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ENVIRONMENTAL ENFORCEMENT
IN DIRE STRAITS:
THERE IS NO PROTECTION FOR NOTHING
AND NO DATA FOR FREE

Victor B. Flatt* & Paul M. Collins, Jr.†

Those charged with drafting and enforcing our environmental laws have had to work with little or no information about whether or not these programs are actually working properly. There are a host of reasons for this, many of them having to do with availability of data that can be examined empirically. Using newly available data on state actions in environmental enforcement, and a new data set of state environmental expenditures which they created, the authors of this Article are able to examine for the first time the relationship between state environmental expenditures and the effectiveness of state environmental enforcement for all permitted sources. They conclude that state expenditures on environmental programs are strongly associated with effective environmental compliance, which has important implications for environmental law and policy. The authors also examine the debate over the effectiveness of cooperative- versus deterrence-based enforcement, relate that to findings on state expenditures, and make suggestions for improving the availability of data and environmental enforcement generally.

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† Assistant Professor, Department of Political Science, University of North Texas. The authors would like to thank the Center for Progressive Reform, and in particular Professors Rob Glicksman, Joel Mintz, Rena Steinzor, and Cliff Rechtschaffen for their help in constructing the study and for comments on earlier drafts of the Article. Thanks also to the O'Quinn Foundation for funding to assist in the project, and to the dedicated and helpful U.S. Environmental Protection Agency personnel who assisted in securing data and addressing issues as they arose in the study. The Article builds on prior work on environmental enforcement conducted by many people, but the authors especially wish to recognize the prior contributions of Joel Mintz, Rena Steinzor, Rob Kuehn, Rob Glicksman, Cliff Rechtschaffen, David Markell, and William Andreen. The article is dependent on the work of multiple Research Assistants, including Philip Shotts, Ben Bhém, Jere Overdyke, and Wendi Lucas. Many thanks as well to John Meiser and the staff at the *Notre Dame Law Review* for their excellent editing and data assistance.

INTRODUCTION

While much of the world debates what our environmental laws should be,¹ the less esoteric question of whether the environmental laws we do have are being properly enforced continues to be insufficiently examined. Yet this question is absolutely critical to any discussion of environmental protection or policy. Whether or not one agrees with the goals of our current environmental statutes, determining whether and how environmental laws are enforced is critical to the successful operation of any environmental law, present or future.

The question of how well environmental enforcement works is really the question of whether our environmental laws get the jobs of cleaning the environment and protecting public health done. In a world of limited financial resources, the answer to this question must include whether the job is done in the most effective and efficient way possible. As we approach the fortieth anniversary of modern environmental laws, the answer to this “\$64 billion question” still is not clear.

We are told that the environmental laws provide extraordinarily high benefits *if enforced properly*. In its *Draft Report to Congress on the Costs and Benefits of Federal Regulation*, the Office of Management and Budget noted that the EPA estimated the total benefits of ten years of Clean Air Act² (CAA) enforcement would be \$1.45 *trillion*, and the benefits for enforcement of the more stringent regulation of criteria pollutants since 1990 would exceed costs of \$54 billion.³ Various assumptions exist, however, relating to these estimates.⁴ More importantly, we don’t know if these laws *are* being properly enforced. Even though we can identify the many areas where pollution has been reduced and environmental improvements have occurred, we are una-

1 See, e.g., Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 803, 805–11 (2008) (discussing requested changes to a host of federal environmental laws to accommodate national security); Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 STAN. ENVTL. L.J. 43, 204–06 (2008) (advocating several amendments to federal environmental laws); Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 2–4 (2007) (describing a “remarkable, bipartisan burst” of environmental regulation over the past three decades).

2 42 U.S.C. §§ 7401–7671 (2006 & Supp. II 2008).

3 Draft Report to Congress on the Costs and Benefits of Federal Regulations, 65 Fed. Reg. 7197, 7203 (Feb. 11, 2000).

4 Professor Hsu presents a very good description of how environmental harms and benefits, as well as the societal costs of regulation, may be routinely under- (or sometimes over-) valued. See Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 440–51 (2008).

ble to clearly determine whether we are valuing and protecting the environment in the most cost-effective and efficient way possible.

Numerous commentators have noted that the difference between environmental laws that actually protect the environment and those that do not is highly dependent on whether, and in what way, these laws are enforced.⁵ Testing whether we are correctly and/or adequately enforcing our environmental laws, however, has proven remarkably difficult as measures of environmental quality have changed over time and differ between locations.⁶ This makes the actual connection between enforcement action and environmental improvements very difficult to ascertain. The possibility of having any more than broad-based measures of actual environmental quality improvements or changes seems so difficult, especially when related to enforcement mechanisms, that their pursuit may be impossible.

Throughout much of the history of environmental law, the assumption has been that vigorous enforcement deters noncompliance with laws, and thus, brings about the desired outcomes.⁷ This assumption is reflected in the very structure of the cooperative federalism model for the administration of environmental laws (i.e., if the state is enforcing, it is doing a good job),⁸ as well as the theories underlying citizen-suit provisions, which are only necessary when the state or federal government is not fulfilling its enforcement role.⁹ However, merely examining the number of such actions taken against noncomplying parties may not tell us much about the overall effective-

5 See William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 203–11 (1987); Victor B. Flatt, *Spare the Rod and Spoil the Law: Why the Clean Water Act Has Never Grown Up*, 55 ALA. L. REV. 595, 596–99 (2004); Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 STAN. ENVTL. L.J. 317, 319–21 (2007); see also JOEL A. MINTZ ET AL., ENVIRONMENTAL ENFORCEMENT 5–15 (2007) (discussing various theories and objectives of environmental enforcement).

6 See Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 49 (2003); Clifford Rechtschaffen & David L. Markell, *Improving State Environmental Enforcement Performance Through Enhanced Government Accountability and Other Strategies*, 33 ENVTL. L. REP. 10,559, 10,565 (2003).

7 Glicksman & Earnhart, *supra* note 5, at 320.

8 See Richard J. Pierce, Jr., *Issues Raised by Friends of the Earth v. Laidlaw Environmental Services: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207, 234 (2001) (arguing that the environmental federalism standard allows no or very little second guessing of state enforcement decisions).

9 See Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 WIDENER L. REV. 91, 91 (2004).

ness of an environmental program.¹⁰ Because pollution sources may be different and states may utilize different strategies, standards, and penalties for enforcement, it is not obviously apparent that the number of actions taken to bring sources into compliance is a good measure of how effective different enforcement mechanisms may be in reaching statutory goals.¹¹

Additionally, recent "second generation" regulatory proponents have suggested that direct enforcement may not achieve effective compliance (and thus, environmental improvements), and that so-called cooperative mechanisms may work better.¹² As defined by Professors Clifford Rechtschaffen and David Markell, authors of a 2003 book about environmental enforcement, cooperative-based enforcement "eschews penalties in favor of persuasion."¹³ Cooperative-based enforcement suggests that carrots work better than sticks. "Many states have actively championed this strategy," pushing towards market mechanisms for pollution control, and proposing to change environmental enforcement from primarily deterrence-based enforcement to a cooperative regime.¹⁴ Some of the cooperative-based enforcement literature propounds the theory that in addition to better results, cooperative-based enforcement may cost less, and thus, be a more cost-efficient form of effective environmental enforcement.¹⁵

Theories regarding different environmental policies and enforcement strategies are important to making environmental protection efficient and responsive to societal needs. So where is the answer to the question of whether we are enforcing our environmental laws in the most effective and efficient ways possible? What is really needed is an empirical examination of which kinds of environmental enforcement strategies work successfully.

The EPA has catalogued a trove of empirical analyses of measured environmental indicators and also of attitudes towards enforcement in the regulated community. Some of these studies (cited below) also try to link these statistically with environmental outcome

10 See Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 66 (2003) (citing Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1219 (1998)).

11 Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 17–19 (1998).

12 See Rena I. Steinzor, *Myths of the Reinvented State*, 29 CAP. U. L. REV. 223, 231–32 (2001).

13 CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 2 (2003).

14 *Id.*

15 See, e.g., Steinzor, *supra* note 12, at 233.

measurements.¹⁶ Because of the lack of comprehensive data on environmental noncompliance and variables we believe may have an important relationship with enforcement, we attempt to go further and bring something new to this analysis. Good attempts have been made in the past and recently, and upon those attempts, we set out in this Article to gather data and conduct statistical analyses that can take the discussion even further. By using data painstakingly culled from the states and combining them with newly available EPA enforcement data, we put forward some important new conclusions regarding the resource allocation necessary for effective environmental enforcement strategies.¹⁷ Just as importantly, we use the knowledge gained from the process and results of data collection to propose ways that data can be improved to make future analyses of environmental enforcement and progress both easier and more useful. This is not an easy task, especially given the difficulty in data retrieval and usage.

Certain theories on enforcement have political constituencies that may be more concerned with political gain, or with spending money on other priorities, than with cost-efficient and effective environmental regulation.¹⁸ Particularly now, in a time of falling state revenues, many states may not wish to learn that specific resource levels are necessary for effective environmental enforcement. If the different strategies based on such theories are not held up for empirical testing, however, then legislators, administrators, businesses, and environmentalists will keep asserting their differing views about what works in enforcement and what does not. The citizens and the environment will thus be the ones to suffer. Environmental enforcement strategies incur costs—to the government, regulated industries, and society—when those strategies fail.¹⁹ We have a duty to acquire the best data available to assist in making policy decisions for the benefit of the whole, rather than for a select few.

In this Article, we attempt to answer important questions about approaches to general enforcement across all industry groups, at least partially, and to make recommendations based on these answers. Additionally, we highlight the difficulty in acquiring the data necessary to make these comparisons effectively, and propose a systematic

16 See U.S. ENVTL. PROT. AGENCY, COMPLIANCE LITERATURE SEARCH RESULTS (2007), available at <http://www.epa.gov/oecaerth/resources/reports/compliance/research/lit-results-2007.pdf> (citing and summarizing more than two hundred compliance-related articles and books).

17 See discussion *infra* Parts IV & V.

18 See Steinzor, *supra* note 12, at 225, 228–32, 240–41.

19 Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 12–13.

approach for collecting these data that makes enforcement effectiveness, and thus environmental protection, more transparent. In Part I, we will discuss the different enforcement ideas and strategies and what we would like to learn about them. In Part II, we set out the research background, ultimate methodology, and data acquisition chosen to answer these questions. Part III contains our analysis of the results of the statistical analyses, Part IV contains our summary of the core empirical findings and their implications, and Part V sets out the policy prescriptions that can be drawn from this study.

I. ENFORCEMENT STRATEGIES

A. *Theories of Environmental Enforcement*

The issue of the effectiveness of environmental enforcement is an old one that begat the modern environmental laws. Though federalization of environmental laws is supported by the economic theory of controlling all factors in a commons pollution problem,²⁰ as well as providing a floor of environmental health for all U.S. citizens,²¹ much of our modern environmental laws can be traced directly to the historic failures of state governments to address these harms themselves.²² Environmental law was traditionally local in origin.²³ Through the concept of public nuisance and later of zoning, the most obvious environmental harms of the past—from raw sewage to choking smoke—were dealt with by local government.²⁴

As environmental harms increased, the ability of states or localities to control those harms did not seem to keep up with them. Even when the federal government stepped in, both the CAA and the Clean Water Act²⁵ (CWA) (before their modern incarnations) relied primarily upon the states to do the regulation necessary to control environmental harms.²⁶ The states proved spectacularly unsuccessful, however, giving impetus to the federal government to take the lead in

20 See CRAIG N. JOHNSTON ET AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 12–15, 24 (2d ed. 2007).

21 See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1551–52 (2007).

22 Flatt, *supra* note 11, at 7, 13–14 (explaining the failure of states to administer the Clean Water Program).

23 See ROBERT L. GLICKSMAN ET AL., *ENVIRONMENTAL PROTECTION* 586–87 (5th ed. 2007); JOHNSTON ET AL., *supra* note 20, at 3.

24 See GLICKSMAN ET AL., *supra* note 23, at 65, 586–87.

25 Clean Water Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1376 (2006 & Supp. II 2008)).

26 See JOHNSTON ET AL., *supra* note 20, at 6–9.

environmental law.²⁷ A new kind of cooperative federalism was created, which moved beyond the traditional reliance on states to deal with such issues, in favor of a state-federal mix of controls.²⁸ Though the states were still to play a role, theoretically it was the federal government that would ensure a fail-safe system in case of state failure.²⁹ The fail-safe system would occur primarily through federal oversight³⁰ and federal ability to take over failing state programs. Though federal oversight showed some strength at first, with the federal government taking over state programs and ordering particular kinds of compliance, this changed quickly.³¹ For political reasons, some of the federal power was reduced.³² Moreover, the appetite for such involvement with local issues, as well as the resources for such take-overs, quickly became a thing of the past.³³

At this point, the states themselves began to assert their own visions for environmental enforcement, and in the face of economic downturns, many states perceived less aggressive environmental enforcement as a way to maximize scarce state resources.³⁴ Many states thus prohibited themselves or localities from adopting any regulations that were more stringent than the federal government's, which in effect made an environmental floor into a ceiling.³⁵ Many states also began actively pursuing a new cooperative-based enforcement strategy, typified by the passage of audit-shield laws, which protected polluters from environmental prosecutions if they corrected environmental problems, and also allowed them to avoid reporting of environmental violations.³⁶ These two examples were but part of a larger pattern. Whether because of state independence, flexibility, friendli-

27 See Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1373-74 (1995).

28 JOHNSTON ET AL., *supra* note 20, at 9-10.

29 Flatt, *supra* note 11, at 15.

30 Buzbee, *supra* note 21, at 1567, 1587.

31 See Flatt, *supra* note 11, at 16-19; see also *Union Elec. Co. v. EPA*, 427 U.S. 246, 265-69 (1976) (limiting EPA's authority to review state air pollution controls).

32 See, for example, 42 U.S.C. § 7410(a)(5)(A)(i) (2006), originally added in 1977, which prohibits the Federal Administrator from requiring states to control indirect sources of air pollution, i.e. control of land use, for State Implementation Plan program approval.

33 Flatt, *supra* note 11, at 16.

34 Kirsten H. Engel, *State Environmental Standard Setting: Is There a "Race" and is it "To the Bottom"?*, 48 HASTINGS L.J. 271, 340-41, 359 (1997).

35 Organ, *supra* note 27, at 1376-77.

36 RECHTSCHAFFEN & MARKELL, *supra* note 13, at 2, 179-81 (noting that almost one-half of states passed audit privilege shield laws despite EPA objection).

ness to business, or friendliness to state coffers, the late 1980s and 1990s saw a new wave of enforcement, wherein states were to “reinvent” environmental enforcement to be more cooperative.³⁷ Many environmental scholars were suspicious of such an agenda, and noted that assertions of state primacy and “better” environmental enforcement may be a screen for special interests, which would only undermine environmental protection.³⁸ Rechtschaffen and Markell summarize this movement as follows:

Two major tenets, among others, lie at the heart of the movement to reinvent environmental regulation. The first is that environmental enforcement should be shifted from a deterrence-based approach to one based on cooperation or compliance. The second is that the federal government should devolve more environmental responsibility and decisionmaking authority to the states. These two distinct, yet related areas have generated enormous interest and debate. From 1997 to 2000 alone, for example, the U.S. Congress held over a dozen hearings on one of these two topics.³⁹

B. Prior Empirical Analyses of Environmental Enforcement

Despite the major shift in theories regarding enforcement in the last two decades, empirical analyses and testing of these strategies have been limited. Most of the data examining the effectiveness of either deterrence- or compliance-based enforcement are industry specific.⁴⁰ In one case, Rechtschaffen and Markell note the importance of the Harrison study from the 1990s, which compared pulp and paper mill pollution sources in Canada and the United States.⁴¹ The Canadian sources, which were in the more cooperative-enforcement jurisdiction, showed less compliance.⁴² Conversely, there have also been evaluations of smaller programs that have shown positive results from using cooperative-based enforcement methods.⁴³ However, none of these studies controlled for other factors that could have influenced the outcomes, and many of the successful programs were resource

37 *Id.* at 1, 156.

38 *See, e.g.,* Daniel C. Esty, *Next Generation Environmental Law: A Response to Richard Stewart*, 29 CAP. U. L. REV. 183, 189 (2001) (suggesting regulatory reform initiatives are actually concerned with using deregulation in an attempt to advance the interests of groups such as small businesses).

39 RECHTSCHAFFEN & MARKELL, *supra* note 13, at 1–2.

40 *See id.* at 237–51.

41 *Id.* at 242.

42 *Id.*

43 *Id.* at 239–40.

intensive, which does not support the theory that cooperative-based enforcement saves money.⁴⁴

From 2005 through 2008, a research group at the University of Kansas surveyed opinions of major National Pollutant Discharge Elimination System⁴⁵ (NPDES) permit holders to determine which types of enforcement mechanisms were believed to be most effective, and also sought to see what happened to source compliance following various enforcement actions.⁴⁶ Their findings have been an important source of new information, particularly about the effectiveness of state enforcement versus federal enforcement. Through a complex analysis, the group was able to assess how state administrative actions compared with federal administrative actions in affecting the amount that major chemical dischargers were over the NPDES-permitted limits.⁴⁷ The results tended to show that federal administrative actions were more effective than state ones, thus complementing the earlier research on state comparisons.⁴⁸

In a follow up article, Professors Glicksman and Earnhart were able to classify regulated sources into two categories depending on whether permit terms had been modified or not modified, using that differentiation as a marker for cooperative- versus deterrence-based enforcement.⁴⁹ (They supposed that sources with allowed permit modifications were beneficiaries of cooperative-based enforcement.)⁵⁰ Though this classification could provide a method for categorizing the type of enforcement in some circumstances, for reasons noted below,⁵¹ such a comparison may be unavailable for large, general data sets.

A 1996 through 1998 statistical analysis by one of the authors of this Article looked at state enforcement of the CWA in two states and examined enforcement across all industrial groups for that program.⁵² The study found that although enforcement actions may have

44 *Id.* at 240–01 (explaining that Illinois and Nevada studies finding positive changes in compliance did not distinguish between changes resulting from modifications to compliance approaches and those resulting from various other reforms).

45 See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006). Section 402 of the CWA established the NPDES. *Id.* § 1342.

46 Glicksman & Earnhart, *supra* note 5, at 329–32.

47 *Id.* at 347–52.

48 *Id.* at 352.

49 Robert L. Glicksman & Dietrich H. Earnhart, *Effectiveness of Government Interventions at Inducing Better Environmental Performance: Does Effectiveness Depend on Facility or Firm Features?*, 35 B.C. ENVTL. AFF. L. REV. 479, 487–89 (2008).

50 *Id.* at 487.

51 See *infra* Part II.B.1.

52 See Flatt, *supra* note 11, at 21–26.

been occurring at the same rate, the individual nature of each state's enforcement actions meant that actual compliance achievement was not uniform even for similarly situated sources.⁵³ This finding challenged the assumption that "enforcement" automatically leads to compliance and focuses us more on the type or kind of enforcement that is occurring.

C. *What Else Can We Learn About Enforcement?*

Despite the prior empirical analyses, we still have no real idea to what extent resource allocation is necessary for effective enforcement, or whether cooperative- or deterrence-based enforcement is more effective. How do we determine these answers? We know that states are required to meet the same federal standards and implement the same federal statutes.⁵⁴ The states are also increasingly responsible for primary enforcement of the environmental laws, which means that their ability to effectively enforce the standards and the laws determines if our environment is protected.⁵⁵ As a result, examining the effectiveness of various state programs might be a good way to determine optimal enforcement strategy.

Particularly, it would be illuminating to analyze: (1) the effects of budgeting by state environmental agencies on enforcement effectiveness; (2) the effectiveness of cooperative- versus deterrence-based enforcement; (3) the effects of budget redeployment in state environmental agencies; and (4) the effects of state-enacted environmental policies, such as lenient audit procedures.⁵⁶ These input variances could be used to compare numerous states or a single state with itself, if policies change temporally. Other theoretically relevant variables could be accounted for through the inclusion of statistical control variables. This would produce both general data for use by a state or anyone else (e.g., this data might show that the state of Texas has a higher percentage of noncompliant sources now than it did in 1990 for type, size, and source violations), or for use to statistically praise or indict strategies (e.g., a statistical analysis of state enforcement agencies around the country could show that audit privilege laws are associated with less compliance by permitted sources). We would not have to measure every state, only a statistically valid sampling thereof.

53 *Id.* at 26–27.

54 *See* Buzbee, *supra* note 21, at 1550.

55 *See* Flatt, *supra* note 11, at 20.

56 For reasons explained in Part II.B.1, the data are not sufficient to test all of these questions. *See infra* notes 68–77 and accompanying text.

The main impediment to such analysis is acquiring the data. In addition to the acquisition of output-variable (i.e., dependent-variable) data on environmental source compliance noted above,⁵⁷ many of the input variables (i.e., independent variables), such as state funding directed to particular programs or state policies on enforcement, require extensive digging even if they can be found or are available at all. Our goal was to acquire the data necessary to answer our questions empirically, or if unable to secure the data, to make suggestions on how policies should be changed to make the needed data available. Following are the interrelated stories of the construction of possible statistical methods for testing our findings, and the attempt to gather data to provide the raw inputs for such analyses.

II. RESEARCH BACKGROUND, METHODOLOGY, AND DATA COLLECTION

A. Outcome Measurement Issues

The underlying issue in trying to conduct the statistical analysis of the effectiveness of any variable, such as different environmental enforcement strategies, is determining an outcome measurement. In the environmental arena this is particularly problematic because, in general, there is no direct measurement of environmental quality. Even in the cases where such measurements are being developed, identical methods do not exist temporally or locationally; for example, today's analysis of water quality may be conducted differently from that of ten years ago, or measurement methodologies in California may not be identical to those in North Carolina.⁵⁸ Therefore, in the environmental arena, there must be some effective substitute for environmental markers that replicates or comes close to replicating the actual state of the environment. Over time, the numbers of enforcement actions and penalty amounts have been used as outcome variables for federal environmental laws.⁵⁹ However, each of these variables suffers from the problem that it is itself a varying enforcement strategy and thus, a varying input variable. In other words, how does one measure the effectiveness of stepped-up enforcement on environmental health if stepped-up enforcement is the outcome variable?

As a second-best option, one can try to test whether enforcement actually alters the way that pollution sources comply with the law.⁶⁰

57 See discussion *supra* Introduction.

58 See Adler, *supra* note 6, at 49.

59 RECHTSCHAFFEN & MARKELL, *supra* note 13, at 247.

60 See Flatt, *supra* note 11, at 24.

The average length of time violators are out of compliance may be related to the actual harm that the environment is undergoing.⁶¹ Courts have affirmed the assumption that violating congressionally mandated standards can be reasonably assumed to harm the environment.⁶²

In a 1998 article, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, one of the authors of this Article proposed using the average time a regulated source is noncompliant as an outcome variable for environmental quality.⁶³ This measure assumes that the basic laws and standards, if enforced, are markers for environmental health.⁶⁴ Even absent this assumption, it will always at least be a marker of how long permitted sources are in technical violation of laws and standards, and thus it will at least always be an outcome variable for legal compliance with environmental standards. This variable can thus be used to test whether various administrative strategies—such as a budget devoted to environmental protection, or cooperative- versus deterrence-based enforcement—are more likely to lead to fewer violations of environmental standards. This is an appropriate measure because, even when the enforcement strategy changes, the sources themselves must still self report technical compliance with the standards on a monthly basis. Its use is limited though, as it fails to capture those sources that are outside the regulatory net altogether and so it cannot test whether we are regulating the correct things or not.⁶⁵ Nor does it determine whether the permit terms themselves are consistent with the legal requirements of the federal regulations (another concern with administrative discretion).⁶⁶ It simply tells us

61 *Id.*

62 See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 184–85 (2000) (“Here, in contrast, it is undisputed that Laidlaw’s unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons*, then, the only ‘subjective’ issue here is [t]he reasonableness of [the] fear’ that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent . . . we see nothing ‘improbable’ about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable . . .” (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7, 108 n.8 (1983))).

63 Flatt, *supra* note 11, at 24.

64 *Id.*

65 *Id.* at 22.

66 Glicksman and Earnhart attempt to measure this. See Glicksman & Earnhart, *supra* note 49, at 504–09.

the effects of various regulatory strategies on the legal compliance issues.

Nevertheless, we propose the use of noncompliance with permits history, which are self reported, as the primary output variable to test the effects of various enforcement strategies. In addition, we also examine the amount of fines levied against facilities for environmental violations as a second means to gauge compliance. While this second measure is somewhat crude, it is nonetheless useful because monetary fines can potentially act as a deterrent to polluting activities and thus encourage facilities' compliance with environmental laws.⁶⁷ This proxy for enforcement thus assumes that facilities fined for environmental violations are more likely to come into compliance with environmental regulations as a result of this enforcement strategy.

Of course we recognize that, while the size of fines appears to be relevant to whether cooperative- or deterrence-based enforcement is a primary strategy of a jurisdiction (i.e., one might assume that lower fines are associated with cooperative-based enforcement), it is difficult to disentangle this output variable from others. For instance, fines might rise the longer a source is noncompliant (meaning higher fines would be associated with longer periods of noncompliance), or conversely, higher initial fines may be an incentive for a source to become compliant more quickly (meaning higher fines would be associated with shorter periods of noncompliance). Despite these concerns, we hope the relationship between fines levied and money spent on enforcement sheds light on whether states with larger per capita environmental program expenditures are more likely to impose higher punishments through higher fines. However, without information on periods of noncompliance, which we do not have for the CWA data, it may be difficult to disentangle the relationship between fines and noncompliance periods.

67 See, e.g., Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ENVTL. L. REP. 10,245, 10,250 (2000) (suggesting that public awareness of sanctions may damage the value and reputation of sanctioned firms, helping to increase general environmental deterrence); Surabhi Kadambe & Kathleen Segerson, *On the Role of Fines as an Environmental Enforcement Tool*, 41 J. ENVTL. PLAN. & MGMT. 217 (1998) (developing a model for analyzing the effect of fine amounts on regulatory compliance); Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262, 278–83 (2005) (questioning the “explicit” deterrent effect of fines but suggesting that they “implicitly” reinforce the general deterrence of other informal sanctions). But see Montserrat Viladrich Grau & Theodore Groves, *The Oil Spill Process: The Effect of Coast Guard Monitoring on Oil Spills*, 10 ENVTL. & RESOURCE ECON. 315, 322–24 (1997) (noting that relatively low fines had no significant effect on the frequency or size of oil spills).

B. Data

In order to conduct empirical research on environmental enforcement, one must overcome data problems on the sources of pollutants as well as the individual state factors that might influence environmental compliance. Below, we discuss for comparison these issues regarding federal pollution-source data from the EPA concerning pollution sources and individual state data concerning environmental funding and enforcement policies.

1. Federal Data from the EPA Concerning Pollution Sources

Historically, it has not been easy to gather information about the compliance of particular sources with various environmental laws, let alone to find ways of comparing them.⁶⁸ The EPA would, in theory, have monitored state actions regarding permitted sources, but it had no way to directly compare the intensity of the resolutions.⁶⁹ In response to continuing difficulties in tracking enforcement, the EPA introduced its Integrated Data for Enforcement Analysis (IDEA) in the early 1990s.⁷⁰ IDEA, in theory, meant that all sources permitted under any statute could be examined and compared with each other and across media.⁷¹ Nevertheless, the introduction of IDEA has still not generally enabled outside examinations of enforcement effectiveness for several reasons.

First, IDEA is generally complex and difficult to access, even to those dedicated to getting the data.⁷² Second, the entire database is not available to the public. Compliance data are presented to the public through the system known as Enforcement and Compliance System Online (ECHO).⁷³ ECHO purports to allow a user to acquire data on compliance history, violations, and enforcement actions.⁷⁴ The current online version also allows one to search for permitted sources using several factors such as location, compliance, and his-

68 Flatt, *supra* note 11, at 18–19.

69 *Id.*

70 See U.S. Envtl. Prot. Agency, Integrated Data for Enforcement Analysis, <http://www.epa.gov/compliance/data/systems/multimedia/idea> (last visited Oct. 26, 2009); Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 57–58 (1993).

71 See *id.*

72 Vandenberg, *supra* note 10, at 87.

73 See U.S. Envtl. Prot. Agency, Enforcement & Compliance History Online, <http://www.epa-echo.gov/echo> (last visited Oct. 26, 2009).

74 See *id.*

tory;⁷⁵ however, this is not in a format that allows for the downloading of data to conduct comparisons across state variables.⁷⁶ Third, at the time we proposed this study, the public ECHO search would only allow the return of 1000 data hits.⁷⁷

Further compounding those limitations, data available on ECHO do not contain a description of the permitted source that would allow a researcher to control for source differences in making comparisons of compliance of sources between states.⁷⁸ For example, although a single numeric indicator such as quarters of noncompliance could be compared across states, such a comparison would be a sloppy use of data and a meaningless comparison without accounting for source differences.⁷⁹ Additionally, through a blocking program, the EPA prevents data from being downloaded from the ECHO site by a computer system, thus requiring manual entry of data.⁸⁰

A second, more complete Online Targeting Information System⁸¹ (OTIS) allows some online queries of the full IDEA database, but is only available to the EPA, the federal government, and state governments.⁸² By only allowing the data to be accessed through queries, data from OTIS cannot be directly downloaded into a program file. Therefore, one cannot introduce different variables, such as state enforcement spending, in order to do statistical comparisons between state enforcement actions.⁸³ To conduct a statistical comparison using IDEA data with other data, the IDEA data would have to be reentered into a spreadsheet to allow a computer program to conduct the many mathematical calculations necessary to do a statistical comparison.⁸⁴

75 See U.S. Envtl. Prot. Agency, ECHO Compliance Data Search (Air Program), http://www.epa-echo.gov/echo/compliance_report_air.html (last visited Oct. 26, 2009).

76 See *id.*

77 See *id.*

78 See Memorandum from Victor B. Flatt to Member Scholars of the Ctr. for Progressive Reform on Sufficiency of IDEA Data for Proposed Analysis (May 1, 2005) [hereinafter Flatt Memorandum] (on file with the authors).

79 *Id.*

80 *Id.* This is ostensibly because of the large computer time costs the EPA would incur through such a download. Because our study has hundreds of thousands of pieces of data, this would make analysis virtually impossible.

81 See U.S. Envtl. Prot. Agency, Online Tracking Information System, <http://www.epa.gov/compliance/data/systems/multimedia/aboutotis.html> (last visited Oct. 26, 2009).

82 See *id.*

83 See *id.*

84 Because of this difficulty, in 1998, one of the authors only conducted a comparison of two states for one environmental program, the CWA. The summarized

Faced with this data problem, in April 2005, we contacted EPA personnel who worked in the Office of Enforcement and Compliance Assurance.⁸⁵ A representative of this office confirmed that the IDEA database contained all of the compliance data (including the data that would allow a control of extraneous factors in a state comparison) for three major federal environmental laws: the CAA, the CWA, and the Resource Conservation and Recovery Act⁸⁶ (RCRA).

We also learned that it was possible for the public to directly access the IDEA data. One would simply need to obtain an EPA mainframe user identification and account (to compensate for the costs of searching) and obtain remote access via a web browser.⁸⁷ The EPA representative informed us that the amount of data that we would be using and manipulating might not be downloadable over the Internet, and might require working at one of the mainframe computers either at the EPA's headquarters in Washington, D.C., or at their research contractor's facility in Cambridge, Massachusetts.⁸⁸

Another EPA employee in the same office, who wished to remain anonymous, sent us the description for all variables in the IDEA database, specifically, which fields can be searched or downloaded.⁸⁹ We learned that the downloaded data could then be transferred into Microsoft Excel and thus into common statistical analysis programs. The full description of these data fields has been made available online.⁹⁰

The description of the data fields in IDEA seemed to indicate that if we could obtain these data, we could meet our research needs.

data was received from the states themselves, and even only two years worth of data required the manual entry of over 10,000 data points. See Flatt, *supra* note 11, at 35 app. A.

85 See Flatt Memorandum, *supra* note 78.

86 42 U.S.C. §§ 6901–6992k (2006).

87 See U.S. Envtl. Prot. Agency, Integrated Data for Enforcement Analysis, <http://www.epa.gov/compliance/data/systems/multimedia/idea> (last visited Oct. 26, 2009).

88 See Flatt Memorandum, *supra* note 78.

89 *Id.*

90 These data fields were received from EPA in 2004, and are on file with the authors and available online as research appendices. See Victor B. Flatt, Research Appendices, <http://www.law.unc.edu/faculty/directory/flattvictorb/research.aspx> (last visited Oct. 28, 2009) [hereinafter Flatt, Research Appendices]. For EPA data pertaining to the CAA [hereinafter Clean Air Data], follow the link for “Clean Air,” and for EPA data pertaining to the CWA [hereinafter Clean Water Data], follow the link for “Clean Water.” These data fields and all other research appendices are also available online through the *Notre Dame Law Review*. See *Notre Dame Law Review*, Archive: Vol. 85, No. 1, <http://www.ndlawreview.org/archive/issue.php?vol=85&num=1> (follow link for “Research Appendices”) (last visited Nov. 3, 2009) [hereinafter *Notre Dame Law Review*, Research Appendices].

With respect to the air data, the number of quarters that a source is noncompliant—one of our proposed dependent variables—is listed for the two years preceding the date of a facility's inspection.⁹¹

There were also data fields that would help us to control for differences between sources, including: (1) which air programs are permitted, such as the New Source Review or Prevention of Significant Deterioration; (2) what kind of a source is under consideration based on the Standard Industrial Classification Code List (allowing us to categorize like sources with like sources); (3) the size of source pollution (e.g., greater than a hundred tons per year of major pollutant); (4) the pollutant subject to most serious compliance violation; and (5) the source's federal regulation status.⁹² With respect to the use of number of quarters a source is in noncompliant status, there are variables that describe the kind of noncompliance more specifically (e.g., whether it is a procedural or a permitting violation). This indicated that we could separate reporting violations from permit violations. There are also fields that assist in testing the dependent variables that we have at issue. There are fields that show the amount of penalty, the action taken (closed, fined, etc.), and the date of a completed compliance action.⁹³

By examining the field descriptions, we were able to determine at least one possible way that we could conduct the research on comparative enforcement, assuming we could get the data. It seemed that the relationship between compliance amount and compliance date, and the number of quarters in violation in the two years preceding a facility's inspection date could be compared with state enforcement policies (funding, etc.) while controlling for differences in the sources. Though the time divisions were gross (number of quarters in violation for the two years preceding the inspection date), they provided some discrimination on noncompliance information regarding a state's dominant enforcement attitude. It also seemed that the water and RCRA data have similar markers, which would allow for similar analysis. Both the water and RCRA data also allowed for distinctions between types of permitted facilities, and both had fields that corresponded to violation determination, history, and status.⁹⁴

91 See Clean Air Data, *supra* note 90.

92 See *id.*

93 See *id.*

94 See Clean Water Data, *supra* note 90. The units of analyses in these databases are the facility-inspection date and the type-classification. This means that each facility appears in the data on the basis of the date of the compliance inspection and the type of compliance inspection.

Despite all of the restrictions on the data usage online, an EPA employee was willing to transfer the raw data for all three programs to us for these research purposes free of charge, allowing us to directly load it into a spreadsheet. From there, we could input information corresponding to measures of state-level environmental spending and the political orientation of a state's political elite.

Although we obtained data covering compliance with the Aromatic Information Retrieval System (AIRS) Facility Subsystem (involving compliance with the CAA), the NPDES (involving compliance with the CWA), and the RCRA (involving compliance with hazardous waste management provisions of RCRA), we were unable to extract information regarding the penalties assessed against a facility for violations of RCRA or the number of quarters a facility was in violation of RCRA requirements. Further, we were unable to extract information related to the number of quarters a facility was in violation of the CWA.⁹⁵ As a result, our empirical analyses focus only on the following dependent variables: (1) the penalties assessed against facilities for violations of CWA regulatory requirements; (2) the penalties assessed against facilities for violations of CAA regulatory requirements; and (3) the number of quarters (in the two years preceding the inspection date) that facilities were in violation of compliance with CAA regulatory requirements. In other words, due to a lack of data availability, we exclude compliance with RCRA requirements from our empirical analyses.

2. Data From States for Comparison Purposes

Since we wished to examine the relationship between state funding, attitudes about cooperative- versus deterrence-based enforcement, and a source's noncompliance status, we needed a way to operationalize these concepts. With respect to state "attitudes," we originally hoped to be able to examine specific legislative, regulatory, or executive branch requirements that might direct a state environmental agency to choose one of these methods. Since there were no

95 Rather bewilderingly, the NPDES data codebook indicates that it contains a variable composed of the number of quarters a facility is in violation of CWA requirements over the two years preceding a facility's inspection date (labeled Historic Non-compliance Quarter). According to the NPDES codebook, this variable takes on values ranging from one to eight. However, in the actual data, this variable does not take on these values, but rather contains year-quarter entries (e.g., 20011, 20012, 20013, 20014) that do not correspond to the number of quarters a facility is in violation of CWA requirements in the manner described in the codebook and do not range from one to eight (even after removing the year from the variable entries). See Clean Water Data, *supra* note 90.

uniform words in either legislation or regulation to indicate such a direction, we believed that the most direct way to get this information was from the enforcement staffs of the state environmental agencies themselves. Similarly, because states had different methods of organizing their state environmental organizations, we would probably have to depend on the state agencies to tell us how much of each state's budget had gone to enforcement programs.

Because we realized that obtaining this much information on an individual basis might be difficult and time consuming, we decided to use a selection of states in this comparison rather than examine the data from all states. The most populous states generally have the most sources,⁹⁶ so the inclusion of these states allows us to both examine the environment in which more people live, as well as increase the number of data points without additional work or complexity. Thus, our sample contains most of the largest states in the country. Because we are examining attitudes about environmental enforcement, and because these attitudes have at least loosely been correlated with political orientation and possibly with regional differences,⁹⁷ we felt that the sample needed to include states from different regions that were governed by different political elites with varying ideologies. In particular, in selecting the large states, it was important to select states with different political orientations. Finally, some states have relatively unique and important environmental values, and this was also used in making the selection.

The states selected were Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, and Texas. Though we originally hoped to obtain data for ten years, because we only had four years of source data from the EPA (2000–2003), we focused on the overlapping time in the states searched. Research assistants working on the project performed an extensive search of online databases to determine if any of this information had been compiled in one place.⁹⁸ Without success, our attention turned to individual state sources. The research assistants then

96 See sources cited *infra* note 101.

97 See, e.g., Riley E. Dunlap et al., *Politics and Environment in America: Partisan and Ideological Cleavages in Public Support for Environmentalism*, 10 ENVTL. POL. 23, 28–33 (2001); David M. Konisky, *Regulator Attitudes and the Environmental Race to the Bottom Argument*, 18 J. PUB. ADMIN. RES. & THEORY 321, 323 (2007); Eugene S. Uyeki & Lani J. Holland, *Diffusion of Pro-Environment Attitudes?*, 43 AM. BEHAV. SCIENTIST 646, 658–60 (2000).

98 E-mail from Phillip Shotts, Research Assistant, University of Houston Law Center, to Author (Feb. 16, 2006, 2:11 CST) (on file with the author).

obtained contact information for each state's environmental agency.⁹⁹ With this information, and an initial round of phone calls and e-mails, they were able to obtain budget information on environmental spending practices for eight of the eighteen states.¹⁰⁰

The states' budget numbers did not contain similarly defined categories. For example, the states might report budgets based on authorizations or expenditures, and the budgets might be subdivided by medium (air, water) or by expense category (personnel, fines, etc.).¹⁰¹ It seemed that the best option we had for comparing budget numbers was to start with the largest common categories that were informative. We decided that this would be total environmental expenditures, assuming that most states categorized "environmental" similarly.

The location of this information varied from state to state. Our research assistants began using the "yellow book of state government" to locate contact persons in specific agencies for information.¹⁰² We received at least skeletal budget information from most of the states quickly. This information was obtained either directly from the state agency or through sources to which research assistants were directed by the state agency.¹⁰³ Some information was found through online research.

99 See Jere Overdyke & Emily Buckles, *Enviro Budget Contacts* (May 17, 2006) (unpublished spreadsheet) (on file with author).

100 See Jere Overdyke, *Flatt Research JCO Additions* (May 17, 2006) (unpublished spreadsheet) (on file with author).

101 For full breakdowns of the states' budgets from each year, see Flatt, *Research Appendices*, *supra* note 90 (follow links under "State Budget Data") (last visited Oct. 2, 2009) [hereinafter *State Budget Data*]; Notre Dame Law Review, *Research Appendices*, *supra* note 90.

102 E-mail from Ben Rhem, Research Assistant, University of Houston Law Center, to Author (Sept. 22, 2009, 18:01 CST) (on file with the author) [hereinafter *Rhem E-mail*].

103 We obtained budget information from the following sources: Arizona Department of Environmental Quality; California Environmental Protection Agency; California State Library; Connecticut Office of Policy and Management, Budget and Financial Management Division; Florida Department of Environmental Quality; Georgia Department of Natural Resources; Indiana Department of Environmental Management, Office of External Affairs; Kansas Department of Health and Environment; Maryland Department of Environment; North Carolina Department of Natural Resources and Environment, Budget and Planning; Ohio Environmental Protection Agency, Office of Fiscal Administration; Oregon Department of Environmental Quality; Texas Commission on Environmental Quality. See *State Budget Data*, *supra* note 101.

a. State per Capita Environmental Spending

A cursory examination of the state budget data seemed to indicate wide swings in per capita environmental spending,¹⁰⁴ so we revisited each state's budget data to see how the budget was broken down. In several cases, we discovered that the budget numbers were not comparable after all. The most common differences occurred in whether broad health, agriculture, or recreation programs (such as hunting or fishing) were included in the state's "environmental" or "natural resource" category. We made adjustments to the figures of some of the states as appropriate.¹⁰⁵

Ultimately, though we contacted sources in Georgia multiple times, we received no return calls or information; therefore, Georgia was dropped from consideration. With this data in hand, our measure of *State per Capita Environmental Spending* represents each of the seventeen states' per capita environmental spending, calculated by year. This variable allows us to examine the relationship between state environmental spending and compliance with CAA and CWA regulatory requirements.

b. State Ideology

As noted above, we were also interested in whether the choice between cooperative- versus deterrence-based enforcement strategies has a significant effect on source compliance. After conducting research on such state policies, we could find no uniform legislative or regulatory marker indicating whether one of these enforcement "attitudes" was dominant in a particular state. As an alternative, we followed Glicksman and Earnhart, who proposed using permit modification as a marker for cooperative- versus deterrence-based enforcement on the logical assumption that a permit modification demonstrated a cooperative action.¹⁰⁶ However, we realized that because Glicksman and Earnhart examined only a subset of CWA data¹⁰⁷ corresponding to the chemical industry, their permit-modified variable exhibited much more variability than a congruent measure in our data, since our data set is more expansive. More specifically, in our CWA data, only 700 observations indicate that a permit was modified, out of 101,498 total observations—less than 0.70%. Accordingly, due to the limited variability in the permits modified for facilities in

104 See State Budget Data, *supra* note 101.

105 For data corrections, see Flatt, Research Appendices, *supra* note 90; Notre Dame Law Review, Research Appendices, *supra* note 90.

106 Glicksman & Earnhart, *supra* note 49, at 487.

107 *Id.* at 483.

our data, we were unable to rigorously control for cooperative-based enforcement using a permit-modified variable.¹⁰⁸ Further, we were unable to locate a similar permit-modified variable in our CAA data.

Because cooperative-based enforcement has been associated with a conservative political viewpoint,¹⁰⁹ we examined whether the political orientations of state political actors are related to compliance with environmental regulations. This provided us with the opportunity to determine whether facilities located in states governed by conservative political actors are more or less likely to comply with environmental regulations as compared to facilities operating in states governed by liberal political actors. Because our data contain a sample of states that vary widely in terms of both their geography and political orientation, we were cognizant of the fact that a Republican in New Jersey is not the same as a Republican in Texas. Accordingly, relying solely on the political party affiliations of the state political elite (i.e., governor and legislature) was undesirable, because such a modeling strategy would make the assumption that all Democrats and all Republicans are created equal, regardless of the geographical location and political history of the state.

Thus, we needed a proxy for *State Elite Ideology* that was capable of capturing the nuances between the political ideologies of the American states. Fortunately, William Berry and his coauthors ("Berry et al.") provide such a measure.¹¹⁰ This measure, calculated yearly for each state, is based on three points of information: interest group ratings of a state's members of Congress, the power division among Republicans and Democrats in a state's legislative chambers, and the ideology of a state's governor.¹¹¹ These scores have been shown to have substantial face validity and are able to capture the differences between the underlying ideologies of the major political parties that vary between states.¹¹² For example, in 2003, Republicans controlled both the legislative and executive branches in Texas, as they did in

108 When we include such a variable in our CWA models, the permit modification variable fails to attain statistical significance anywhere near conventional levels.

109 See, e.g., John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115, 123 (1991) (testing "the corollary that Democrats will be less associated with cooperative enforcement than Republicans").

110 William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327, 330-31 (1998). These ideology scores have subsequently been updated through 2006. See Richard C. Fording, *State Citizen & Government Ideology*, <http://www.uky.edu/~rford/stateideology.html> (last visited Sept. 20, 2009) (containing updated ideology scores through 2007).

111 Berry et al., *supra* note 110, at 330-31.

112 *Id.* at 341-43.

2001 in New Jersey. Reflecting the fundamental differences between the Republican parties in Texas and New Jersey, Berry et al. score Texas in 2003 as very conservative (8.93), while they score New Jersey in 2001 as much more moderate (50.23), even though both states were controlled by the Republican Party. Given the power offered by the Berry et al. scores, we utilized them to operationalize our measure of *State Elite Ideology*. This variable ranges from 0 to 97.5, with higher scores reflecting more liberal state elite ideologies.¹¹³

In addition to our key independent variables (*State per Capita Environmental Spending* and *State Elite Ideology*), we also controlled for attributes of the facilities through the inclusion of dummy variables. In the models capturing a facility's compliance with CAA regulatory requirements, we include 12 dummy variables controlling for the Air Program Code of the facility, 15 dummy variables accounting for the National Action Type Code of the facility, and 113 dummy variables controlling for the Standard Industrial Code clusters of the facility. In the model capturing a facility's compliance with CWA regulatory requirements, we include 94 dummy variables controlling for the Enforcement Action Code of the facility, 31 dummy variables accounting for the Inspection Type Code of the facility, and 97 dummy variables controlling for the Standard Industrial Code clusters of the facility.¹¹⁴ The purpose of including these controls is to allow us to "hold all else constant" in interpreting the influence of our central explanatory variables of interest. Accordingly, although we include these dummy variables in the statistical models, we do not report the coefficients associated with these variables.

113 As an alternative to the Berry et al. scores, we operationalized a measure of elite ideology based on the political party affiliation of a state's legislative and executive branches scored such that: 6 = unified Democrat (governor and legislature), 5 = Democratic governor, divided legislature, 4 = Democratic governor, Republican legislature, 3 = Republican governor, Democratic legislature, 2 = Republican governor, divided legislature, 1 = unified Republican (governor and legislature). This information was collected from each state's legislative website, the website of the National Governor's Association, and individual contacts with the following agencies: Colorado Legislative Council Staff; Connecticut State Library; Kansas State Library; New Jersey State Library; Maryland Department of Legislative Services; State Library of Ohio; and New Mexico State Library. This alternative measure is correlated with the variable employed here at the 0.8 level. Substituting it for the measure utilized in this Article does not alter the substance of the results.

114 The number of dummy variables accounting for the Standard Industrial Code clusters of facilities differs in the CAA and CWA models due to the fact that a smaller number of Standard Industrial Code clusters are applicable to facilities appearing in the CWA data.

III. EMPIRICAL RESULTS

Table 1 reports the results of the model that captures the penalty assessed against a facility in violation of compliance with CWA regulatory requirements. As our dependent variable,¹¹⁵ the monetary penalty levied against a facility is a continuous variable, and we utilize ordinary least squares regression (OLS) to model the influence of *State per Capita Environmental Spending* and *State Elite Ideology* on the penalty assessed against a facility.¹¹⁶ This table reveals that the more a state spends per capita on its environmental budget, the higher the fines levied against polluters for violations associated with the CWA. In substantive terms, for each \$1 per capita increase in state environmental spending, the fine levied against a facility increases by about \$18, holding all else constant. A one standard deviation increase from the mean of state environmental spending (raising per capita spending from \$27.60 to \$39) increases the penalty levied against a polluter by \$204.50, *ceteris paribus*. The results of our proxy for *State Elite Ideology* indicates that, as a state's political elite become more liberal, the fines levied against polluters for violations of CWA regulatory requirements decrease. All else equal, a one-unit increase in the liberalism of the state's political elite corresponds to a \$14 decrease in the monetary penalty levied against a polluter. A one standard deviation increase from the mean of *State Elite Ideology* (increasing *State Elite Ideology* from 43.9 to 70.4) decreases the penalty assessed against a facility by \$379.48, *ceteris paribus*.

115 The mean of the dependent variable in Table 1 is 903.8 (standard deviation = 15,159.87; range = 0 to 792,000). The data used in Table 1 include facilities that were assessed monetary penalties for violations of CWA regulatory requirements, as well as those facilities that were not assessed monetary penalties. The data contain 25,282 unique observations of facilities, meaning that, on average, facilities appear in the data 3.93 times. To account for this nonindependence of observations, we estimate the regression model employing robust standard errors, clustered on facility. See generally, M. Arellano, *Computing Robust Standard Errors for Within-Groups Estimators*, 49 OXFORD BULL. ECON. & STAT. 431 (1987) (explaining a formula for calculating robust standard errors).

116 See generally CHRISTOPHER H. ACHEN, INTERPRETING AND USING REGRESSION 18–34 (John L. Sullivan & Richard G. Niemi eds., 1982) (providing an overview of OLS regressions); DAMODAR N. GUJARATI & DAWN C. PORTER, BASIC ECONOMETRICS 55–80 (5th ed. 2009) (explaining the methodology behind and relative simplicity of the OLS regression model).

TABLE 1. OLS REGRESSION ESTIMATES OF THE PENALTY ASSESSED AGAINST A FACILITY IN VIOLATION OF THE CWA, 2000–2003

Variable	Coefficient
State per Capita Environmental Spending	17.94* (8.43)
State Elite Ideology	-14.32* (3.74)
Constant	-443.06 (649.1)
R^2	0.075
N	101,498

* $p < .05$ (two-tailed tests)

Entries are ordinary least squares regression coefficients. Numbers in parentheses indicate robust standard errors, clustered on facility.

Model includes 94 dummy variables controlling for the Enforcement Action Code of the facility, 31 dummy variables controlling for the Inspection Type Code of the facility, and 97 dummy variables controlling for the Standard Industrial Code clusters of the facility (results not shown).

Sample includes the following states: Alaska, Arizona, California, Colorado, Connecticut, Florida, Indiana, Kansas, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, and Texas.

Table 2 presents the results of the model that captures influences on the penalty assessed against a facility for violations of compliance with CAA regulatory requirements. As with Table 1, because our dependent variable¹¹⁷ is continuous, we utilize OLS regression. The results of the CAA model indicate, unlike the results of the CWA model, that neither *State per Capita Environmental Spending* nor *State Elite Ideology* influences the monetary penalty assessed against a facility. This is evidenced by the fact that the coefficients associated with these variables fail to obtain statistical significance at conventional levels.

117 The mean of the dependent variable in Table 2 is 2250.3 (standard deviation = 60,139.4; range = 0 to 8,000,000). The data used in Table 2 include three facilities that were assessed monetary penalties for violations of CAA regulatory requirements, as well as those facilities that were not assessed monetary penalties. The data contain 15,407 unique observations of facilities, meaning that, on average, facilities appear in the data 6.59 times. To control for the nonindependence of observations, we estimate the regression model utilizing robust standard errors, clustered on facility.

TABLE 2. OLS REGRESSION ESTIMATES OF THE PENALTY ASSESSED AGAINST A FACILITY IN VIOLATION OF THE CAA, 2000–2003

Variable	Coefficient
State per Capita Environmental Spending	-2.59 (31.90)
State Elite Ideology	-2.83 (6.86)
Constant	8855.30 (10,435.90)
R^2	0.007
N	99,428

Entries are ordinary least squares regression coefficients. Numbers in parentheses indicate robust standard errors, clustered on facility.

Model includes 12 dummy variables controlling for the Air Program Code of the facility, 15 dummy variables controlling for the National Action Type Code of the facility, and 113 dummy variables controlling for the Standard Industrial Code clusters of the facility (results not shown).

Sample includes the following states: Alaska, Arizona, California, Colorado, Connecticut, Florida, Indiana, Kansas, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, and Texas.

Table 3 reports the results of the model that captures the number of quarters (in the two years preceding the inspection date) that a facility was in violation of the CAA regulatory requirements. As this dependent variable¹¹⁸ is a non-negative count, we utilized a negative binomial regression model.¹¹⁹ Because the parameter estimates of the

118 The mean of the dependent variable in Table 3 is 1.55 (standard deviation = 2.01; range = 0 to 8). The data used in Table 3 include facilities that were in violation of CAA regulatory requirements, as well as those facilities that were not in violation of CAA regulatory requirements. The data contain 25,282 unique observations of facilities, meaning that, on average, facilities appear in the data 3.93 times. To account for this nonindependence of observations, we estimate the negative binomial regression model employing robust standard errors, clustered on facility.

119 The negative binomial regression model (NBRM) is preferable to the OLS regression model given the makeup of our dependent variable. The NBRM is distinct from the most obvious alternative, the Poisson model, in that the NBRM does not make the assumption that the variance is equal to the conditional mean of the dependent variable. Rather, the NBRM estimates a parameter, α , that accounts for the unobserved heterogeneity among observations in the data. In order to test for the appropriateness of the NBRM as compared with the Poisson model, we estimated a log likelihood test for overdispersion in the data, which indicates that the NBRM is the more appropriate modeling strategy. For a general discussion of the NBRM, see, for example, A. COLIN CAMERON & PRAVIN K. TRIVEDI, REGRESSION ANALYSIS OF COUNT DATA 70–77 (1998) (discussing generally the use of the NBRM) and J. SCOTT LONG &

TABLE 3. NEGATIVE BINOMIAL REGRESSION ESTIMATES OF THE NUMBER OF QUARTERS A FACILITY IS IN VIOLATION OF THE CAA, 2000–2003

Variable	Coefficient	$\Delta\%$ ^a
State per Capita Environmental Spending	-.006* (.003)	-0.6*
State Elite Ideology	-.002* (.001)	+0.2*
Constant	.513 (.225)	
α	3.98 (.290)*	
Wald χ^2	34,651.06*	
N	99,428	

* $p < .05$ (two-tailed tests)

α Indicates percentage change in the number of quarters a facility is in violation of compliance with Clean Air Act Regulatory Requirements corresponding to a one-unit change in the independent variable.

Entries are negative binomial regression coefficients. Numbers in parentheses indicate robust standard errors, clustered on facility.

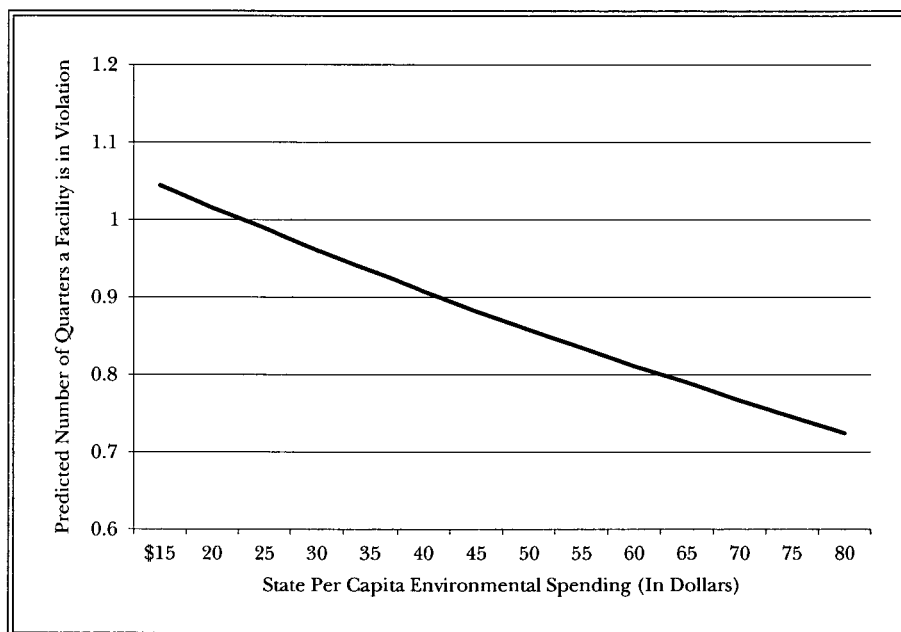
Model includes 12 dummy variables controlling for the Air Program Code of the facility, 15 dummy variables controlling for the National Action Type Code of the facility, and 113 dummy variables controlling for the Standard Industrial Code clusters of the facility (results not shown).

Sample includes the following states: Alaska, Arizona, California, Colorado, Connecticut, Florida, Indiana, Kansas, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, and Texas.

independent variables in the negative binomial regression model cannot be interpreted directly (as in an OLS regression model), Table 3 also reports the percentage change in the number of quarters a facility is in violation of CAA regulatory requirements corresponding to a one-unit change in each independent variable. This Table reveals that as state environmental spending increases, the number of quarters that a facility is in violation of CAA regulatory requirements decreases. In substantive terms, for each \$1 per capita increase in state environmental spending, the number of quarters a facility is in violation of the CAA decreases by 0.6%, *ceteris paribus*. For example, 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, as illustrated in Figure 1. Table 3 also indicates that, as a state's political elite ideology becomes more liberal, the number of quarters a facility is in violation of CAA regulatory requirements increases. More substantively, for each one unit increase in state elite liberalism, the number of quarters a facility is in violation of the CAA increases by 0.2%, all things being equal. A one standard deviation increase from the mean of elite ideology (increasing state elite ideology from 48.1 to 80.2) increases the number of quarters a facility is in violation of the CAA by 6%, *ceteris paribus*.

FIGURE 1. THE ESTIMATED NUMBER OF QUARTERS A FACILITY IS IN VIOLATION OF THE CAA AS A FUNCTION OF STATE PER CAPITA ENVIRONMENTAL SPENDING



IV. SUMMARY OF EMPIRICAL RESULTS

Taken as a whole, the results from our analyses are both expected and surprising. The most important finding is that, with regard to the CAA, the more a state spends per capita on its environmental budget, the shorter time a permitted source is in violation of the Act. Assuming that we have adequately controlled for differences in fines based on the type of facility and type of violation (as we attempted to do), this finding supports the conclusion that funding of environmental programs plays a very important role in how successful an agency is in

avoiding, catching, and/or ending violations. Both the substantive and statistical effects of this relationship are strong. To the extent that support for cooperative-based enforcement has been premised on accomplishing compliance at a cost savings, we show that, at least at this time, "cost savings" in environmental programs are strongly associated with less compliance, and thus, should be removed as a supporting reason for using more cooperative types of enforcement. While this does not reject the idea that cooperative enforcement may assist compliance in some circumstances, or that it can be productively paired with deterrence-based enforcement in certain circumstances (as detailed by Rechtschaffen and Markell),¹²⁰ it does indicate that, at this time at least, whatever effective cooperative enforcement has been used would not have resulted in significant cost savings. There are, of course, substantial limitations to our conclusion. Because of the data sets, we can only measure environmental spending at its broadest level. This only supports our conclusion if overall spending on the environment is, percentage-wise, similar to CAA enforcement spending. We explore this data problem more *infra* Part V.B.

To the extent that the standards set forth in our environmental laws result in environmental protection, we have also shown that increased state environmental spending translates into better compliance, thus potentially improving the quality of the environment. Unfortunately, with regard to the CWA data, we were not able to show the same correlation because the EPA incorrectly entered the data for the important variable that measures how many quarters a source is noncompliant. We also do not know how splitting environmental budgets into different categories in each state might help in more efficient enforcement. Nevertheless, this result is important.

We also found that for administration of the CWA, the more a state spends per capita on its environmental budget, the higher the fines levied against polluters. Though we cannot make any definitive conclusion about how this relates to noncompliance times, if the CAA results were replicated in the CWA context, it might indicate that higher fines (which are associated with deterrence-based enforcement) spur compliance, or that higher per-capita-spending states support higher fines.

Our results also indicate that facilities are assessed larger fines for violations of the CWA and remain out of compliance with the CAA for shorter periods of time in states governed by conservative political elites. To the extent our other results suggest that cooperative-based enforcement, or at least cooperative-based enforcement premised on

120 RECHTSCHAFFEN & MARKELL, *supra* note 13, at 251-52.

cost savings, is not particularly effective, this result might seem surprising, particularly if we believe that conservative political ideologies are more likely to be associated with cooperative-based enforcement.

Because we do not know how ideology actually relates to cooperative- versus deterrence-based enforcement, we can draw no real conclusions. However, these findings do give rise to interesting speculation. The CWA finding could suggest that conservative ideologies allow polluters to reach worse violations, which in turn support higher fines. Conversely, the CAA finding may suggest that conservative state ideologies foster better compliance, perhaps through the use of more cooperative methods. It is possible that *adding* the carrot of cooperative schemes for enforcement in certain circumstances to the stick of deterrence-based enforcement may improve results overall. This is suggested by Rechtschaffen and Markell, who note that “[a] system that is purely or primarily deterrence-based can be improved by integrating features of the cooperative model, such as more emphasis on agency advice and consultation, and incentives for voluntary self-policing.”¹²¹

V. IMPLICATIONS FOR ENFORCEMENT POLICY

A. *Resource Allocation*

Resources do matter. For purposes of enforcement policy, this is the most important finding in our research. The strong relationship between per capita spending on state environmental programs and shorter noncompliance times in the CAA across many states of different sizes, environmental challenges, and political governance, suggests this. That “resources do matter” means that states cannot adequately do their jobs in enforcing environmental laws without necessary resources. While our study does not show any “optimal” level of resource expenditure on environmental programs, it does show that a lack of spending creates noncompliance rates outside what the American public would assume or expect for enforcement of environmental programs. Presumably, this implication is generalizable to federal environmental enforcement as well. Coupled with the results demonstrating that more resources lead to higher fines, the study also suggests that deterrence-based enforcement is important in actually creating effective compliance.

The efficacy of cooperative-based enforcement, either alone or in combination with deterrence-based enforcement, is harder to evaluate. We can see that at least during the time of our study, no coopera-

121 *Id.* at 251.

tive-based enforcement was able to successfully produce effective environmental compliance at a significantly lower cost. We do note that a more conservative political ideology is related to better compliance, and that conservative political ideologies have been more generally supportive of cooperative-based enforcement. The substantive effect of elite ideology is not as strong as the effect of per capita state spending on the environment, but it is provocative. As noted above, it might suggest that some combination of cooperative- and deterrent-based enforcement is the optimal formula. We do know that it does not suggest that "leaner" government, at least in terms of environmental expenditures, will lead to better compliance. One cannot get compliance on the cheap. Whether one uses cooperative- or deterrence-based enforcement, one still must spend money to protect the environment.

B. Importance of Data to Understanding the Effectiveness of Environmental Policies

The other important implication from our four-year study is related to the acquisition and reporting of the data. Though we believe that this study goes further than some previous studies and provides strong evidence as to the importance of sufficient funds to promote environmental compliance, it does not answer more subtle questions directly. These questions can only be answered by an improvement in the availability of relevant data. For instance, to more thoroughly test the efficacy of cooperative-based enforcement, we would need to procure data from each state about how money in environmental enforcement is spent in each arena. The gross per capita numbers that we were able to retrieve from the states do not give the more tailored information of exactly how much a state spends on which program and in what way.

Of course, it is likely that data problems are themselves related to money spent on environmental programs. According to research done on EPA enforcement by Professor Joel Mintz, budget shortfalls are directly linked to poor data keeping and record collection.¹²² According to Professor Mintz, "when faced with tight budgets, enforcement managers tend to cut record keeping first rather than contract the size and principal responsibilities of their staffs of inspectors, engineers, attorneys, etc."¹²³

¹²² See E-mail from Joel Mintz, Professor of Law, Nova Southeastern University, to Author (Dec. 26, 2008, 2:11 EST) (on file with author).

¹²³ *Id.*

Whatever the reason, given that data issues have bedeviled research on environmental enforcement and effectiveness from the beginning, it seems that the time has come for the EPA to tackle this head on. To really understand whether state programs are effective and which programs promote better compliance, the EPA needs to receive enforcement data and information about resources in a uniform manner. This could be accomplished without impinging on federalism. States can create and operate their budgets in any manner they see fit, but they (and EPA regions) should be required to report data on delegated programs in a uniform manner, much as the SEC requires regulated companies to report data.¹²⁴ One option could be to require states to organize their data to show how much money was spent on environmental programs, how much went to enforcement, and of that, how much went to different kinds of enforcement (as specified by the EPA), further breaking this all down among delegated programs. The states already have this information, and changing to uniform reporting should not be too difficult. Recently, the federal government began to require that all states use the federal definition of graduation and drop rates to avoid the "tangle of inaccurate state data."¹²⁵

Additionally, the EPA's own data system also needs improvement. Although the EPA has moved in the direction of providing more data to the public, the current publicly available database, ECHO, is difficult to use. Moreover, longstanding flaws in the data suggest that there is no effective mechanism to ensure correct reporting and entry of data.¹²⁶ Funding directed to this alone would be important. It will continue to be difficult to understand enforcement without these corrections.

CONCLUSION

Although our modern environmental programs have been in existence for decades, we have not learned all we need to know about which ways of enforcing these programs work and which do not. Over time, diverse scholars have gathered critical data points and contributed to the debate about which types of environmental enforcement programs are most effective at the lowest cost.

124 See U.S. Sec. & Exch. Comm'n, Interactive Data for Financial Reporting, <http://www.sec.gov/info/smallbus/secg/interactivedata-secg.htm> (last visited on Sept. 20, 2009).

125 Sam Dillon, *U.S. to Require States to Use a Single School Dropout Formula*, N.Y. TIMES, Apr. 1, 2008, at A16.

126 See, e.g., Clean Water Data, *supra* note 90.

In the study we conducted, we were not able to put to rest the question of which is “better”—cooperative- or deterrence-based enforcement. In fact, sweeping generalizations are currently difficult because most every state conducts its programs in a unique way. However, we were able to empirically demonstrate that higher per capita spending by states on environmental enforcement programs (at least with respect to the CAA) is strongly associated with better program compliance, and thus, presumably better environmental results. This is an important finding and should spur reexamination of theories about how cheaper enforcement (usually supposed to be cooperative-based) can still provide adequate environmental protection. The study also creates interesting questions regarding state ideology and program effectiveness that will have to wait for more comprehensive data in order to more fully untangle these relationships.

Just as importantly, our study again demonstrates the incredible difficulty in answering such questions, primarily because of the lack of data in usable form or the failure to effectively monitor and give attention to the data support systems. Given these ongoing problems in understanding how well environmental programs work, it is difficult to avoid reaching the conclusion that the lack of adequate and uniform data is a partial function of the contentious nature of American politics in which public officials, corporations, and interest groups may profit from this state of affairs. The EPA is currently undergoing fundamental reorganization of enforcement because of previous difficulties. This Article should be a call to the EPA to compel uniform data reporting as part of its comprehensive enforcement upgrade.

