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Environmental Law: A Case for Administratively Imposed Civil Money Penalites in the Enforcement of Policy Objectives

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ENVIRONMENTAL LAW: A CASE FOR ADMINISTRATIVELY IMPOSED CIVIL MONEY PENALTIES IN THE ENFORCEMENT OF POLICY OBJECTIVES

Legal sanctions have traditionally been created and enforced in part because they are thought to channel human behavior in a desired direction. With the increase in governmental activity resulting from the complexities of metropolitan life, a host of social welfare regulations designed to insure minimal standards of health and safety have been generated. Any efforts to protect and improve the environment have been formulated by balancing economic and environmental priorities.[1] To date, most regulations have relied on criminal sanctions and injunctions for enforcement.[2] Neither of these sanctions has proven to be an effective deterrent to polluters or an effective means of implementing environmental policy.[3]

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1. The effect is that this country has been forced to balance economic and environmental considerations in order to determine how much environmental protection can be afforded consistent with competing problems of inflation, unemployment, and energy production.

2. In the absence of total voluntary compliance, the effectiveness of any otherwise enforceable law depends on the availability of adequate legal remedies to the enforcement agency and its application of them. The purpose of remedial provisions in environmental control is to deter future violation and thus to make future imposition of the remedy unnecessary. If remedial powers and procedures are broad, flexible, and speedy, and the penalties are not trivial, the law can and will deter the prohibited behavior. A number of enforcement devices are usually available to pollution control agencies: *See, e.g.*, N.Y. ENVIR. CONSERV. LAW § 19-0305(2)(l) (McKinney 1973) indicating that the Commissioner of Environmental Conservation may "[d]o such other things as he may deem necessary, proper or desirable in order that he may enforce codes, rules or regulations . . . ."; N.J. STAT. ANN. § 26:2C-14 (Supp. 1977), which empowers the State Department of Health to issue cease and desist orders after investigating and discovering violations of environmental regulations; N.Y. ENVIR. CONSERV. LAW § 71-2107 (McKinney 1973 Supp. 1976) which grants the power to issue injunctions. Further, although no reported cases have come under the Federal Water Pollution Control Act, 33 U.S.C. § 411 (1970) provides a fine from $500 to $2500, or imprisonment of thirty days to one year, or both for dumping refuse of any kind into navigable waterways.

3. Since the use of injunctions and criminal sanctions have been costly and ineffective as a means of encouraging environmental policy recommendations, it has been indicated that more extensive use of civil penalties by federal agencies be employed to effectuate statutory goals. State employment of civil money penalties is partially due to the federal decision to use them in the field of environmental protection. For example, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251-1376 (Supp. V 1975), requires a state which desires to administer its own permit program pursuant to the Act to possess the authority to abate pollution violations, including the authority to impose civil money penalties. 33 U.S.C. § 1342(b)(7) (Supp. V 1975); *see also* 40 C.F.R. § 124.73(h) (1976).

The federal government has employed the use of civil money penalties in a number of other areas of environmental control. *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972, §§ 309 (d), 311 (b)(6), 33 U.S.C. §§ 1319 (d), 1321 (b)(6) (Supp. V 1975); Federal Environmental Pesticide Control Act of 1972, § 14(a), 7 U.S.C. § 136 (l)(a) (Supp. V 1975).

The use of civil money penalties has also begun to appear in a number of environmental state statutes. *See, e.g.*, ILL. ANN. STAT. ch. 111 1/2, § 1042 (Smith-Hurd 1977); N.Y. ENVIR.

In considering the usefulness of administratively imposed civil money penalties[4] as the primary means of encouraging compliance with environmental objectives, this comment will demonstrate that the civil money penalties are designed to reduce environmental pollution rather than to punish violators.[5] Further, it will be shown that traditional sanctions, that is, the injunction, and the criminal imposition of money penalties are often slow and ineffective in encouraging environmental compliance. Finally, this comment will illustrate that the degree of environmental compliance will be influenced by the amount of the penalty imposed and the procedure used to impose and collect them.

I. Traditional Sanctions

Since good intentions alone will not be sufficient to preserve the environment, and no major contribution to the solution is likely to be found in voluntary measures on the part of public-spirited business concerns, it is necessary to examine the methods that have been employed to implement and enforce policy objectives.[6]

The usual goal of environmental laws has been the reduction of environmental pollution to an acceptable level and the maintenance of this level. While it is difficult to distinguish exactly what factors[7] influence the implementation and enforcement of environmental policy, the creation of the Environmental Protection Agency (EPA) has been an important stimulus to improved implementation and more stringent enforcement.[8] To accomplish the goal of environ-

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Conserv. Law §§ 71-1707, -1725, -1929, -1941, -2103 (McKinney 1973 & Supp. 1976).

4. There are a number of civil remedies besides the money penalty. Examples are cease and desist orders, injunctions, damages to injured parties, licensing on condition, revocation of licenses, and publicity. For a more extensive review refer to McKay, *Sanctions in Motion: The Administrative Process,* 49 Iowa L. Rev. 441 (1964).

5. *See* Schwartz & Orleans, *On Legal Sanctions,* 34 U. Chi. L. Rev. 274 (1967), in which the author discusses the effectiveness of legal sanctions.

6. Although this review of the traditional methods employed to implement environmental policy will discuss the nature, strengths, and weaknesses of each in theoretical terms, it is important to note that practical problems, such as sufficient funds, manpower, etc., greatly influence the efficacy of any technique. Moreover, in most situations, under present law, the company that increases its expenses substantially to avoid polluting the environment will generally find itself at a competitive disadvantage.

7. The usual factors influencing environmental policy are public opinion, legal requirements, the attitudes of the administration, Congress, and the Courts.

8. Prior to 1970, federal responsibility for environmental control was scattered among a large number of agencies. For example, water pollution was the responsibility of the Department of Interior, while national air pollution was controlled by the Department of Health, Education and Welfare. This fragmentation of agencies was changed by Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970); *reprinted in* 5 U.S.C. app., at 609 (1970) *and in* 84 Stat. 2086 (1970).

The Ash Counsel, formed to consider how the agency was to be organized, concluded that

mental protection, a certain level of air and water quality has often been legislatively or administratively determined to be acceptable.[9] Under traditional air and water programs, the polluters monitor their own discharges and communicate the results to the proper environmental enforcement agency, which periodically inspects the polluter's plant to verify the reported rates. If the polluter is found to have violated any condition of his industry's stipulated acceptable discharge, he may be enjoined from continuing such violations or be subjected to various penalties.[10] Often traditional sanctions applied in cases where there is damage to the environment appear to be inappropriate and ineffective.[11] In reviewing the methods that have been employed to encourage compliance with environmental policy, it will be illustrated that the injunction and the criminal imposition of money penalties are more effective if used as additional leverage in particular cases, rather than as the primary sanction of a comprehensive environmental protection scheme.

A. *Injunctions*

Although the injunction has served as an invaluable environmental tool because of its adaptability to diverse situations, its use is limited because it is inapplicable to violations which have already

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the basic structure of the Environmental Protection Agency (EPA) should be along functional lines such as enforcement, research, and standard setting. In 1974, the research budget of EPA was cut, so it is now primarily a regulatory and enforcement agency.

The role of regulator and enforcer was also thrust upon EPA by deadlines of the Clean Air Amendments of 1970, 42 U.S.C. § 1857 (1970), and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251-1376 (Supp. V 1975), which required the agency to take an extensive series of far-reaching and politically sensitive actions. These actions included establishing regulations for specific industries and for the implementing of air and water standards.

9. *See, e.g.*, Federal Water Pollution Act Amendments of 1972, §§ 309-11, 33 U.S.C. §§ 1319-1321 (Supp. V 1975); Clean Air Act, 42 U.S.C. § 1857 (1970).

10. For a survey of state and municipal government enforcement techniques in the area, *see* F. GRAD, G. RATHJENS & A. ROSENTHAL, ENFORCEMENT CONTROL: PRIORITIES, POLICIES, AND THE LAW 117 (1971).

11. For example, as applied to the ordinary polluter, criminal fines prove to be too blunt a weapon. In the majority of situations, faced with the first offender, juries are normally unwilling to stigmatize the individuals responsible, preferring to acquit them or pass the responsibility on to impersonal business entities. Further, when considering injunctions, judges often grant continuances in an attempt to extort compliance and then settle for half-measures when faced with technical difficulties of full compliance. Conversely, criminal procedures offer too many irrelevant protections for the uncooperative polluter, *e.g.*, appeal, granted of right to criminal defendants, often means either acquittal or the significant reduction of a fine. *See generally* Comment, *Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61, 62-63 (1972); Schachter, *Some Criteria for Evaluating State and Local Air Pollution Control Laws*, 14 B.C. INDUS. & COM. L. REV. 583, 633-34 (1973).

occurred or are not expected to occur.[12] In employing the injunction, which focuses on the prevention of future pollution, courts balance the various equities in light of public policy considerations.[13] As a practical matter, courts are more likely to enjoin a new abuse than they are a continued defilement.[14] Since an injunction operates as a deterrent only when it closes down a polluter's operation, courts are reluctant to order a plant shutdown when the defendant can show that the prospect of serious economic injury might be greater than the environmental benefits to be realized.[15]

Two recent decisions illustrate the court's reluctance to order polluting plants to close down in the absence of some immediate threat to human life. In *United States v. Reserve Mining Co.*,[16] the United States District Court of Minnesota found a serious health threat, and ordered Reserve to immediately cease all discharges into Lake Superior. The Eighth Circuit Court of Appeals, considering a motion to stay the district court's injunction, found little likelihood that the taconite tailings discharged into the lake would produce an eventual showing of a substantial health threat. Moreover, the court of appeals reasoned that the industrial plant was central to the economy of the entire region and that an immediate shutdown would have a great economic impact on Reserve's three thousand employees, their families, and the communities in which they lived. Consequently, the stay was granted for the purpose of allowing abatement to take place over a period of time according to a timetable.[17]

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12. *See* note 2 and accompanying text *supra* for a number of statutes which give the courts the power to enjoin.

13. In determining whether the polluter should be forced into immediate compliance with environmental laws or be allowed to comply over an extended period of time, courts look to whether the relief sought is against a long standing abuse such as the continued polluting of a river or a projected new affront such as the destruction of a mountain.

14. In Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) a court order indefinitely continued a preliminary injunction barring the Secretary of Agriculture from selling timber in a relatively untouched area.

15. *See* 33 U.S.C. § 1160(h) (1970), which encourages the enforcement of such judgments, as the public interest and equities of the case may require. *See also* Barry, *Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1106, 1120 (1970).

16. 380 F. Supp. 11 (D. Minn. 1974) (injunction issued), *aff'd with modifications*, 514 F.2d 492 (8th Cir. 1975) (injunction modified to take place according to a timetable).

17. Implicit in the court's holding is a clear message, especially for counsel representing the small or middle sized plant or facility which is not in compliance with a major environmental law. That is, if companies fail to effectively engage in voluntary compliance with minimal business dislocation, then courts that recognize the remedial purposes of environmental laws are going to order compliance programs and dates which are often costly and accelerated. United States v. Reserve Mining Co., 417 F. Supp. 789, 790 (1976).

In an earlier case, *Boomer v. Atlantic Cement Co.*,[18] the New York Court of Appeals refused to enjoin the operation of a plant which injured property of landowners through its emission of dirt, smoke, and vibration. The court reasoned that the technology which would permit operation without pollution had not yet been developed and that the defendant's investment in and contribution to the economy of the community outweighed the injury complained of, which was to property rather than to health. Instead, damages for the permanent reduction in the value of the plaintiffs' property were awarded.[19]

In both cases, the important factors were the economic importance of the defendant's activity and the legislative nature of the judicial action sought. Moreover, until recently there seemed to be substantial likelihood that if the injunction was the principal tool relied upon, polluters might find it economically advantageous to keep polluting until all the channels of review had been exhausted.[20] While this all-or-nothing type of sanction may be appropriate in cases of extremely hazardous violations, the effect of an injunction as the principal enforcement tool, that is, forcing a polluter to close down, is likely to cause more damage to the particular community than it prevents.

B. Criminal Imposition of Money Penalties

Traditionally, criminal sanctions[21] have been employed to deter anti-social behavior, including conduct detrimental to the environment. Despite the emphasis in anti-pollution legislation on criminal sanctions, it has been argued that criminal prosecutions are seldom

18. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). *Boomer* is an example of a nuisance action in which the court refused to enjoin the cement plant because it felt the important factors were the economic importance of the defendant's activity and the legislative nature of the judicial action required.

19. It should be noted that while the defendants in both the *Boomer* and *Reserve* cases were causing serious pollution problems, the respective appellate courts found an injunction to be inappropriate since the economic importance of the defendant's activity in each instance was controlling. For a discussion of some of the present federal statutes that encourage the denial of injunctions in the event of economic hardship *see* Barry *supra* note 15, at 1106, 1120; Gelpe & Tarlock, *Uses of Scientific Information in Environmental Decisionmaking*, 48 S. CAL. L. REV. 371 (1974).

20. Accelerated procedures have been established with respect to air pollution violations in the Clean Air Act, § 113, 42 U.S.C. § 1857 c-8 (1970), *as amended*, 42 U.S.C. § 1857 c-8 (Supp. V 1975). What is necessary is similar speed-up procedures in connection with other types of environmental violations.

21. For an illustration of a statute allowing the imposition of criminal sanctions for continuous polluting of the environment *see* MASS. GEN. LAWS ANN. ch. 111 § 142A (West 1971 Supp. 1977).

used effectively in the enforcement of environmental laws and objectives.[22] One of the problems with employing criminal sanctions as the primary enforcement tool is that environmental discharges are not a crime because they are considered morally wrong, but merely because they have been declared unlawful.[23] Consequently, the real deterrent effect of the criminal sanction, the stigma of moral blame, is greatly reduced.

Further, the heaviest polluters are likely to be large business concerns which cannot be imprisoned. Moreover, it is often impossible to prove personal culpability of individual officers. Since it is difficult to determine the official responsible for the decision that led to the violation, it is hard for the prosecution to establish criminal intent beyond a reasonable doubt. This being the case, a number of recent environmental statutes have reduced the accountability problem by simply making omission the basis of liability.[24] Although criminal money penalties can be imposed, unless they are greater than the cost of compliance, they will have negligible deterrent effect. To date, the criminal fines that have been imposed have been small and have been of little value. It should be noted that for any monetary fines to be effective they must be more than the cost of compliance.[25]

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22. *See generally* Rosenthal, *Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct*, 45 So. CAL. L. REV. 397, 414 (1972); Willick & Windle, *Rule Enforcement by the Los Angeles County Air Pollution Control District*, 3 ECOLOGY L. Q. 507 (1973).

23. *See* Ball & Friedman, *Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 216-17 (1965). In this article it is argued that since health and safety laws are considered to be *malum prohibitum*, the deterrent value of the criminal sanction, the stigma of moral blame, is minimized. *Cf.* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1279 (1966). The authors point out that inadequate sentencing practices in housing cases arise out of the unwillingness of criminal courts to recognize housing violations as true "crimes," and that the same odium does not attach to offenses *mala prohibita* as to those *mala in se*. The difficulty is not confined to prosecutions for housing violations but extends to virtually all municipal prosecutions for health and safety offenses. There are grounds for apprehension that the same attitudes may prevail in prosecutions for environmental offenses.

24. *See, e.g.*, CONN. GEN. STAT. ANN. § 25-54(q) (West 1975); 33 U.S.C. § 411 (1970). *See also* Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 436, 442 (1963). It should be pointed out that without the usual requirements of criminal intent, and without any attachment of moral culpability to the unlawful act, administrators and prosecutors are reluctant to invoke criminal sanctions, jurors are reluctant to find guilt, and judges are reluctant to impose strong penalties. Consequently, the real deterrent value of the criminal sanction, the stigma of moral blame, is greatly reduced. *See* Grad, *supra* note 10, at 2-161.

25. *See* note 10 and accompanying text. It should be noted that there are a number of additional problems peculiar to corporate polluters. That is, increasingly corporations are agreeing to indemnify the officers and directors that might be fined if certain claims are

Further difficulties that arise in criminal prosecutions concern the procedural drawbacks of the criminal justice system. For money penalties to effectively encourage environmental objectives, the procedure for its imposition and collection must be immediate and not amenable to deferment by the polluter, as is often the case when injunctions and criminal sanctions are imposed. Consequently, for money penalties to be an effective deterrent in environmental cases, the procedural safeguards must be discarded.[26]

As long as the context remains commercial, the damage of the particular defendant not clearly discernible, and the violation not intentional, the role of the criminal sanction will remain negligible.[27] However, the use of criminal sanctions are appropriate in cases of intentional or reckless violations. In such a case some measure of moral culpability is involved and the sanction may act as an effective deterrent.[28]

C. *Civil Money Penalties*

A civil penalty is a monetary penalty that is imposed in a civil proceeding for a violation of the law.[29] While civil money penalties may be considered a sanction since they are imposed to eliminate violations, their primary objective is not to punish violators or collect revenue.[30] The purpose of these penalties is to deter future viola-

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brought against them. Further, stockholders may be able to assert a derivative action against officers or directors whose illegal conduct caused the corporation to be fined. *See* Dyksta, *Revival of the Derivative Suit,* 116 U. PA. L. REV. 74 (1964). It is interesting to note that some major underwriters insuring officers and directors against stockholder suits have excluded from coverage actions based on air and water pollution. N.Y. Times, Sept. 27, 1971, at 1, col. 3 (city ed.).

26. Procedural safeguards appear inappropriate in environmental money penalty cases, since they do nothing to enhance the implementation of environmental policy objectives. For further discussion concerning why criminal prosecutions have been ineffective in enforcing environmental protection laws *see* Rosenthal, *supra* note 22, at 414-15.

27. *See* Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions,* 71 YALE L. J. 280, 282-87 (1961), in which it is argued that the criminal fine as presently administered is but a "reasonable license fee" for engaging in prohibited conduct.

It should be pointed out that as long as the violation is not reckless, wanton, or intentional, and the context remains commercial, the situation may begin to resemble the enforcement of antitrust laws. That is, the role of the criminal sanction is negligible, while the private treble damage action would be more significant. *See* Flynn, *Criminal Sanctions under State and Federal Antitrust Laws,* 45 TEXAS L. REV. 1301, 1304-05 (1967).

28. An example of such a provision is N.Y. ENVIR. CONSERV. LAW § 71-1933 (McKinney 1973 Supp. 1976).

29. *See* note 2 and accompanying text *supra.*

30. In pollution control regulation, the philosophy that the sole purpose of the fine is to eliminate violations is embodied in provisions authorizing the agency to compromise and settle a penalty, often including a rebate of the penalty. *See, e.g.,* N.J. STAT. ANN. § 26:2C-

tions, compensate for environmental damage, and aid in the internalization of pollution costs.

For civil penalties to be effective as a deterrent, two basic conditions must be met: (1) the amount of the penalties should be meaningful, and (2) the procedures preceding the imposition of the penalties should be swift yet not abuse the violators' procedural rights. In determining the effectiveness of civil money penalties, it is important to keep in mind that it is appropriate in a wide variety of situations whereas injunctions and criminal sanctions can be employed only in a limited number of situations.[31]

Except in the case of intentional or reckless violations, civil money penalties have a number of distinct advantages over criminal sanctions in that they effect deterrence by the use of economic disincentives rather than by fixation of moral blame. This avoids the problems inherent in the criminal sanction and prevents harmful acts which are considered morally culpable. Further, while criminal procedures offer a number of irrelevant protections for a polluter,[32] by employing civil money penalties as the primary enforcement tool the apparatus of apprehending and punishing violators swiftly and accurately would more effectively deter violations.[33]

As penalties are set to achieve an optimum level of environmental quality, traditional criminal techniques fail to take into account that it is the cumulative effect of numerous morally blameless violations that bring about pollution. Further, while moral blameworthiness is an essential element of traditional criminality, society does not dictate the same moral necessity to apprehend polluters as to apprehend thieves. Rather, environmental objectives are to stop enough polluters so as to reduce overall pollution to a tolerable level.[34]

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19 (Supp. 1977). For an interesting discussion of penalties *see* Schwartz & Orleans, *supra* note 5, at 277.

31. Where it would not be in the public interest to enjoin an entire operation which is important to a local economy, the civil money penalty seems more appropriate since it can be imposed swiftly without hindering the community. For a discussion of situations where the enforcement authority has only the choice of no remedy or a drastically harsh one, *see* Goldschmid, *Civil Money Penalties as a Sanction,* Recommendation 72-6, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: JULY 1, 1970-DEC. 31, 1972.

32. For a discussion of the procedural provisions involved in environmental control *see* Kovel, *A Case for Civil Penalties: Air Pollution Control,* 46 J. URB. L. 153, 155-58 (1969); note 20 *supra* and articles cited therein.

33. That is, civil money penalties effect deterrence by the use of economic disincentives rather than fixation of moral blame. Moreover, it avoids subjecting the offender to the stigma of a lifetime criminal record for conduct he may not have known was wrongful. *See* Gribetz & Grad, *supra* note 24, at 1285.

34. In criminal proceedings it is the stigma of moral blameworthiness that is meant to

Since there is no stigma attached to environmental violations, the only advantage in proceeding criminally seems to be the ultimate power to punish severely, such as by imprisonment. Although many commentators argue it is socially regrettable that the moral sense of community is not sufficiently developed to consider pollution morally wrong, until it is, there is little sense in unnecessarily handicapping regulatory efforts.[35] Moreover, it is unfair to expect a moral sense of guilt to develop around each of the thousands of existing regulatory offenses. Further, in matters such as environmental control there is nothing in the offense that might give reasonable notice to an offender as to the law's requirement.[36] A shift to a civil money penalty as a primary tool to encourage environmental protection would not help people learn all the laws and the technical standards, but it would serve to show that they are not morally to blame for their ignorance.

In view of the growing federal and state acceptance of civil money penalties,[37] it may be beneficial to increase their use toward the ultimate objective—voluntary compliance. Moreover, the inappropriateness of the criminal law in environmental violations has served to increase resentment at its intrusion where it has demonstrated incompetence in effectively apprehending and punishing violators. Because of this misapplication of the criminal law, the apparatus of apprehension, proof, and appeal is complicated and pointless.

II. Determination of an Effective Money Penalty

As seen in the preceding sections, the purpose of imposing penalties for environmental violations is to deter violations and make the imposition of the penalty unnecessary. To assure that the efficiency of civil money penalties is realized, the method by which

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shame the offender and to deter others. It has been argued that people resent the state's attempt to impose a stigma for environmental pollution, when their sense of morality tells them none belongs. Consequently, juries in environmental litigation react against the state's attempt and do not blame the defendant, and treat him leniently. *See* Hart, *Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 418 n. 42 (1958).

35. *See* Ball & Friedman, *supra* note 23, at 200, in which the authors point out that traditional crimes may be "wrong" because we are accustomed to calling them crimes, and presumably if we keep pretending that pollution is immoral, eventually people will be thereby educated to consider it immoral. Meanwhile, however, it seems that the educational function of the criminal law will be severely disserved when social welfare laws are ineffective and largely discarded.

36. *See* Hart, *supra* note 36, at 420.

37. *See* City of Waukegan v. Pollution Control Board, 57 Ill. 2d 170, 311 N.E.2d 146 (1974).

fines are assessed is an important consideration. That is, in establishing effective penalty provisions and guidelines, the amount and procedure by which penalties are to be imposed must be selected with great care. One such guideline is the minimum fine. The minimum fine is at least as important as the maximum fine in determining whether the amount of the fine is meaningful. The reason for this lies in the fact that the minimum fine is generally imposed more frequently than any other fine. Further, it has been argued that the minimum amount cannot be trivial, and the maximum must be sufficiently substantial to have a significant effect on most businesses. For large companies, the only fine that will have a significant effect is probably the one that exceeds the cost of compliance.[38]

In cases of repetitive environmental violations, the cumulative effect is what is harmful rather than an isolated act. Consequently, it has been argued, that a *per diem* fine would be more effective than a fine assessed for each individual violation. The advantage of *per diem* fines appears to lie in the fact that continuing violators incur severe penalties through accumulation even though basic *per diem* penalties are not unreasonable.[39]

In computing penalties to be assessed, it is also important to determine the damage to the environment caused by the violation. The importance of being able to determine the amount of damage to the environment is apparent when the costs of the damage are shifted to the polluter rather than to society which incurs the economic loss. The predominant function of penalties in this type of situation is not deterrence, but rather compensation for the harm to society.[40]

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38. In this instance the fine against the large company might appear outrageously excessive if applied to smaller companies. In determining an appropriate fine it is important to keep in mind that if it is too excessive, the company might pay the fine but attempt to lobby and change the law. At this point other sanctions must be accessible to gain compliance. Such measures include publicizing the violation and also the possibility of criminal sanctions. Generally a relatively unblemished community or national image is a highly valuable intangible asset. Further, it is interesting to point out that the Federal Water Pollution Control Act provides a $10,000 civil money penalty for the person in charge of a facility or vessel making an illegal discharge of oil into navigable waters or adjoining shorelines.

39. In cases of continuing discharges, the critical provision necessary to insure real deterrence is that the penalty exceed the cost of abatement. *See* 40 C.F.R. § 124.73(h)(2) (1976), which provides in part that civil penalties imposed for water and air pollution violations should "represent an actual and substantial economic deterrent to the actions for which they are assessed or levied."

40. *See, e.g.*, CAL. HEALTH AND SAFETY CODE § 39262 (West 1973); FLA. STAT. ANN. § 403.121 (West 1973). Statutes such as these often provide for penalties in addition to liability for environmental damage, such as clean up costs.

In assessing penalties with the intent to achieve compliance, it appears to be good policy to set a penalty that the polluter can afford. Further, it has been argued that expenditures made by the polluter in compliance efforts should be considered in mitigating the penalties.[41] Since such efforts are evidence of the polluter's attempts to internalize the costs, some states provide for remission of all or part of the penalty if the violation is immediately corrected. This appears to be good policy since it encourages compliance after penalties are collected, and serves to emphasize that the purpose of civil money penalties is to deter violations rather than to punish violators.[42]

Some environmental statutes possess the drawback that penalties cannot be assessed for violations which occur prior to the issuance of a cease and desist order.[43] In such cases a significant factor becomes whether penalty fines commence on the first day of the violation or from the date on which the violation was to have been eliminated in accordance with a cease and desist order. Cease and desist orders generally give the violator ample time in which to correct the violation, and therefore the amount of fines may be significantly less if they run from the date the violation was to have been eliminated. Thus, statutes that require a cease and desist order for assessment of a penalty will have negligible effect as a deterrent compared to one commencing on the day that the polluter first receives notice of the violation.[44] Rather than allowing a violator to escape responsibility until he receives notice of his violations from the government, cease and desist orders should function so as to impose liability from the day the violation began.[45]

III. Toward Administrative Enforcement of Civil Money Penalties

The flexibility and effectiveness of civil money penalties are greatly affected by the procedure used in assessing and collecting the penalties. The growth and visibility of environmental litigation has prompted serious debate as to how the judiciary should handle

41. *See, e.g.*, N.Y. Envir. Conserv. Law § 71-1941(3)(b) (McKinney Supp. 1976).

42. *See, e.g.*, N.J. Stat. Ann. § 26:2C-19 (Supp. 1977).

43. *See, e.g.*, N.Y. Envir. Conserv. Law § 71-2103(1) (McKinney 1973 Supp. 1976).

44. It should be pointed out the loss of deterrence may be mitigated by provisions which allow the agency to issue the cease and desist order at the time of the original notice of the violation. *See, e.g.*, N.J. Stat. Ann. § 26:2C-19 (Supp. 1977).

45. For an interesting approach to the problem *see* 1973 Conn. Pub. Acts, 73-665, § 2(2) which provides an initial maximum penalty of $25,000 plus $1,000 for each day of violation after the final order, which may be entered twenty five days later.

such matters. Two basic procedures are most often utilized in assessing and collecting penalties for environmental violations. They are the judicial imposition and the administrative imposition of civil money penalties.

A number of state statutes provide a very inflexible procedure for the judicial imposition of civil money penalties for environmental violations.[46] The state environmental enforcement agency makes an assessment of the polluter's liability caused by his violations and then brings a civil action in court, seeking an imposition of whatever penalties are provided by the state statute.[47] Here the court has complete discretion to impose or not to impose any penalties; as well as complete discretion concerning the amount of such penalty. In this type of process the polluter is entitled to a de novo trial on both the merits and the amount of the penalty assessed.[48]

A more flexible procedure involves the administrative imposition of civil money penalties.[49] In this case the state environmental agency, in an administrative hearing, would determine the polluter's liability and the amount of the penalty to be assessed. The polluter would then be entitled to judicial review, which would be limited to a determination of whether the amount of the penalty was supported by substantial evidence.[50] If the polluter did not seek review or pay the determined penalty, the environmental agency could enforce the penalty as if it were a court judgment,[51] or institute a streamlined collection proceeding in the courts. It should be noted that in this collection proceeding the polluter is not able to raise issues as to his liability or as to the reasonableness of the penalty.[52]

A variation of the administratively imposed procedure is employed in Ohio,[53] as well as in other states.[54] It is similar to the above procedure in that the state environmental agency determines both the polluter's liability and the amount of the penalty to be assessed. However, in some states, if the polluter does not voluntarily make the payment, a suit must be instituted to compel payment. At this

46. *See, e.g.*, CAL. WATER CODE § 13385-86 (West Supp. 1974), MINN. STAT. ANN. § 115.071, subd. 3 (West 1977).

47. *See, e.g.*, TEX. WATER CODE ANN. tit. 2, § 21.253 (Vernon 1972).

48. *See* Goldschmid *supra* note 31, at 907.

49. *See, e.g.*, 1973 Conn. Pub. Acts, 73-665, § 2(2); N.Y. ENVIR. CONSERV. LAW §§ 71-1707, -1729, -1941 (McKinney 1973 & Supp. 1976).

50. *See, e.g.*, 1973 Conn. Pub. Acts, 73-665, § (4).

51. *Id. See also*, PA. STAT. ANN. v. 35, § 691.605 (Purdon 1977).

52. *See, e.g.*, N.Y. ENVIR. CONSERV. LAW §§ 71-1707, -1941 (McKinney 1973 & Supp. 1976).

53. *See* OHIO REV. CODE ANN. § 6111.30 (Page 1971).

54. *See, e.g.*, COLO. REV. STAT. § 25-8-608 (1973); ILL. ANN. STAT. ch. 111 1/2, §§ 1033, 1042 (Smith-Hurd 1977).

time the polluter is entitled to limited judicial review of the agency's action.[55] The difference between the administrative procedures and the judicial procedures for the imposition of civil money penalties, lies in the fact that under the administrative procedure the polluter is entitled only to a limited form of judicial review.

In considering the feasibility of administratively imposed civil money penalties for all environmental violations, it should be pointed out that the only advantage of the judicially imposed procedure is that enforcement institutions are more familiar with it. However, while judicially imposed civil money penalties avoid legal questions that arise when an administrative agency performs tasks of a judicial nature, the system lacks much of the flexibility that makes civil money penalties so desirable.[56] In order for civil money penalties to be effective in encouraging environmental protection, cases must be resolved quickly, efficiently, and at relatively low cost. While this is possible if done administratively, penalties which are judicially imposed are much slower and much more costly due to court procedures.[57] It has also been argued that the courts are already overcrowded and that two factors would increase the strain on the system. First, environmental litigation is complex and often lengthy. Second, the number of cases added to the docket would be large, in that the imposition of the civil money penalty would need to be assessed by the court.[58] Since the courts are already overburdened and the costs of environmental litigation usually exceed the amount of the penalty assessed, the state environmental agencies often accept meager settlements, believing they have no choice. Consequently, the judicial imposition procedure favors large corporations which can more easily afford to contest the environmental agency's action, knowing that if settlement is not reached, the agency may not be able or willing to go to court.[59]

Under the administrative imposition of civil money penalties,

55. *See* N.J. STAT. ANN. §§ 26:2C-19, 23:5-28 (Supp. 1977). This provides a procedure for a court-imposed penalty for environmental violations. Here the polluter is offered a summary court proceeding without the right to a jury trial.

56. Agency proceedings can be more flexible and expert depending upon enabling legislation. The agency will generally have an easier time obtaining evidence, through less stringent constitutional provisions of admissibility and also through reporting requirements. Although hearings would be subject to the due process requirements and administrative acts, enforcement officers would be better off because the procedure would be more likely to reach the real issues. *See* McKay, *supra* note 4, at 454-55 and cases cited therein.

57. *See* Schachter, *supra* note 11, at 630.

58. For an extensive evaluation of how the system of court-imposed penalties has functioned on the federal level *see* Goldschmid, *supra* note 48, at 919-27.

59. *See* Goldschmid, *supra* note 48, at 921-23.

low settlements will be avoided by eliminating the pressures created by the unavailability of overburdened courts and the expense of using them in such complex litigation.[60] Moreover, there will be no opportunity for wealthy violators to avoid settlement as is the case when civil money penalties are imposed by way of the courts.[61]

A further drawback in the system of judicially imposed penalties is that a danger exists that environmental violations and enforcement of civil money penalties will be inadequately treated by piecemeal methods of litigation. That is, courtroom battles appear to slow down effective environmental policymaking. Moreover, litigation often fails to provide sufficient opportunities for expert analysis and broad perspective that environmental policymaking requires.[62] More effective enforcement may be provided by state environmental agencies, which are able to specialize in a particular field and are often better suited to administer the penalties in a consistent fashion pursuant to specific policy objectives.[63]

A number of the problems that arise when civil money penalties are imposed in a judicial proceeding can be avoided by statutes which allow the state environmental agency to recover, through the penalty action, reasonable costs and expenses in detecting, controlling, and abating violations.

IV. Conclusion

In this "new era"[64] of environmental and economic regulation, there is a need for an approach which genuinely facilitates substantive review of environmental discharges. Judge Bazelon[65] expressed the fear that in many areas of rulemaking, such as, environmental

60. *See* Goldschmid, *supra* note 48, at 928. He argues that the availability of fair and realistic settlements is crucial to an effective environmental enforcement policy, because a civil money penalty will not reduce environmental violations where the amount assessed is far below the polluter's cost of compliance.

61. *See* Goldschmid, *supra* note 48, at 929.

62. It should be indicated that similar arguments have been made in other highly complex areas of law.

63. *See* Goldschmid, *supra* note 48, at 924. Here he points out that as a practical matter, fair and impartial treatment may be more easily obtained under an administrative proceeding in which a civil money penalty is imposed. He notes that where a de novo trial is available in court, an agency may tend to forego usual procedural protections and put less emphasis on acting fairly and reasonably. He points out that, paradoxically, where an ill-treated or innocent defendant who cannot afford to fight the agency action in court, or will not because the proposed penalty is less than the cost of litigation, a settlement is likely. Such a defendant will therefore forfeit the right to even limited judicial review.

64. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

65. *See* International Harvester v. Ruckelshaus, 478 F.2d 615, 650-53 (D.C. Cir. 1973).

law, the exercise of substantive review dangerously taxes the courts' competence, converting them into superagencies charged with second guessing the technological and scientific judgments of rulemakers.

Since legislators are still searching for an effective enforcement tool to aid in the implementation of environmental policy, civil money penalties that are imposed by the state environmental agency appear to be flexible and ideally suited to environmental offenses. Moreover, the civil money penalty appears to be especially effective in encouraging compliance when the damage is measured by the profit reaped from the undesirable conduct.[66] Further, the civil money penalty operates on the premise that where the penalty is greater than the polluter's cost of abatement, the polluter will choose to comply with the law and abate his pollution rather than pay the penalty. Thus, the civil money penalty is designed to reduce environmental pollution, and partially internalize the costs of pollution, rather than impose the entire burden of these costs on society as a whole.

In order to assure its effectiveness, the civil money penalty should be administered to achieve maximum flexibility while providing the polluter with fair and reasonable treatment. The degree of flexibility will be greatly affected by the procedure used in imposition and collection. That is, the state environmental agency should determine the extent of the polluter's violation and the amount of the penalty. Under this administrative approach, a penalty could be assessed soon after the violation occurred, rather than after following the slow and inflexible procedure of judicial imposition.

In short, incentives are needed which are designed to obtain compliance in broader terms than the traditional negative sanction of criminally imposed fines and jail sentences.[67] Thus, legislation approving administratively imposed civil money penalties by a state environmental agency should be enacted in an attempt to effectively deter excessive pollution in instances where the industry is not acting willfully and the industry cannot for policy reasons be enjoined from operating.

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66. *See, e.g.*, FLA. STAT. ANN. § 403.141 (West 1973 Supp. 1976).
67. *See* MODEL PENAL CODE § 6.03, Comment (Tent. Draft No.2, 1953).