. Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C.A. §§ 7401-7671q (West Supp. 1991)).

ronmental program. The Amendments will require extensive revisions of state implementation plans,<sup>35</sup> establish a major new regulatory program for 189 air toxics,<sup>36</sup> and create a system of tradeable sulfur dioxide allowances to control acid precipitation.<sup>37</sup> The Amendments will also regulate emissions from hundreds of smaller facilities that discharge hazardous pollutants into the air.<sup>38</sup>

In addition, at the state level, a significant number of new programs without direct federal parallels have been adopted since the mid-1980s. In Minnesota, for example, a new law designed to prevent degradation of groundwater was passed in 1989.<sup>39</sup> Under this statute, facilities that are required to file toxic release inventory forms under EPCRA must now prepare a toxic pollution prevention plan that establishes an objective for reducing the generation of toxic pollutants and sets a schedule for meeting that objective.<sup>40</sup> The state also requires companies that work with chlorofluorocarbons, such as salvage yards, refrigeration repair services, automobile shops, and fire extinguisher maintenance companies, to recycle or recover halons and chlorofluorocarbons.<sup>41</sup>

Further, Minnesota places extensive limits on how several types of solid waste may be managed. The disposal of waste tires

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35. *Id.* secs. 101-111, §§ 107, 110, 171-193, 104 Stat. at 2399-71 (codified at 42 U.S.C.A. §§ 7407, 7410, 7501-7515). *See also* ARNOLD & PORTER, OVERVIEW OF THE 1990 CLEAN AIR ACT AMENDMENTS 1-4 (1990). State implementation plans are programs developed by states to meet national ambient air quality standards under the Clean Air Act. 42 U.S.C. § 7410 (1988), *amended by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, secs. 101(b)-(d), 102(h), 107(c), 108(d), 412, § 110 2466-67, 2634 (codified at 42 U.S.C.A. § 7410).

36. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, secs. 301-306, §§ 112, 129, 104 Stat. at 2531-84 (codified at 42 U.S.C.A. §§ 7412, 7429).

37. *Id.* sec. 401, § 403, 104 Stat. at 2631-32 (codified at 42 U.S.C.A. § 7651b).

38. *See* ARNOLD & PORTER, *supra* note 35, at 18. Under the Clean Air Act, a major source of air pollution is any source that emits or has the potential to emit either 10 tons of a hazardous air pollutant, or 25 tons or more of any combination of hazardous air pollutants. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 301, § 112, 104 Stat. at 2531 (codified at 42 U.S.C.A. § 7412). In addition, the Amendments cover smaller polluters, known as "area sources," that emit hazardous air pollutants below the level required to become a major source. *Id.*; *see also* ARNOLD & PORTER, *supra* note 35, at 18.

39. 1989 Laws of Minnesota ch. 326, §§ 103A.43, 103H.001-103H.151 MINN. STAT. (Supp. 1991).

40. MINN. STAT. § 115D.07.

41. *Id.* § 116.731-116.743.

in the land is prohibited.<sup>42</sup> Similarly, major appliances and lead-acid batteries may not be placed in landfills.<sup>43</sup> Retailers selling lead-acid batteries must accept batteries back from customers.<sup>44</sup> A very large number of facilities are subject to these new Minnesota laws, many of which are likely to have parallels in other states.

Finally, Minnesota is considering a dramatic expansion in its oversight of the use of packaging materials and the sale of consumer products containing toxic materials. The Governor's Select Committee on Packaging and the Environment has recommended that the state regulate the level of toxics in dyes and inks used in packaging,<sup>45</sup> establish specific quantity reduction and recycling goals for several types of packaging,<sup>46</sup> impose a fee on packaging materials to enforce reduction goals,<sup>47</sup> and levy a special fee on consumer products that contain hazardous materials.<sup>48</sup> Should the recommendations be enacted, another large group would be added to the roster of regulated facilities in Minnesota.

A dominant feature of many of the recent extensions of federal and state environmental laws is the concern about smaller facilities and smaller releases of pollutants, especially where toxic pollutants or hazardous materials are involved. The focus is on the handling of hazardous waste by body shops and dry cleaners, the disclosure of the presence of ammonia at meat packing plants, the monitoring of underground storage tanks at neighborhood gas stations, the disposition of syringes generated in doctor's offices, the quality of drinking water in small towns, the discharges of hazardous air pollutants from print shops, the release of chlorofluorocarbons in automobile repair operations and from the abandonment of major appliances, and the release of lead from old automobile batteries. While major releases from large facilities remain the primary concern for environmental officials, there has been an obvious recognition that serious harm can result from

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42. *Id.* § 115A.904.

43. *Id.* §§ 115A.915, 115A.9561.

44. MINN. STAT. § 115E.1151, subd. 2 (Supp. 1991).

45. MINNESOTA GOVERNOR'S SELECT COMM. ON PACKAGING AND THE ENV'T, FINAL REPORT 8 (1990) [hereinafter PACKAGING REPORT].

46. *Id.* at 2-3.

47. *Id.* at 6-7.

48. *Id.* at 8-9.

small releases either individually or cumulatively.<sup>49</sup>

The tremendous expansion in the number of regulated facilities and the need to monitor even small facilities to prevent serious health or environmental problems places significant stress on an already hard-pressed system.<sup>50</sup> In response, major changes in

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49. As an example, disposal of a small quantity of the solvent perchloroethylene in a barrel buried behind a dry cleaning facility in a small central Minnesota town resulted in groundwater contamination that forced the closure of the city's well and dozens of private wells. Total remedial costs exceeded one million dollars. Interview with Gary Pulford, Site Response Section, Groundwater and Solid Waste Division, Minnesota Pollution Control Agency (Sept. 5, 1989). Similarly, leaking USTs have resulted in substantial environmental and economic costs in many parts of the state. FRESHWATER FOUND., *ECONOMIC IMPLICATIONS OF GROUNDWATER CONTAMINATION TO COMPANIES AND CITIES* 78 (1989).

50. See OFF. OF THE LEGIS. AUDITOR, *supra* note 16, at x. An additional problem for enforcement officials is the increased reliance on taxes, fees, and tradeable allowances as methods of encouraging environmentally desirable behavior. One of the first uses of taxes in the environmental field was under CERCLA, which imposes taxes on crude oil and petroleum, 26 U.S.C. § 4611 (1988), and on certain listed chemicals, *id.* § 4671. Minnesota also taxes hazardous waste to support its Superfund. MINN. STAT. § 115B.21 (Supp. 1991).

Fees are now part of several state and federal laws. The 1990 Amendments require states to impose permit fees of \$25 per ton of any regulated pollutant. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 501, § 502(b)(3)(B), 104 Stat. 2399, 2636-37 (codified at 42 U.S.C.A. § 7661a(b)(3)(B) (West Supp. 1991)). Minnesota places fees on USTs to cover the costs of cleaning up releases from the tanks, MINN. STAT. § 115C.08, subd. 3 (Supp. 1991), on the sale of pesticide and fertilizer to support the cleanup of releases of those substances, *id.* § 18E.03, subd. 4, 5, and on the release of toxic chemicals reported on the EPCRA Toxic Release Inventory Form, *id.* § 115D.12. In addition, the Governor's Select Committee on Packaging has recommended placing packaging fees on packaging types that do not meet reduction and recycling goals, and on consumer products that contain hazardous materials. PACKAGING REPORT, *supra* note 45, at 6-7, 8-9.

Tradeable allowances are used in two recent programs under the Clean Air Act. The rules enacted by the EPA to implement the Montreal Protocol for the Protection of the Stratospheric Ozone Layer limit the amount of certain chlorofluorocarbons that can be manufactured in the United States or imported into the United States. 40 C.F.R. § 82.4 (1990). These manufacturing and importation allowances may be bought and sold. *Id.* § 82.12. The 1990 Amendments establish a tradeable allowances program for emissions of sulfur dioxide, a precursor pollutant for acid precipitation. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 401, § 403, 104 Stat. at 2631-32 (codified at 42 U.S.C.A. § 7651b). States and the federal government have little experience enforcing environmental taxes, fees, and tradeable allowances. As the use of these economic regulatory mechanisms increases, enforcement officials will have to develop techniques to ensure that these indirect regulatory tools are not being circumvented.

the way in which environmental enforcement occurs are needed to ensure that the new environmental laws are effective in achieving their objectives.

### III. THE CHANGING FACE OF ENVIRONMENTAL ENFORCEMENT

For most of the last twenty years, states and the EPA have used a fairly narrow range of enforcement tools, primarily notices of violations (NOVs) and judicially imposed civil penalties. These civil penalty cases are typically settled before they reach trial. Settlements may be documented in consent decrees, consent orders, or stipulation agreements. To date, local governments have had only a limited role, since most enforcement under the major national and state environmental laws has occurred at the national or state level.

This centralized system with only limited enforcement tools has significant limitations when applied to the new context for environmental enforcement. For example, one recent study estimates that, under a centralized system, a small quantity hazardous waste generator in Minnesota would be inspected only once every 100 to 300 years.<sup>51</sup> The study also found that NOVs are a "relatively weak enforcement tool,"<sup>52</sup> and that settling potential civil penalty cases through stipulation agreements tends to be "expensive and time-consuming, so it is sometimes difficult . . . to justify their use."<sup>53</sup>

Changes are clearly needed in the enforcement systems if governments are going to effectively address violations of the vast new environmental programs. Some of these changes are quite advanced while others have barely emerged.

#### A. Administrative Penalty Orders

One of the principle changes in environmental enforcement has been a rapid shift to the use of administratively imposed penalties. Administrative penalties differ from judicially imposed civil penalties in two important respects. First, administrative penalties can be imposed by an administrator of an environmen-

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51. OFF. OF LEGIS. AUDITOR, *supra* note 16, at 146-47.

52. *Id.* at 55.

53. *Id.* at 170.

tal agency without having to resort to a court. Second, administrative penalties frequently have lower ceilings than judicially imposed penalties.<sup>54</sup> The principle advantages of administrative penalties are that they usually can be imposed more quickly and that they require less staff time than filing a judicial action or negotiating a settlement of a potential court action.<sup>55</sup>

All of the major federal environmental laws now authorize the Administrator of the EPA to impose penalties for violations of environmental laws.<sup>56</sup> In Minnesota, administrative penalties were first authorized for violations of the state's hazardous waste laws in 1987.<sup>57</sup> An audit of the state's hazardous waste program found administrative penalties "have proven to be an effective [enforcement] tool . . . ."<sup>58</sup>

### B. Criminal Enforcement

A second significant change in enforcement programs has been the introduction of criminal law as a tool for environmental enforcement. Although some environmental criminal cases were filed in the early 1980s, criminal enforcement was not used widely by environmental agencies until late in the decade.<sup>59</sup> Today,

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54. Compare, e.g., 33 U.S.C. § 1319(d) (1988) (allowing judicially imposed civil penalties of \$25,000 per day of violation) with *id.* § 1319(g)(2) (limiting administrative penalties to \$10,000 per day of violation); 42 U.S.C. § 300g-3(g)(3)(B) (allowing the Administrator of the EPA to assess penalties up to \$5,000) with *id.* § 300g-3(g)(3)(C) (requiring the Administrator to bring an action in federal district court for fines in excess of \$5,000); MINN. STAT. § 115.071, subd. 3 (Supp. 1991) (authorizing civil penalties of up to \$25,000 per day of violation of Minnesota's hazardous waste laws) with *id.* § 116.072 (limiting administrative penalties for hazardous waste violations to \$10,000).

55. See Memorandum from Lisa J. Thorvig, Chief, Regulatory Compliance Section, Air Quality Div., Minnesota Pollution Control Agency, to Lee Paddock, Asst. Attorney Gen. 2 (Feb. 7, 1991); OFF. OF LEGIS. AUDITOR, *supra* note 16, at 151.

56. See CWA, 33 U.S.C. § 1319(g) (1988); RCRA, 42 U.S.C. §§ 6928(a), 6991e(a) (hazardous waste and UST subchapters); EPCRA, 42 U.S.C. § 11045. Contrast 42 U.S.C. § 7413(b) (1982), with Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 701, § 113(d), 104 Stat. 2399, 2672-80 (codified at 42 U.S.C.A. § 7413(d) (West Supp. 1991)).

57. 1987 Minn. Laws ch. 174, § 116.072, MINN. STAT. (Supp. 1991).

58. OFF. OF LEGIS. AUDITOR, *supra* note 16, at 170.

59. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL GUIDE TO ENVIRONMENTAL LAW 135 (1990) [hereinafter GUIDE TO ENVIRONMENTAL LAW].

thirty-three states have felony laws that apply to illegal disposal of hazardous waste<sup>60</sup> and about one-half of the states have active environmental criminal enforcement programs at the state or local level.<sup>61</sup> Still, criminal enforcement is not used extensively outside of the hazardous waste field.

There are two principle reasons for the increased use of criminal enforcement. First, it is now clear that some environmental violations are not prevented by the threat of civil penalties. This is especially true when substantial money can be made through illegal conduct. Hence, the agencies see the more severe penalties, such as prison sentences available under the criminal law, as the only effective tool to address these violations.<sup>62</sup>

The second and more important reason for increased criminal enforcement is related to the large number of regulated facilities. Since facilities may only rarely be inspected under some environmental programs,<sup>63</sup> it is important to deter serious violations. Criminal enforcement is believed to be an effective method of deterring environmental violations.<sup>64</sup> As one commentator noted: "The deterrent effect of the environmental statutes is enhanced . . . if responsible individuals within the corporation know they may not sanction or participate in illegal activity without subjecting themselves personally to the possibility of substantial fines and/or imprisonment."<sup>65</sup> Criminal enforcement is rapidly becoming a routine enforcement tool in environmental cases.<sup>66</sup> This trend is likely to continue throughout the remainder of this decade.

### C. Strategic Planning

Another emerging approach to enforcement is the wider use

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60. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ENVIRONMENTAL CRIMINAL STATUTES, HAZARDOUS WASTE (1991).

61. GUIDE TO ENVIRONMENTAL LAW, *supra* note 59, at 136, 141.

62. See McMurray & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1141 (1986).

63. See *supra* note 51 and accompanying text.

64. See Conerton & Paddock, *supra* note 2 at 978; McMurray & Ramsey, *supra* note 62, at 1141-43.

65. McMurray & Ramsey, *supra* note 62, at 1143.

66. *Id.*

of strategic planning techniques, including multimedia enforcement, targeting, and risk-based enforcement. Multimedia enforcement is designed to use inspection and enforcement personnel more effectively by reviewing all aspects of a facility's environmental compliance at one time rather than in a series of uncoordinated, single media inspections and enforcement actions.<sup>67</sup> Targeting involves selecting categories of facilities for enforcement either on an industry or geographic basis.<sup>68</sup> The technique is designed to achieve a high level of compliance through individual cases and the related deterrent effect of those cases in the selected industry or geographic area.<sup>69</sup> The final strategic planning tool is risk-based enforcement. This technique is designed to focus enforcement resources on the violations that present the most serious risks to health and the environment.<sup>70</sup>

The increasing use of strategic planning techniques indicates a growing understanding that limited enforcement resources must be leveraged to obtain the maximum degree of compliance in the most important areas of concern. It is clear that federal and state enforcement officials will not be able to inspect and initiate enforcement proceedings against the hundreds of thousands of regulated entities. Rather, much like a tax auditing system, it will be necessary to conduct a number of well-planned enforcement initiatives designed to achieve a significant "enforcement presence" in the area of concern.

#### *D. Field Citations*

Field citations are a class of enforcement documents issued by inspectors in the field.<sup>71</sup> The citations are similar to traffic tickets.<sup>72</sup> They are designed to address minor violations through small fines that can be issued with a minimum of administrative process.<sup>73</sup> This technique has been used by a few state and local governments and on an experimental basis, in some EPA pro-

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67. See U.S. EPA, ENFORCEMENT IN THE 1990's—INNOVATIVE ENFORCEMENT PROJECT pt. VI (1991).

68. See *id.* pt. VII.

69. *Id.*

70. *Id.* pt. VIII.

71. *Id.* pt. X.

72. U.S. EPA, *supra* note 67, pt. X.

73. *Id.*

grams.<sup>74</sup> The 1990 Amendments authorized the first federal statutory field citation program. The Amendments allow the issuance of field citations with penalties of up to five thousand dollars for minor violations.<sup>75</sup>

On the state level, a bill that authorizes state officials to issue field citations has been passed by the Minnesota Legislature. Under the bill, designated state Pollution Control Agency employees and Department of Natural Resources conservation officers could fine a person up to two thousand dollars for illegally disposing of waste tires, lead-acid batteries, major appliances, or solid waste.<sup>76</sup>

The field citation process holds some promise for agencies trying to manage the greatly expanded enforcement workload. Citations are designed to take even less time to issue than administrative penalty orders, allowing larger numbers of citations to be issued. However, field citations are typically limited to small, easily proven violations and, therefore, are limited in their application.

#### *E. Enforcement by Local Governments*

Local governments have played a limited role in enforcing the major state and federal environmental programs over the past two decades. One of the few major federal programs routinely enforced by local governmental officials is the pretreatment program under the CWA.<sup>77</sup> Portions of other programs are occasionally enforced by local governments. For example, some counties enforce parts of the UST program.<sup>78</sup> Local Emergency Planning Committees<sup>79</sup> established under EPCRA are authorized by federal law

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74. *Id.* at app. 1.

75. Pub. L. No. 101-549, sec. 701, § 113(d)(3), 104 Stat. 2399, 2679-80 (codified at 42 U.S.C.A. § 7413(d)(3) (West Supp. 1991)).

76. 1991 Minn. Laws, ch. 347, sec. 15, § 115.072, MINN. STAT. (1991).

77. 33 U.S.C. § 1317(b) (1988). The pretreatment program requires industries that discharge waste water to sewers to pretreat the waste if the discharge would interfere with or pass through a publicly owned treatment work. *Id.*

78. U.S. EPA, *supra* note 1, at 3 (1990).

79. Local Emergency Planning Committees (LEPCs) are established under EPCRA to oversee the preparation of emergency response plans for the release of hazardous substances and to assist in providing information to the public on hazardous substances stored by facilities within the boundaries of the LEPCs. 42 U.S.C. §§ 11001, 11003, 11022 (1988).

to enforce some portions of the Act in federal courts,<sup>80</sup> and some local governments have assumed responsibility for aspects of the RCRA hazardous waste program.<sup>81</sup> However, these instances of local enforcement constitute only a small minority of all environmental enforcement activities.

A comparison between the American and Dutch environmental enforcement schemes reveals the potential for local government involvement in expanded enforcement systems. The Dutch government has moved rapidly over the past few years to expand the role of local governments in enforcing the country's major environmental laws.<sup>82</sup> The government provides funding for local governments to implement the Netherlands' Public Nuisance Act, the basic environmental law of the country.<sup>83</sup> This Act gives municipalities the primary responsibility for monitoring compliance by the 150,000 firms subject to the Act.<sup>84</sup> Municipalities are encouraged to target specific industries, such as body shops, electroplating firms, or shipyards, to facilitate training of local enforcement officials.<sup>85</sup>

The Dutch government also encourages local prosecutors and police to assume a larger role in environmental enforcement.<sup>86</sup> Local police are being trained to identify environmental violations,<sup>87</sup> and additional prosecutors have been assigned to handle environmental cases.<sup>88</sup>

The Dutch experience indicates that an expanded role for local governments may be one way to deal with the large number of regulated facilities in this country. However, increasing the role of local governments must be done carefully to ensure that enforcement activities are successful. The following factors should be considered in allocating enforcement responsibilities to local governments:

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80. See 42 U.S.C. § 11045.

81. See MINN. STAT. § 473.811, subd. 5b (Supp. 1991).

82. Schaap, *Small Business Compliance, The Role of Local Communities*, in INTERNATIONAL ENFORCEMENT WORKSHOP 87, 91 (1990) (proceedings of a symposium held in May 1990).

83. *Id.* at 91.

84. *Id.*

85. *Id.* at 91-92.

86. *Id.* at 92.

87. Schaap, *supra* note 82, at 92.

88. *Id.*

- (1) The number of regulated facilities;
- (2) The degree of expertise needed to effectively enforce the law;
- (3) The need for oversight of the local government's enforcement program;
- (4) The interest of the local governmental unit in participating in enforcing the law; and
- (5) The availability of adequate resources to enforce the law.<sup>89</sup>

#### F. Citizen Suits

Most of the major federal environmental laws authorize citizens to file lawsuits to enforce aspects of those laws.<sup>90</sup> Citizen suit provisions typically require the plaintiff to file a notice of intent to sue with the federal or state government sixty days prior to commencing an action.<sup>91</sup> The citizen suit may be foreclosed if the government initiates an enforcement action within the sixty-day period or is diligently pursuing an enforcement action.<sup>92</sup>

While citizen suit provisions have existed for several years, they have not been used extensively to enforce environmental laws except under the CWA. The CWA provides a ready means of identifying violations through review of discharge monitoring reports (DMRs).<sup>93</sup> DMRs must be filed periodically by any person who holds a National Pollutant Discharge Elimination System permit.<sup>94</sup> The DMRs report the results of required monitoring, which can include violations of discharge limitations set in the permit. Thus, by reviewing DMRs, citizens can identify violations of the CWA and sue to enforce the permit. Citizen suits under

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89. See Conerton & Paddock, *supra* note 2, at 950.

90. See 33 U.S.C. § 1365 (1988); 42 U.S.C. § 300j-8; 42 U.S.C. § 6972; 42 U.S.C. § 7604, *amended by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, secs. 302(f), 707(a)-(g), § 304, 104 Stat. 2399, 2574, 2682-83 (codified at 42 U.S.C.A. § 7604 (West Supp. 1991)); 42 U.S.C. § 9659; 42 U.S.C. § 11046(a).

91. See 33 U.S.C. § 1365(b); 42 U.S.C. § 300j-8(b); 42 U.S.C. § 6972(b); 42 U.S.C. § 7604(b); 42 U.S.C. § 9659(d).

92. See statutes cited *supra* note 91; see also 42 U.S.C. § 11046(e).

93. See 40 C.F.R. § 122.2 (1990).

94. *Id.* § 122.41(j).

other environmental statutes are less common, in part, because violations cannot be as easily identified using reports submitted under those programs.

Citizen suits have proven to be a useful part of the enforcement program under the CWA. This success indicates that a more active role for citizens in enforcing other environmental laws may be one way to apportion part of the increasing enforcement workload.

Since, in the past, some governmental officials have discouraged citizen suits, several steps must be taken to facilitate increased citizen involvement. To stimulate a greater role for citizen suits, this reluctance to integrate citizen suits into the enforcement system must change.<sup>95</sup> More importantly, governments must provide citizens with better and simpler access to data related to compliance.<sup>96</sup> This may require the promulgation of additional industry self-reporting requirements similar to those currently used under the CWA.<sup>97</sup> Finally, states without citizen suit provisions may have to adopt new laws to permit these suits to obtain the full benefits of citizen enforcement.<sup>98</sup>

#### IV. ENVIRONMENTAL ENFORCEMENT AT THE TURN OF THE CENTURY

Environmental enforcement at the turn of the century will be quite different than today. The most striking difference will be a greatly expanded role for local government. Given the huge number of regulated facilities, many of which are small neighborhood operations, it is clear that state and federal officials cannot, by themselves, adequately enforce the wide array of national and state environmental laws. Local governments will have to step in or be brought in to fill this void. To assist in ensuring a smooth transition to local governmental enforcement, state and federal governments should begin now to work with local governments to develop strategies for local enforcement of the major environmental laws.

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95. See ENVIRONMENTAL LAW INST., REPORT OF THE COLLOQUIUM ON FEDERAL-STATE RELATIONS IN ENVIRONMENTAL ENFORCEMENT 11 (1991).

96. *Id.* at 13.

97. *Id.*

98. *Id.* at 13-14.

A second major change by the year 2000 will be the full integration of criminal enforcement into the environmental field. The primary reason for this broader role for criminal enforcement is the important role deterrence must play in enforcement programs, given the number of facilities subject to regulation and the serious environmental harm that can result from even small releases of hazardous substances. Another reason for this change is a growing view that at least the most serious environmental violations are socially unacceptable. This view also holds that this socially unacceptable conduct, like many other forms of socially unacceptable conduct, should be punished through the criminal system.

To adequately address the enforcement workload, a third change must occur well before the turn of the century. Environmental agencies will need to expand the enforcement tools they use and rely heavily on strategic planning tools to effectively address the enforcement workload. By using administrative penalty orders and field citations, state and federal agencies can initiate far more enforcement actions with their limited enforcement resources. Similarly, employing strategic techniques such as multimedia enforcement, industry and geographic targeting, and risk-based enforcement, limited governmental resources can be stretched to achieve maximum results. By expanding the range of enforcement tools and using strategic techniques, administrative agencies will be able to use their limited enforcement resources much more effectively by the end of the decade.

Finally, states and the federal government will need to take further steps to support citizen suits by the close of this decade. The principle mechanism for achieving this result is to redesign reporting requirements for regulated facilities so that citizens can more readily identify violations.

Enforcement officials face major challenges in the years ahead. They must ensure that the vast new environmental programs passed by Congress and state legislatures and widely supported by the public are more than paper requirements. The changes discussed in this Essay will form the basis for effective enforcement of these laws throughout this decade and into the next century.