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“Neither the Best of Times Nor the Worst of Times”: EPA Enforcement During the Clinton Administration

by Joel A. Mintz

Editors' Summary: This Article examines the enforcement efforts at EPA during the Administration of President William J. Clinton from 1993 to 2001. It covers EPA's reorganization, budget dispute, institutional intragovernmental enforcement relationships, and enforcement programs. The author based the Article on interviews with current and former EPA/DOJ officials and review of numerous articles and EPA policy documents.

Vigorous and effective enforcement has long been recognized to be a crucial aspect of any credible governmental program to regulate businesses and other entities. Very clearly, business firms differ in their approaches and attitudes toward government regulation. Some tend to comply with applicable requirements fairly readily, with little or no prodding from representatives of the government. Other firms, in contrast, are stubbornly resistant to achieving compliance, unless and until they perceive that they will be subject to unacceptably costly sanctions in the immediate future. Where it is successful, regulatory enforcement promptly motivates regulated entities to achieve or maintain compliance. Sound enforcement removes any economic advantage that noncomplying firms have gained over law-abiding competitors by their violations; and it deters other would-be violators from failing to adhere to regulatory mandates and standards.

This Article examines the strengths and shortcomings of enforcement at one federal regulatory agency, the U.S. Environmental Protection Agency (EPA), during the Administration of President William J. Clinton (the Clinton Administration) from 1993 to 2001. In various respects, both substantive and methodological, the Article is a follow-up to my 1995 monograph, *Enforcement at the EPA: High Stakes and Hard Choices*,¹ in which I surveyed the major trends, events, and developments in EPA enforcement from the Agency's beginnings through the Administration of Presi-

dent George H.W. Bush (the Bush I Administration). In that work, I also focused on some larger questions of congressional oversight,² partisan politics,³ and measurements of program success,⁴ questions that arose from and were closely related to EPA's enforcement efforts.

After a brief summary of the research methods that I have employed herein, this Article begins with a description of EPA enforcement in the opening two years of the Clinton Administration. It discusses the confusion of the Agency's enforcement staff in that initial period, from what they perceived as a mixed message from EPA headquarters as to the relative importance of traditional enforcement work. It also analyzes the failure of the Administration's effort, in an antiregulatory yet Democrat-controlled U.S. Congress, to build a consensus among competing interests in favor of a renewal of the Superfund statute, a modest strengthening of several other environmental laws, and the elevation of EPA to Cabinet-level status; and it assays the merits of a massive reorganization of the Agency's headquarters, and many of its regional offices, that was engineered by the Clinton Administration in 1993 and 1994.

From the reorganization, I shall turn to an analysis of the tense, high-stakes conflict between the Clinton Administration and the Republican-dominated 104th Congress over the size of EPA's budget. I will describe the key events of that bitter, partisan dispute—including the furloughs that kept the Agency closed a total of 33 days in late 1995 and early 1996. I will also assess the ultimate implications of this controversy, both for the short term and with respect to the remainder of the Clinton presidency.

Another focus of this Article is EPA's institutional intragovernmental enforcement relationships as they developed during the Clinton years. In particular, I will describe the relationships between EPA headquarters and regional

The author is a Professor of Law, Nova Southeastern University Law Center and Member Scholar, Center for Progressive Regulation. He received his B.A., Columbia University; J.D., New York University School of Law; LL.M. and J.S.D., Columbia Law School. The author gratefully acknowledges the Nova Southeastern University President's Faculty Scholarship Award that financed most of his research costs for this Article. He also wishes to thank his friends Gail and Bob Ginsberg, Rana Segal, Mike Smith, and Noël and Roger Wise for their gracious and kind hospitality in having him as a guest in their homes during his research travels around the country.

1. JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* (University of Texas Press 1995).

2. *Id.* ch. 7.

3. *Id.*

4. *Id.* 119-26.

offices, EPA enforcement attorneys and technical staff, and Agency enforcement personnel and the states, the U.S. Department of Justice (DOJ), the U.S. Attorneys' Offices, and Congress.

Finally, I will evaluate EPA's enforcement programs during President Clinton's second term in office, a period of relative autonomy and progress for the Agency's enforcement efforts. In that regard, I shall consider EPA's bold "targeted national enforcement initiative," improvements to the Agency's enforcement database, the expansion of federal criminal enforcement, the administrative reform of the Superfund program, the acceptance of supplemental environmental projects (SEPs) in lieu of penalties in settlement agreements with civil defendants, the growth of administrative enforcement in certain substantive areas, the continuation of multimedia enforcement efforts, and the adoption of additional ways of measuring the success of environmental enforcement work. At the same time, however, I will also take account of a few new trends, and some lingering impacts of the Clinton Administration's opening years, that detracted to some extent from its late-term enforcement achievements.

I. Introduction—A Word on Methodology

In preparing this Article, I followed a research methodology that was substantially patterned on the methodological approach that I took in researching and writing *Enforcement at the EPA*. Specifically, I reviewed the body of academic literature that concerns EPA enforcement in the past three and one-half years, EPA enforcement policy documents prepared in the same period, and a variety of other EPA files and records of enforcement activities. I also examined pertinent newspaper and trade journal articles and other summary materials.

During the spring of 2003, the winter and spring of 2004, and the winter of 2005, I interviewed, in person, 58 present and former government officials, from EPA and the DOJ, to obtain their recollections of the critical trends, developments, and events in EPA enforcement in the Clinton Administration and in the Administration of President George W. Bush (the Bush II Administration).⁵ I questioned these individuals as well with respect to the various sets of intra-governmental and intergovernmental relationships that exist in the federal enforcement field.

I selected my interviewees on the basis of the breadth of their experience in the federal government and the likelihood that they would have been involved in or knowledgeable about EPA hazardous waste enforcement. I sought interviews with present and former officials who had diverse professional backgrounds and perspectives. For the most part, respondents held top-level or mid-level managerial positions with EPA or were attorneys or scientists and technical experts on the Agency's enforcement staff.

Because of the importance of EPA's regional offices in implementing the Agency's enforcement program, I conducted interviews with present and former officials in EPA Regions II (New York), V (Chicago), and IX (San Francisco), as well as in the Agency's headquarters office in

Washington, D.C. I also held interviews with upper level and mid-level managers and attorneys in the DOJ's Washington, D.C., headquarters.⁶

Regardless of their past or present institutional affiliations, I asked respondents a standard set of questions, which was furnished to them in advance whenever possible, along with a brief description of the purposes for and methods employed in the study.⁷ I asked most respondents all of the questions. In a few isolated instances, the respondent completed only portions of the standard interview, due to limitations of time or circumstances, or because the interviewee's pertinent views had elsewhere been made part of the public record. I did not omit any items from the standard set of questions—in any interview—because of the actual (or perceived) political preferences of the interviewee.

To avoid losing the complexity of the respondents' perceptions and attitudes, I posed open-ended questions. In addition to the questions included in the standard interview format, I frequently asked spontaneous follow-up questions.

In order to encourage candor and comprehensiveness in the comments I received, I offered all interviewees the option of speaking with me "off the record," in the sense that I would refrain from quoting them by name or attributing their remarks to them directly. Approximately one-third of those I spoke with elected to do so "on the record." The rest of my interviewees, however, asked that I obtain their permission before quoting them or attributing their remarks to them directly. I have attempted to honor that commitment in all instances.

One methodological issue which again arose in the course of my research concerned the relative weight to be given the results of my interviews with present and former government officials, as compared with primary documents written during the period of this study. I have on balance tended to place more emphasis on the comments gathered from participants in (or government observers of) EPA's enforcement efforts. Where these comments contradict one another or contemporary written documents I have noted that fact.

Emphasis on the results of oral interviews stems, in part, from impressions formed during my own professional work with EPA. In particular, during my own time in the Agency from 1975 to 1981, I learned firsthand that a great many documents on enforcement policies, guidances, and other matters, generated by the managers at the Agency's headquarters, are drafted with the overriding goal of winning the political support of one or more constituencies. Such constituencies may include other officials within the executive branch, congressional committees and their staffs, environmental organizations, regulated industries, and state and local government officials. Although such primary EPA documents are not devoid of historical significance, I believe that relying on them too heavily would be analogous to making judgments about the efforts and products of a private enterprise based solely on its public advertising. In contrast, in my judgment the interviews I conducted provide a less distorted picture of the most significant trends, developments, and events in EPA's enforcement history.

5. My article on EPA enforcement under the Bush II Administration was published as Joel A. Mintz, "Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ELR 10912 (Oct. 2004).

6. See Appendix A (interview list).

7. See Appendix B (standard questions).

II. EPA Enforcement in the Clinton Administration's First Two Years: Counterpressures, Missteps, and Miscommunications

The election of Clinton as president of the United States, in November 1992, gave rise to high hopes among environmental advocates. Among environmental organizations, EPA staff members, pro-environmental congresspersons, senators and their staffs, some state and local officials, and others who favored effective environmental regulation, the coming to power of Clinton's Administration, coupled with the continued dominance of Congress by the Democratic party, created a very real prospect that environmental matters would once again be afforded a high priority in Washington, D.C. Redoubled EPA enforcement together with vigorous rulemaking (especially under the 1990 Amendments to the Clean Air Act (CAA)) and the prompt passage of additional federal environmental legislation all seemed realistic and within view.

That rosy assessment, however, was soon abandoned in many quarters.⁸ New, inexperienced in federal regulation, and facing an apparent antiregulatory, antienvironmental "backlash" (among some leading Democrats as well as Republicans) on Capitol Hill, the Clinton Administration's EPA team took a more cautious and deliberate approach to protecting the environment in its first two years than the environmental public interest community would have preferred. Distracted by political controversies over how to respond to demands that environmental laws be significantly pared back, Clinton's EPA managers promulgated watered-down versions of certain new regulations—making some of them so ambiguous, complex, or overbroad to be all but unenforceable. Those managers confused some members of the Agency's enforcement staff by blending renewed enforcement initiatives with a new emphasis on "compliance incentive programs," "compliance assistance," and "reinvention of government," programs that seemed to some of their employees to be at odds with EPA's traditional deterrent enforcement approach. They also engaged in a structural reorganization of the Agency's headquarters office which, while bold in concept and undoubtedly well intentioned, was implemented too slowly and chaotically to realize its maximum potential.

As we shall see, these early mishaps resulted, in fiscal year (FY) 1995, in a dramatic decline in the traditional "output" numbers by which EPA enforcement success was measured. That brief decline came to an abrupt end soon thereafter, however, when the Republican party won a majority status in the U.S. House of Representatives and the U.S. Senate—an unforeseen situation which created new sets of obstacles (together with some significant new political opportunities) for EPA's top managers.

At the outset, the selection and confirmation of managers to fill EPA's highest positions proceeded slowly. Although then-President-elect Clinton's choice for EPA Administrator (Carol M. Browner) was announced in December 1992, other high-level Agency officials—including its Deputy Administrator and its Assistant Administrator for enforcement—were not nominated by the president until several months after the Clinton Administration had taken power (and not confirmed by the Senate until May

1993). Still other EPA appointees were announced as late as July 1993—midway through the first year of Clinton's term—and not confirmed until a few weeks later. These delays created discomfiting uncertainties for EPA's professional staff, environmental organizations, and regulated firms.

Nonetheless, once they were finally selected, EPA's new set of top managers were greeted with broad approval and prompt Senate confirmation. Browner, the Agency's new Administrator, was particularly well regarded by environmental organizations while remaining acceptable to regulated industries. Browner had previously served for two years as head of the Florida Department of Environmental Regulation. In that capacity, she had skillfully negotiated settlement of a complex, contentious lawsuit regarding cleanup of the Florida Everglades. Prior to that, Browner had been legislative director for then-Sen. Al Gore (D-Tenn.), general counsel for the Senate Committee on Environment and Natural Resources, and a legislative aide in the office of former Sen. Lawton Chiles (D-Fla.).⁹ She was politically associated with Vice President Gore, and her selection as Administrator was viewed as a political tribute and benefit to him.

The Clinton Administration's nominee for EPA Deputy Administrator was Robert Sussman, an expert in toxic substances law who had been a partner in a Washington, D.C., law firm and an active participant in Democratic party politics.¹⁰ Sussman's tenure at EPA proved brief, however. He left the Agency in October 1994, to assume another position within the Clinton Administration.¹¹ Sussman's replacement as Deputy Administrator was Fred Hansen, director of the Oregon Department of Environmental Quality, who had previously served as a congressional aide, an executive officer in the Peace Corps, and deputy treasurer of the state of Oregon.¹²

For the position of Assistant Administrator for Enforcement, President Clinton nominated Steven (Steve) Herman, a veteran career attorney with the DOJ, who had specialized in litigating cases arising under the National Environmental Policy Act.¹³ As Herman later recalled:

I was a career attorney at DOJ, an assistant section chief who oversaw the case that DOJ had brought on behalf of the federal government against the state of Florida to protect the Florida Everglades. I came to know Browner professionally while negotiating a settlement in that case. When she was named EPA Administrator by Clinton, [Browner] called and said she wanted someone for the assistant administrator for enforcement position who wouldn't be perceived as political. That's how I got the job.¹⁴

Upon assuming office, EPA's new leaders faced unanticipated resistance to EPA's basic mission from some unexpected sources. As Browner put it: "In 1993 and 1994, I was fighting for the Agency's survival. The antiregulatory

8. See John H. Cushman Jr., *Environmental Lobby Beats Tactical Retreat*, N.Y. TIMES, Mar. 30, 1994, at B7.

9. *Browner Portrayed as Hard-Working, Results-Oriented*, Env't Rep. (BNA), Dec. 18, 1992, at 2086.

10. *White House Nominations for Some EPA Posts Draw Varied Reactions*, INSIDE EPA, Mar. 5, 1993, at 11.

11. *EPA Deputy Administrator Nominee Receives Broad Support*, INSIDE EPA, Sept. 30, 1994, at 4.

12. *Id.*

13. *White House Nominations*, *supra* note 10, at 12.

14. Interview with Steve Herman.

movement, which had considerable support among both Republicans and Democrats, was very active in those years It really took us a while to get up and going.”¹⁵

Congressional demands for steps to roll back and limit the costs of environmental regulation increased. These demands, in turn, fueled a vigorous debate, within the Clinton Administration, as to the positions the Administration should take regarding the renewal of key federal environmental legislation. After anxious and heated internal discussion, the Administration determined to proceed with proposals to renew and strengthen the Clean Water Act (CWA), Superfund, and the Safe Drinking Water Act (SDWA).¹⁶ It also proposed legislation to elevate EPA to the status of a Cabinet-level department. At the same time, however, as part of a strategy to fend off antiregulatory legislation, the Clinton Administration proposed a package of regulatory cutbacks that would have waived penalties, and granted grace periods, for small businesses that were making good-faith efforts to comply with environmental requirements.¹⁷

In the end, the Administration’s efforts to build a consensus among opposing interests, and convince Congress to strengthen federal environmental statutes, met with defeat. After what Browner later characterized as “huge, ugly fights,”¹⁸ Congress declined to extend the regulatory reach of the CWA or the SDWA. The Administration’s campaign to elevate EPA to Cabinet level was also abandoned after the House voted to allow debate on an antiregulatory amendment to the EPA Cabinet bill that would have required EPA to conduct cost-benefit analyses and risk assessments before issuing any new regulations.¹⁹ Moreover, notwithstanding

the emergence of a remarkable consensus among industries, environmental organizations, and other interested parties, Congress failed to reauthorize the Superfund Act, and the statute’s taxing authority subsequently expired on December 31, 1995.²⁰

Beyond preoccupying EPA’s new management team with fending off potential threats to the Agency’s legislative agenda—and to its fundamental legal authority as well—the antiregulatory mood of Congress in 1993 and 1994 appears to have had other significant effects on EPA (including its enforcement programs) in the early years of the Clinton period.

One such impact was an effort to supplement the Agency’s traditional deterrent enforcement approach—a method that emphasized formal enforcement actions, penalty collection, and tracking numbers of enforcement inspections, numbers of enforcement actions initiated, etc.—with “compliance assistance” to particular regulated industries and “compliance incentive” programs designed to provide regulatory relief to firms whose alternative pollution control proposals met certain EPA criteria.²¹ This change in emphasis, which EPA’s political appointees often referred to as the “full tool chest” approach, was intended to expand the discretion of EPA enforcement personnel without interfering with traditional enforcement work. Regrettably, though, it gave rise to considerable confusion and misunderstanding among EPA’s permanent career enforcement staff. As Bill Muszynski, a veteran administrator in EPA’s Region II office, observed: “It is difficult to explain to the staff that the Agency must strike the right balance between compliance assistance and enforcement. Steve Herman had difficulty doing that, especially in the early years of the Clinton Administration. He tried not to send a mixed message, but he was perceived as doing so nonetheless.”²²

Former Assistant Administrator Herman (and one of his closest aides, Deputy Assistant Administrator Sylvia Lowrance) subsequently maintained that aggressive EPA enforcement had been emphasized clearly and consistently by EPA’s top managers during all eight years of the Clinton Administration.²³ Interviews with experienced members of EPA’s enforcement programs in several regional offices, however, reveal that an unambiguous, pro-enforcement emphasis was not conveyed to the Agency’s key enforcement personnel in the field in 1993 and 1994.

Thus, one senior enforcement manager in EPA Region V, stated: “At the very beginning of the Clinton Administration, it wasn’t terribly clear where they stood on enforcement There was a lot of talk about taking a collaborative approach to environmental protection.”²⁴ Similarly, Walter

15. Interview with Carol Browner. *Accord Environment President? Not Yet*, N.Y. TIMES, Feb. 13, 1994, D14. (“The whole concept of environmental stewardship . . . has run head-on into a nasty sense that the cleanliness crusade has burdened the country with too much regulation and exacted too heavy a price in jobs and growth. The skeptics now include many of the President’s fellow Democrats.”)

16. In the case of Superfund, the intraadministration deliberations were colored by a statement made by President Clinton soon after he took office that “the Superfund has been a disaster. All the money goes to the lawyers, and none of the money goes to clean up the problems that it was designed to clean up.” David E. Rosenbaum, *Business Leaders Urged by Clinton to Back Tax Plan*, N.Y. TIMES, Feb. 12, 1993, at A1. In administration discussions as to what legislation to propose to “fix” Superfund, some officials proposed repealing the statute’s requirement of strict joint and several liability. That approach was energetically opposed by other officials, however, led by Assistant Attorney General Lois Schiffer. Schiffer passionately and skillfully defended the law’s liability scheme within the Administration. Interviews with Walter Mugdan and Bruce Gelber. In the end, Schiffer and her allies prevailed. The revised version of Superfund that the Administration proposed left the statute’s liability provisions intact. It did suggest a number of other reforms, however, including the creation of uniform national standards as to how clean a site should be, factoring future land use at a site into decisionmaking as to how clean a site should be, increasing the influence of local citizen groups in site cleanup decisions, encouraging arbitration among responsible parties, and collecting \$8 billion over 10 years (mostly from insurance companies) to finance the Superfund. John H. Cushman Jr., *Congress Foregoes Its Bid to Hasten Cleanup of Dumps*, N.Y. TIMES, Oct. 6, 1994, at A1.

17. John H. Cushman Jr., *Proposed Changes Simplify Rules on Pollution Control*, N.Y. TIMES, Mar. 17, 1995, at A20.

18. Interview with Carol Browner.

19. *General Policy: Future of EPA Cabinet Bill Uncertain Following House Vote on Amendment Rule*, Env’t Rep. (BNA), Feb. 4, 1994, at 1719; John H. Cushman Jr., *EPA Critics Get Boost in Congress*, N.Y. TIMES, Feb. 7, 1994 at A1. As Carol Browner remembered, the EPA Cabinet bill “became so loaded up with anti-environmental

measures that the Vice President and I actually had to go to Congress and convince them to kill the Administration’s own bill.” Interview with Carol Browner.

20. For an insightful analysis of the 103th Congress’ discussions regarding Superfund, see Rena I. Steinzor, *The Reauthorization of Superfund: The Public Works Alternative?*, 25 ELR 10078 (Jan. 1995). Notably, the Superfund tax has not been reauthorized to date.

21. See Keith Schneider, *Unbending Regulations Incite Move to Alter Pollution Laws*, N.Y. TIMES, Nov. 29, 1993, at A1; John H. Cushman Jr., *EPA and Arizona Factory Agree on Innovative Regulatory Plan*, N.Y. TIMES, Nov. 20, 1996, at A18.

22. Interview with Bill Muszynski.

23. Interviews with Steve Herman and Sylvia Lowrance.

24. Interview with an EPA manager who did not wish to be identified by name.

Mugdan, an experienced enforcement administrator in EPA Region II, indicated:

I would not consider the first two years of the Clinton Administration as standing out with respect to enforcement activity On the contrary, in those years I believe there was a decreased emphasis on what might be called the “hard path” and an increased emphasis on the “soft path.” It was during this time that compliance assistance—the “soft path”—was established as a priority. Many states had become critical of EPA, asserting that the Agency was too focused on counting penalties and the number of enforcement cases. In the first two years of the Clinton Administration, EPA’s leadership seemed to accept some of that criticism, and sent signals that EPA regions were to shift resources from hard enforcement to compliance assistance and other “soft path” approaches.²⁵

Moreover, an attorney in EPA Region IX, expressed the view that “there was no strong environmental philosophy espoused in the early Clinton Administration’s enforcement activities. Gore had his pet projects and ideas. But even then, the idea was to avoid confrontation and get to the point where you can still survive. It was a defensive posture. There was not much in the way of an overall enforcement initiative at all.”²⁶

One especially contentious controversy between EPA’s career enforcement staff and the Clinton Administration’s political appointees during the first two years of the Clinton era appears to have arisen in the Agency’s San Francisco regional office. As an EPA enforcement official who worked in the Region IX Office of Regional Counsel during much of the Clinton Administration remembered the dispute:

During the Clinton period, the politicians weren’t really communicating their message very well. There was a lot of management nonsense, like reinvention, but there was no clear direction. This was especially true toward the beginning of the Clinton years. The senior [enforcement] staff didn’t really know what the politicians wanted. It was a fiasco.²⁷

The same interviewee added that, from his or her perspective, Clinton’s political appointees were “not the most enforcement-oriented people.” Instead, they were “very into the political resolution of problems and ‘collaborative’ ways of getting things done. That was a big change from the middle years of the Bush I administration, [when] the whole operation seemed much more professional.”²⁸

In contrast, Felicia Marcus, the Regional Administrator in Region IX throughout the Clinton era, recalled the disagreement in this way:

Our view in the Administration was let’s find those environmental violators who are really bad, really obvious and describable in terms of harm to the environment and public health, and the enforcement staff should go after those. But there is a big mass of people who are also confused by our complicated EPA regulations, or who say they are committed to environmental results and can do better than our regulations if we can cut through some of

the paperwork burden. Let’s do something more sophisticated by announcing we are going to enforce, let’s go after the intelligible targets send a clear message . . . but let’s also find the companies we can collaborate with and collaborate with them, so we can better isolate the truly bad guys and maximize our net environmental gain by using different strategies with different actors. This culture change was confusing for the [regional enforcement] staff. It felt for many of us that many EPA staff had never really been managed to the degree that our Administration was stepping in to do. They had been allowed to be cowboys, for want of a better word. [They] liked going after the bad guys and keeping the world relatively simple. “We” were good and “they” were bad. That is sometimes true but it is rarely that simple We [the Administration] were trying to get people to be a little less judgmental and a little more strategic and creative, and that was hard for some people. Our Administration came in, Democrats, all very environmental, and we underestimated what we had to do. I think the staff people thought we would come in and they would just get to enforce even more. Instead, it was sort of like Nixon going to China, we came in and we wanted to do reinvention Some people heard the “reinvention” part and heard “instead of enforcement” which was not at all what we meant. We meant a combination of strong enforcement and new incentives to do more environmental protection. We eventually did the course correction when we realized how we were being misheard.²⁹

EPA’s compliance assistance and compliance incentive programs (such as Project XL, the Small Business Compliance Policy, the Common Sense Initiative, Compliance Auditing, and the Self-Audit Program) may well have created goodwill among some of the many entities regulated by the Agency. Nonetheless, as former Region V Regional Counsel Gail Ginsberg put it:

These programs sometimes siphoned off resources from enforcement, especially where regional program managers did not believe in enforcement. As a result, the [regional] technical staff who remained devoted to enforcement [in those programs] were not the shining stars of the staff, i.e., not the most capable people. Also, when technical people [in EPA regional offices] left enforcement, they were replaced by very inexperienced staff that did not know how to do enforcement.³⁰

In addition to that, from the perspective of another manager familiar with EPA enforcement efforts, compliance assistance and incentive programs

made it more difficult to do enforcement, because where you are trying to reach collaborative solutions with people they sometimes have the impression that they have some kind of a pass from enforcement and that, if we bring an enforcement action against them, we are somehow or another betraying them There was a need for some clear policy direction that just because we were working together did not mean that we were not going to enforce.³¹

Another unfortunate EPA response to congressional antiregulatory pressure in the early Clinton years (and, thereafter, in some instances) was the promulgation of new sets of Agency regulations that contained a number of diffi-

25. Interview with Walter Mugdan.

26. Interview with an EPA regional attorney who requested that I not attribute this statement to him or her.

27. Interview with an EPA Region IX enforcement staff member who asked not to be identified.

28. *Id.*

29. Interview with Felicia Marcus.

30. Interview with Gail Ginsberg.

31. Interview with an EPA regional manager who requested anonymity.

cult-to-enforce requirements. As a former Assistant Regional Counsel in EPA Region IX, aptly observed: “Excessive flexibility within EPA’s regulations make it very difficult to establish compliance. This was especially true in the underground storage tank area, and it is also true as to some maximum achievable control technology (MACT) Clean Air Standards In the long term this will lead to environmental problems and pressure for more rigid regulations.”³² Similarly, another EPA enforcement official candidly observed:

EPA has written many rules [the way that it has] because of a desire to move quickly, to not offend the people fighting over what the rules should say, or to obfuscate in order to get the rules through the regulatory and [the Office of Management and Budget (OMB)] approval process. However, that all comes home to roost when the Agency tries to write a permit or take an enforcement action. The enforcement program bears a lot of the weight for that lack of clarity and it hurts the [enforcement] program’s reputation. [The enforcement staff] is seen as unreasonably stretching the law when the problem is really the vagueness—or overbreadth—of the regulations themselves.³³

One early regulatory controversy in the Clinton Administration—with important enforcement implications—concerned the continuous emission monitoring requirements for stationary sources of air pollution, called for by the 1990 CAA Amendments. EPA proposed an effective set of regulations in that area but subsequently pared them back. As Bruce Buckheit, a senior Agency enforcement manager, later viewed it: “The 1990 Amendments were written to have better self-monitoring. There, we won the battle in the legislation but we lost the battle in the implementation. We do not have better self-monitoring today, by and large.”³⁴ Another EPA employee who works primarily on CAA enforcement issues, substantially agreed. That interviewee opined: “In the Clinton Administration, there was a pervasive let’s make a deal atmosphere. This was probably most true in air [policy matters]. Enhanced monitoring was greatly watered down in the Clinton Administration. Industry won more than it should have in that debate.”³⁵

Nonenforceability problems also arose with respect to EPA’s MACT standards, which the Agency was required to establish to control the emission of toxic air pollutants. Significant portions of those regulations were drafted, at the invitation of EPA’s Office of Air Quality Planning and Standards, by the very industries that were later subject to them.³⁶ In interviews, EPA enforcement personnel were highly critical of certain sections of those regulations including (but not limited to) the MACT requirements that apply to wood-coating and degreasing operations, and to bulk gasoline terminals.³⁷ Buckheit conceded that EPA’s MACT

enforcement is “spotty, scattered and not coordinated,” and he observed that “there are an enormous number of [MACT] standards coming out. Who can know them all? We try to put some organization on it but it is very difficult.”³⁸ Steve Rothblatt, the Director of the Air and Radiation Division in EPA Region V held a similar view. In an interview, he exclaimed: “There is just so much complexity in how to manage this [set of MACT regulations] that it is just mind-boggling!”³⁹

One of the most significant management initiatives undertaken by the Clinton Administration in its first two years in office was a large-scale reorganization of EPA’s headquarters in order to create a new, expanded Office of Enforcement and Compliance Assurance (OECA). Touting this restructuring as “a major accomplishment” of his tenure in office, Herman explained some of the rationale for the changes it engineered:

The reorganization consolidated headquarters enforcement personnel in one office. It also led to some reorganizations in the regions. The reorganization at headquarters allowed us to use resources more efficiently. Having both attorneys and technical people in one office allowed us to focus on big, difficult issues and cases. It gave the office independence in terms of looking at and addressing enforcement problems Once it was done, it really worked.⁴⁰

Deputy Assistant Administrator Lowrance had a similar opinion as to the benefits of the 1993-1994 headquarters reorganization. She stated:

It was a wonderful concept because there was a single assistant administrator/decisionmaker—not a series of fiefdoms—as long as the administrator backed the assistant administrator up (which Carol Browner routinely did). The reorganization was an attempt to go back to square one and set up an entire framework for compliance. It was massive. It created synergies between and among enforcement people from different media working together for the first time.⁴¹

Following a relatively lengthy review by a 35-member EPA task force, headed by Associate Deputy Administrator Michael P. Vandenberg, Browner expanded the headquarters Office of Enforcement into a new office that housed

especially as compared with the former, it is “incredibly hard” to determine compliance with the latter. He also noted that MACT standards often contain “work practice regulations” that are labor-intensive for EPA inspectors to enforce. Interview with an EPA enforcement attorney who requested anonymity.

38. Interview with Bruce Buckheit.

39. Interview with Steve Rothblatt. Rothblatt noted that there are 90 MACT standards and that their length and complexity make them exceptionally hard to include within Title V permits and very difficult to enforce. Among the challenges for EPA that he mentioned in this area were: (1) the reluctance of personnel at regulated plants to certify compliance with so complex a set of regulations; (2) the difficulty that state personnel have in understanding the MACT regulations; (3) the problem posed for EPA regional office personnel set of keeping track of the adoptions (by rulemaking) of MACT standards by states; and (4) the technical complexity of reviewing company applications for alternative MACT standards. *Id.*

40. Interview with Steve Herman.

41. Interview with Sylvia Lowrance. *Accord* Interview with Eric Schaeffer. (“It is valuable to have an independent enforcement office that is an agent for implementation of environmental laws and for having them taken seriously, that does not depend upon the program offices for inspections and so on. That was the major accomplishment of the reorganization.”)

32. Interview with Arthur Haubenstock.

33. Interview with a well-informed EPA employee who asked that his or her name not be used.

34. Interview with Bruce Buckheit.

35. Interview with Allan Zabel.

36. *Id.*

37. Interview with Allan Zabel. Another seasoned EPA enforcement attorney suggested that I compare 40 C.F.R. pt. 60, subpt. xx, EPA’s new source performance standards for bulk gasoline terminals, with 40 C.F.R. pt. 63(r) (the MACT standards for the same type of facilities). He suggested that (even though there are a number of even more egregious examples of incomprehensible MACT regulations)

both EPA headquarters enforcement lawyers and headquarters enforcement technical personnel who had previously been situated in media-specific program offices.

The newly formed OECA incorporated several previously existing entities as well, such as an Office of Criminal Enforcement, the Office of Federal Activities, and the National Enforcement Investigations Center. It also included a new Office of Site Remediation, with jurisdiction over Superfund matters; and it became the institutional “home” of two entirely new organizational units: the Office of Regulatory Enforcement (ORE) and the Office of Compliance (OC).

The ORE was given the lead role in supporting enforcement case development, and it was organized along media-specific lines. The ORE thus contained separate divisions devoted to enforcement of the CAA, the CWA, the Resource Conservation and Recovery Act (RCRA), etc., along with a new Multimedia Enforcement Division. In contrast, the OC was given the leading role in enforcement planning, data management, inspection targeting, compliance monitoring and assistance, and it was organized by regulated sectors (such as manufacturing, energy and transportation, and chemical, municipal, and commercial services). The OC also contained separate divisions for environmental planning, targeting, data analysis, agriculture, and ecosystems.⁴²

After deliberation, Administrator Browner decided not to require EPA’s regional offices to create separate regional enforcement divisions that paralleled the structure of the new OECA. Instead, she allowed the regional offices discretion to fashion their own new enforcement structures. The regions, however, were subject to a minimum requirement: each region that did not reestablish an enforcement division was required to appoint a single enforcement coordinator who reported directly to the deputy regional administrator, and to create an identifiable, separate enforcement unit within each regional program division.⁴³

Without question, EPA’s reorganization of 1993-1994 did succeed in accomplishing some of the laudable, ambitious goals of its designers. Thus, the Clinton Administration’s restructuring efforts successfully eliminated some redundancy and waste within the Office of Enforcement. The reorganization allowed for some helpful cross-media and interdisciplinary contact that had not previously been a feature of EPA’s enforcement culture. Its very existence also sent a signal to at least some EPA headquarters and regional managers that enforcement was indeed a priority under this Administration.⁴⁴

At the same time, however, in both its design and its implementation, the Agency’s massive reorganization of the early 1990s was flawed and incomplete. As one of the reorganization’s principal architects later reflected: “I can’t look back at the reorganization that I was a part of and say that it was an unqualified success. I think we probably took some

wrong turns in some places.”⁴⁵ In fact, EPA enforcement officials who had designed, observed, and/or been professionally affected by the reorganization did subsequently identify a number of specific wrong turns in the way it was conceived and carried out.

One such imperfection concerned the organization’s disruptive effect on ongoing enforcement work. As one knowledgeable EPA enforcement official candidly stated: “Planning the reorganization took a little over one year. It took an additional year to put it in place. We lost some momentum in enforcement during that time period.”⁴⁶

In particular, the reorganization appears to have had a negative (although temporary) impact on the Agency’s previously established efforts in the areas of compliance monitoring, state-federal relationships, and the integration of enforcement strategies.⁴⁷ Ann Lassiter, then an EPA headquarters enforcement supervisor, viewed it this way:

In the reorganization, the compliance assessment and analysis function of EPA headquarters simply got lost . . . OECA lost control of some of headquarters’ tools for looking at enforcement program trends and overall performance at the regional office level. A fair amount of the resources associated with the compliance assessment and analysis function were lost in the transfer to the new organization, and people in headquarters who had been performing that work doing compliance functions were suddenly asked to carry out the mostly new function of compliance assistance.⁴⁸

Beyond this, the reorganization gave rise to new institutional jealousies and rivalries within EPA headquarters. According to Eric Schaeffer, the OECA’s first Director of the Office of Regulatory Enforcement:

When the headquarters program offices lost [their enforcement components] in the reorganization, it became a lot easier for the programs to take potshots at enforcement. They no longer had internal people who lobbied for balance in execution in the regulations. They also lost an important link to the regions; and they became further involved in inside-the-beltway policy questions, and more removed from what was going on in the field.⁴⁹

Understandably, the post-reorganization program offices had not been happy about ceding their enforcement components to a new, very powerful OECA. In some cases, this resentment soon evolved into an increased antipathy to enforcement work itself, which some of the now-reduced pro-

42. *Browner Splits Enforcement Office by Function and Sector*, INSIDE EPA, Oct. 15, 1993, at 11-12; *Compliance, Regulatory Offices Created Under Reorganization of EPA Enforcement*, Env’t Rep. (BNA), Oct. 15, 1993, at 1137.

43. *Browner Calls for Limited Reorganization of Regions*, INSIDE EPA, June 24, 1994, at 1, 10. Browner indicated that she had made that decision in order to allow the structure of the regional offices to reflect the unique aspects of the states. Interview with Carol Browner.

44. Interviews with an EPA attorney and manager who declined to be identified and Nancy Marvel.

45. Interview with Eric Schaeffer. *Accord*, in part, Interview with Steve Herman (“The reorganization was not perfect.”); Sylvia Lowrance (“A reorganization of this magnitude always has a few missteps, but that doesn’t take away from its ultimate success.”); and Carol Browner (“The reorganization was imperfect.”).

46. Interview with an EPA employee who asked not to be identified. *Accord* Interviews with Bruce Gelber and Bill Muszynski.

47. Interview with Cheryl Wasserman. Wasserman pointed out that “we lost a lot of ground because the states had nowhere to connect in the new OECA.” She also noted that, although the policies remained nominally in effect, the OECA’s management essentially abandoned the “timely and appropriate” framework as an important management construct for evaluating state and regional performances (which EPA had successfully negotiated with the states in the Bush I Administration) that was still in effect in 1993. *Id.*

48. Interview with Ann Lassiter. *Accord* Interview with Arthur Horowitz (“There was a real loss of functions in the compliance area. An effort was later made to build that back. But it took quite a while.”).

49. Interview with Eric Schaeffer.

gram offices viewed as very much “a legalistic obstacle” to the collaborative approaches they were pursuing.⁵⁰

In addition, significant antipathy developed between the new ORE and the OC. Some of this rivalry concerned distribution of scarce OECA resources since the creation of the ORE and the OC had split up the OECA’s resources in such a way that “neither office really was left with enough to get a lot of things done.”⁵¹ Other aspects of this intra-OECA dispute concerned questions of professional prerogative (since the ORE contained more attorneys and the OC tended to be dominated by non-lawyers) and “turf issues” as to which office was to handle what enforcement function(s).⁵²

The EPA reorganization of 1993 and 1994 was a chaotic and highly uncertain process for many EPA enforcement employees, especially for those (mostly technically trained) staff members who (for the most part) ended up situated in the OC. Some insight into their disorienting experiences may be gleaned from the recollections of one EPA employee, initially a program analyst in EPA’s headquarters Office of Air Quality Planning and Standards, who began his career at EPA in September 1992—just a few months before the reorganization was planned.

In the spring of 1993, EPA announced the reorganization and I didn’t quite know what that meant for me. I was then still new at the Agency, and trying to learn about the Clean Air Act and what my job was. Reorganization work groups were started and then, some time later, a reorganization plan [for EPA headquarters] was ultimately put in place. Then they had competitions to select the new OECA office directors, then the division directors, then the branch chiefs. At that point, I thought that someone would put together position descriptions [for staff-level jobs] and start having people compete for those jobs, or else be assigned to them. That was not done. So they said to the staff in OE and the program offices who were in the reorganization mix “this is your chance to go wherever you want to.” We on the staff were given the opportunity to select three job choices and they would try to place us in one of them. But of course, how can you choose to go work someplace if you don’t know what the job is? The people who formulated the reorganization didn’t appear to know what many of our existing jobs were and they never really bothered to ask. I thought to myself “this is a recipe for chaos.” Anyway, some staff people were beginning to be told where they would or could move to in the restructured OECA so I went to my deputy division director and asked him “where is my job going?” He said: “I have no idea.” I also called several newly appointed branch chiefs and asked them what work their branches would be doing. They too said: “heck, I don’t know.”⁵³

50. Interview with Bob Tolpa.

51. Interview with an EPA employee who requested anonymity.

52. Interview with Eric Schaeffer. Schaeffer observed that, in hindsight, EPA’s voluntary self-audit disclosure program seems a “natural fit” for the OC. If they had taken responsibility for that, and let the traditional compliance monitoring function go to the ORE, it would have been a better arrangement since it would have given the OC a vital program role where they would have had to interact with the ORE in a positive way. *Id.* Another EPA enforcement staff member felt that the reorganization had unnecessarily divided up responsibility for RCRA programs among different organizational units, and that it had needlessly deemphasized the role of RCRA as compared with the Superfund program. Interview with Mimi Newton.

53. Interview with Arthur Horowitz. In the end, Horowitz’s initial job in EPA headquarters, tracking state and regional performance under EPA’s Significant Violator, Timely and Appropriate Guidance, was

In addition to its unplanned, chaotic quality—especially as perceived by the Agency’s headquarters technical enforcement staff—the reorganization has also been criticized on the basis that in the drawn out interoffice negotiations that had preceded it, the OECA came away with too few (and sometimes the wrong) resources. As one experienced federal enforcement manager, saw it:

OECA got taken to the cleaners on resources during the reorganization. We really missed out on getting some key people in. The program offices did not cough up all that they should have.⁵⁴

Finally, with the benefit of hindsight, the reorganization has been criticized by some of its own principal proponents, for not creating sufficient changes in the structure of EPA’s regional offices. As Herman now sees it:

If I had to do [the reorganization] over again, I would try to ensure a bit more uniformity across the regions. I’m now not sure that the geographical differences that exist among the regions drives the need for different organizational structures at the regional level. I would also try to build in more direct accountability from the regions to headquarters in terms of enforcement. We did have that in some regions and we didn’t have that in other regions.⁵⁵

In sum, the EPA reorganization of 1993-1994 was only a partial success. On the positive side, it boldly restored some of the historical size and prestige of the Agency’s headquarter-

abolished altogether. He ultimately accepted a staff position in one newly formed OECA office, primarily on the basis of his initial rapport with the head of that office, who had also told him that she did not yet know just what work her branch (or Horowitz individually) would be doing if he worked for her. *Id.*

54. Interview with an EPA manager who preferred not to be identified. The same individual further explained that

a reorganization is seen as a hostile act against everybody else in the organization. The people who were making the final [reorganization] decisions were [thus] advised to move quickly, identify the resources [that they needed] and say, we’ve got those, new we’re going to talk about how the responsibilities shake out. Instead, they got into protracted negotiations with the program offices about what their resources were going to be and [OECA] wound up getting less than we should have We have had a smaller base than we should have and we’ve been taking sustained [budget] cuts from that base over the years. I think it is starting to hurt.

Id. Accord, in part, Interviews with Ann Lassiter and Cheryl Wasserman. (Lassiter and Wasserman noted that responsibility for most EPA grants to states, including federal grants to do state environmental enforcement work, remained in EPA’s headquarters program offices instead of being transferred to the OECA. Little real effort was made to involve enforcement in the decisionmaking and (with the sole exception of pesticides state grants) there was no reporting back to the OECA on how the grant money was actually used and what it accomplished.

55. Interview with Steve Herman. *Accord* Interviews with Mike Stahl, Sylvia Lowrance, Eric Schaeffer, George Hays, and Joe Boyle. Perhaps a more fundamental flaw in the regional office phase of the reorganization was that in August 1995, the Administrator directed that regional restructuring be completed by September 30, 1995, several months ahead of the originally announced regional reorganization completion deadline. As one senior regional manager recalled: “These things take time and it takes a lot of ‘tender loving care’ to do it, and that just wasn’t possible in that time frame We had to do [the regional reorganization] a lot more rapidly than we would otherwise would have had to, and as a result some people [in our regional office] felt they weren’t treated properly.” Soon afterwards, employer-employee relations within EPA “took a step back,” and an EPA employees’ union was formed. Interview with an EPA official who asked that his or her name not be revealed.

ters enforcement component; it also set the stage for some important enforcement successes in the balance of the Clinton era. Nonetheless, the Agency's reorganization resulted in a clear, although temporary, loss of enforcement momentum, a decline in the morale of some components of the enforcement staff, the creation of an (avoidable) set of intrainstitutional rivalries, a smaller resource base for enforcement work than was later found to be needed, and an inconsistent set of regional organizational structures (which allowed some regional managers a degree of autonomy in enforcement matters that was denied to their counterparts in other EPA Regions).

Overall, the Clinton Administration's first two years in office were a period of uncertainty and confusion with respect to EPA enforcement. During this time, the Agency's new top managers were still inexperienced at federal agency management. They were also still unskilled in communicating and negotiating with their enforcement staff; and, in some cases, they seem to have been distracted by sharply negative congressional reactions to the Administration's legislative agenda.

This is not to suggest that 1993 and 1994 saw no progress in the EPA enforcement programs. In this beginning period, EPA's new management team strengthened the Agency's initial commitment to environmental justice.⁵⁶ EPA also placed long overdue emphasis on environmental protection on Native American tribal lands. Moreover, in the same period, the Agency began its staunch (and ultimately successful) opposition to misguided state legislation intended to grant "amnesty" or "immunity from prosecution" to environmental law violators who conducted environmental self-audits and then reported their firm's violations to state environmental authorities.⁵⁷

These achievements and successes notwithstanding, however, the first two years of the Clinton era in EPA enforcement remain, on balance, an undistinguished time. Nonetheless, as we shall see, 1993 and 1994 foreshadowed a very different sort of period in American governmental history, an era when issues of EPA enforcement were located at the epicenter of a bitter, highly publicized, partisan budgetary dispute, whose resolution had important consequences for all involved in it. Moreover, as we shall see further, the initial two years of the Clinton period stand in sharp contrast to the innovations, initiatives, and solid achievements in EPA enforcement that ultimately characterized former President Clinton's second term in office.

56. On its website, EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people, regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws regulations and policies." See <http://www.epa.gov/compliance/about/ej.html>. The Agency's environmental justice program was given an important boost when President Clinton signed Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, on February 11, 1994. This order directed all federal agencies to develop "environmental justice strategies" that would identify and address disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority and low income populations. The order also established an Interagency Working Group (IWG) that includes the heads of 11 federal agencies and departments and is chaired by the EPA Administrator. The IWG has selected and helped fund 15 environmental justice "demonstration projects" around the United States, and it has helped to coordinate interagency collaborative efforts in the environmental justice area.

57. Interviews with Gail Ginsberg and Steve Herman. See *infra* notes 126-27 and accompanying text.

III. The Budget Conflict During the "Gingrich Revolution": EPA Enforcement Under Partisan Attack

The results of the election of 1994 came as a shock to many observers. For the first time since the early 1950s, the Republican party won majority control of both the House and the Senate. Led by Rep. (and then Speaker of the House) Newt Gingrich (R-Ga.), a fiery partisan with very conservative views who had angrily criticized the "abuses of power" by the Democratic House leadership before and during the 1994 campaign, the Republican victory became known as the "Gingrich Revolution." Its "manifesto" was a slim volume of proposed reforms, titled the *Contract With America*,⁵⁸ some of whose provisions seemed likely to all but dismantle the then-existing federal environmental laws and the enforcement of those laws by EPA.

Specifically, the *Contract With America* proposed a new Job Creation and Wage Enhancement Act that would have granted individuals being inspected or investigated by a federal agency the right to remain silent, refuse a warrantless search, be warned that statements they make may be used against them, have an attorney and/or an accountant present, be present at the time of the agency inspection or investigation, and receive reimbursement for "unreasonable damages." The proposed Act would also have authorized individuals to bring lawsuits against any federal agency that has threatened them with "a prohibited regulatory practice," which was defined as "an inconsistent application of any law, rule, or regulation causing mismanagement of agency resources by any agency or employee of the agency."⁵⁹ The *Contract With America* also contained proposals—quickly introduced as legislative bills after the 104th Congress convened—that would have required elaborate risk assessment and cost-benefit analyses prior to the promulgation of any new agency regulations, imposed a "regulatory budget" which would have imposed a specific ceiling on the cost of complying with all federal regulatory requirements, and mandated additional requirements regarding regulatory flexibility, regulatory impact analysis, and compensation of owners of private property that is subject to regulation.⁶⁰

EPA's leadership responded swiftly to these radical legislative proposals, which began to be passed by various House committees—and then by the entire House—in the winter of

58. CONTRACT WITH AMERICA (Times Book 1994).

59. *Id.* at 134.

60. *Id.* at 24-25, 131-35.

61. See John H. Cushman Jr., *Republicans Plan Sweeping Barriers to New U.S. Rules*, N.Y. TIMES, Dec. 25, 1994, at A1; John H. Cushman Jr., *Congressional Roundup: Backed by Business, GOP Takes Steps to Overhaul Environmental Regulations*, N.Y. TIMES, Feb. 10, 1995, at A22; John H. Cushman Jr., *Congressional Republicans Take Aim at an Extensive List of Environmental Statutes*, N.Y. TIMES, Feb. 22, 1995, at A14; John H. Cushman Jr., *House Votes to Freeze Regulations as Democrats Fail to Gain Health and Safety Limitations*, N.Y. TIMES, Feb. 25, 1995, at A7; John H. Cushman Jr., *House Considers Bill to Impose Extensive Review Process on New Rules for Health and Safety*, N.Y. TIMES, Feb. 28, 1995, at A18; John H. Cushman Jr., *The 104th Congress and the Environment: House Approves Sweeping Changes on Regulations*, N.Y. TIMES, Mar. 1, 1995, at A1. In addition to proposing across the board regulatory reform measures, the new Republican majority in the House also worked with some conservative Democrats to propose legislation that would have made far-reaching changes in the CWA and in other, specific environmental statutes. John H. Cushman Jr., *House Set to Revamp Law Cleaning Water in U.S.*, N.Y. TIMES, Mar. 23,

1995.⁶¹ Administrator Browner declared that the Republican legislative initiative “undermines every single environmental and public health standard in this country.”⁶² She further stated that “every person in this Administration is greatly alarmed” by the proposals,⁶³ that “this legislation is not reform, it is a full frontal assault on protecting public health and the environment.”⁶⁴ Browner also declared:

There is a very hostile tone that has been set, and I am fearful it will endure. Congress [has] acted in haste, did not involve the people on whose behalf they serve and did not do their business in the open. It doesn't serve anyone well [for Congress] not to work with the agencies of the executive branch, which has the ultimate responsibility for implementing the laws . . . There is no doubt that we need reform. Unfortunately, they weren't willing to do the hard work with us and the American people to do an intelligent system of change.⁶⁵

Environmental organizations, working cooperatively with the Clinton Administration, mounted a concerted lobbying effort to defeat the Republican reforms. Those proposals, in turn, received active backing of a broad coalition of business interests.

Ultimately, in July 1995, the antiregulatory measures that had passed the House were defeated in the Senate, when the Republicans were unable to sustain a Democratic filibuster against them. At that point, however, the Republican congressional leadership shifted tactics. Following Gingrich's declaration that “when you have revolutions you never give up; you keep looking for pressure points to break through,”⁶⁶ the House Republicans began to look to the federal budget as the principal means of accomplishing their antiregulatory goals.⁶⁷

In the final week of July 1995, the House considered legislation that would cut approximately one-third, or \$2.4 billion, from EPA's overall budget (including a \$431 million cut from the Superfund program), and that would target a 50% cut in funding for the Agency's enforcement work.⁶⁸ The bill, which President Clinton promptly threatened to veto,⁶⁹ included some 17 specific riders intended to curtail EPA's enforcement authority and limit its regulatory powers, along with provisions that would force Congress to reauthorize the CAA, the CWA, and the SDWA in order for the implementation of those statutes to receive funding.⁷⁰ After initially rejecting the measure,⁷¹ the full House

reversed itself and passed the bill on a vote of 228 to 193.⁷² President Clinton responded by labeling the bill a “polluter's protection act,” and once again threatening to veto it.⁷³

The House-passed EPA spending bill then moved to the Senate. There, the Appropriations Committee (followed soon afterward by the full Senate) voted to cut approximately \$1 billion from what had been EPA's FY 1995 budget—an immense cut, but one that was nonetheless more modest than EPA budget reductions and restrictions that had passed the House.

This development was followed by a series of House-Senate conference committee meetings in which House negotiators agreed to remove, or soften, the most intensely disputed rider provisions of the legislation that the House had originally adopted and to cut EPA's budget only to the extent that the Senate bill had called for.

The compromise spending bill (which would still have cut the Agency's overall budget by 14% and EPA's enforcement budget by 21% from the prior year) remained unacceptable to the Clinton Administration. President Clinton formally vetoed the bill along with certain other proposed appropriation measures, in mid-November 1995. That decisive action by the president led to an immediate, disruptive and extensively publicized, six-day partial shutdown of the federal government, including EPA and numerous other federal agencies and departments.⁷⁴

This shutdown—the first of two that would be caused by this dispute—was resolved by a stopgap agreement to finance EPA and other agencies at a reduced level, on a temporary basis, until mid-December. In the meanwhile, President Clinton agreed to meet directly with the Republican congressional leadership—including House Speaker Gingrich and Senate Majority Leader Bob Dole (R-Kan.)—to work out a compromise spending package.⁷⁵

These high-level negotiations soon stalled, however.⁷⁶ The House and Senate responded to that stalemate by passing a new set of spending bills almost identical to the bills that President Clinton had previously vetoed with respect to the levels of spending they permitted, and which also added back a number of the antiregulatory riders that House nego-

1995, at A22; John H. Cushman Jr., *House Votes Sweeping Changes in Clean Water Act*, N.Y. TIMES, May 17, 1995, at A17.

62. Cushman, *Congressional Roundup*, *supra* note 61.

63. Cushman, *Congressional Republicans Take Aim*, *supra* note 61.

64. Cushman, *The 104th Congress*, *supra* note 61.

65. *After 100 Days: A Legacy of Unfairness or a Bolder Direction?*, N.Y. TIMES, Apr. 9, 1995, at A15.

66. Adam Clymer, *Congressional Memo: After Bad Week, GOP Looks to Budget for Help*, N.Y. TIMES, July 23, 1995, at A18.

67. *Id.*

68. Jerry Gray, *House Rebuffs Many Budget Amendments*, N.Y. TIMES, July 28, 1995, at A18.

69. John H. Cushman Jr., *Clinton Threatens Veto of EPA Budget Cutbacks*, N.Y. TIMES, July 17, 1995, at A1.

70. Gray, *House Rebuffs*, *supra* note 68.

71. John H. Cushman Jr., *House Coalition Sets GOP Back on Environment*, N.Y. TIMES, July 29, 1995, at A1.

72. John H. Cushman Jr., *GOP House Leaders Succeed in Advancing Limits on EPA*, N.Y. TIMES, Aug. 1, 1995, at A1.

73. Todd S. Purdum, *Clinton Lashes Out at Congress, Citing Pollution and Guns*, N.Y. TIMES, Aug. 2, 1995, at A1. Administrator Browner also remained highly critical of the House's action. In a series of speeches, she stressed the importance to society of keeping the “environmental cop on the beat,” and the public health significance of the legislation that the Republican leadership was seeking to curtail or repeal. Interview with Carol Browner.

74. Jerry Gray, *Negotiators on Budget Make Some Headway*, N.Y. TIMES, Nov. 30, 1995, at B14.

75. *Id.* Prior to that, at the close of FY 1995, in September 1995, when the same set of budgetary disagreements had not been resolved, the president and leaders of the Republican-controlled Congress had agreed to keep the government open until November 13, with modestly reduced budgetary allowances to be allocated to government agencies prior to that deadline. Michael Weiss, *GOP and Clinton Reach Deal to Halt Federal Shutdown*, N.Y. TIMES, Sept. 28, 1995, at A1.

76. David E. Rosenbaum, *Congressional Memo: Two Sides in Budget Talks Take the Road to Nowhere*, N.Y. TIMES, Dec. 2, 1995, at A8; David E. Rosenbaum, *Clinton Outlines Alternative Plan to Halt Deficit*, N.Y. TIMES, Dec. 8, 1995, at A1; David E. Rosenbaum, *With No Budget Clinton and Republicans Pass the Blame*, N.Y. TIMES, Dec. 17, 1995, at A40; Michael Wines, *High Level Talks Again Fail to End Budget Standoff*, N.Y. TIMES, Dec. 23, 1995, at A1.

tiators had previously agreed to abandon in House-Senate conference committee sessions.⁷⁷ President Clinton vetoed these bills as well, and the budgetary impasse continued.⁷⁸

In the meantime, on December 15, the temporary spending authority of a number of executive branch agencies and departments, including EPA, expired. As a result, 280,000 federal employees, including nearly all EPA employees, were placed on "furlough status." Their forced layoffs (for which the employees did ultimately receive full back pay) lasted for some 27 days. Virtually all EPA operations were suspended during this period—including ongoing work at approximately 500 Superfund sites—and the EPA Administrator publicly warned that if the Republican budget cuts went into effect, 3,000 to 5,000 EPA employees would lose their jobs on a permanent basis, beginning in May 1996.⁷⁹

Finally, after returning from a holiday recess, Congress voted on January 5, 1996, to approve three bills that reopened closed federal programs to various degrees and returned many federal workers to their jobs. President Clinton quickly signed that legislation; with the federal government (including EPA) open and operating once again, negotiations between Congress and the White House over the federal budget were renewed.⁸⁰

Following the January 5 vote, Rep. John R. Kasich (R-Ohio), chairman of the House Budget Committee, publicly declared: "We're not anywhere near raising a white flag."⁸¹ Soon afterwards, however, events were to prove that statement false. During their holiday visits to their districts, a number of congressional representatives had found many of their constituents angry over the continuing government shutdown, and also tending to blame congressional Republicans, more than the Clinton Administration, for the continuing impasse. These impressions dovetailed with the results of several public opinion polls, commissioned by Republican politicians, which found broad public disdain for the antienvironmental positions of the Republican leadership.⁸² In addition, early in February 1996, Ron Wyden, a Democrat, won an upset victory in a special election to replace Sen. Bob Packwood (R-Or.). Exit polls from that election indicated that the efforts of congressional Repub-

licans to undermine EPA had played a crucial role in Wyden's victory.⁸³

In response to those clear public signals, Republicans in the House and Senate, with the support of their allies in regulated industries,⁸⁴ gradually began to back away from further confrontations on environmental issues. On March 6, 1996, faced with the potential defection of a bloc of Republican representatives, House Republican leaders postponed debate on a conservative bill to roll back government regulations; and they promised to work on less sweeping versions of the legislation.⁸⁵ Two days later, they entered into an agreement with the Administration to extend the government's borrowing authority for two more weeks, thus averting a third, unpopular government closure.⁸⁶

Finally, in the last week of April 1996, after continued, contentious negotiations and repeated, temporary extensions of funding for government agency operations, Congress and the Administration reached an agreement on a \$160 billion FY 1996 spending bill. This bill eliminated riders that would have impaired EPA's enforcement and regulatory activities and restored funding for the Agency (including its enforcement programs) at a level of \$6.6 billion, only slightly below the amount that EPA had spent in the previous FY.⁸⁷

Although it ended with little immediate change in EPA's resource levels, the lengthy and often bitter partisan struggle over fiscal policy in late 1995 and early 1996 did have very significant impacts—both in the short term and in the longer run—on EPA and its enforcement work. The lengthy dispute, with its two employee furloughs and months of uncertainty, led to a precipitous (if short-lived) decline in the morale of the Agency's career staff. The controversy also created a "chilling effect" on EPA enforcement work.⁸⁸ As Lassiter recalled:

People got scared that their reputation among Congress was that they were heavy handed and beat up on the little guys. This created a tough environment for [EPA] enforcement to be aggressive. The Agency's reaction was to be cautious not to do anything that would get it negative publicity.⁸⁹

In addition, the winter 1995-1996 EPA employee furloughs set back the Agency's internal timetable for conducting inspections of regulated facilities; and some EPA regional offices, unsure what their budgets would ultimately be, held back resources from inspections, and other routine enforcement-related tasks during the entire budget dispute, in favor of what they perceived as higher priority projects. These steps delayed EPA's enforcement process for the rest

77. John H. Cushman Jr., *Senate Backs Cuts in Environmental Spending*, N.Y. TIMES, Dec. 15, 1995, at A35; John H. Cushman Jr., *Brief Clause in Bill Would Curb U.S. Power to Protect Wetlands*, N.Y. TIMES, Dec. 12, 1995, at A1.

78. Todd S. Purdham, *Two More Spending Bills Vetoed But Clinton Offers to Negotiate*, N.Y. TIMES, Dec. 19, 1995, at A1.

79. John H. Cushman Jr., *Budget Cuts Leave EPA Facing Layoffs*, N.Y. TIMES, Dec. 24, 1995, at A14. In fact, internal EPA contingency planning for the possibility of budget cuts and employee furloughs had begun in the summer of 1995. At that time, EPA curtailed its travel budgets, laid off temporary workers, encouraged some veteran employees to take early retirements, and placed a freeze on promotions. *Id.*

80. Adam Clymer, *Congress Votes to Return 760,000 to Federal Payroll and Resume Some Services; Step Is Temporary*, N.Y. TIMES, Jan. 6, 1996, at A1.

81. *Id.*

82. John H. Cushman Jr., *GOP Backing Off From Tough Stand Over Environment*, N.Y. TIMES, Jan. 26, 1996, at A1. One such pollster, Linda Di Vall, reported that "by greater than a 2-1 margin, voters have more confidence in the Democrats than the Republicans as the party they trust most to protect the environment. Most disturbing is that 55% of Republicans do not trust their party when it comes to protecting the environment, while 72% of the Democrats do trust their party." Thus, Di Vall concluded, "attacking the EPA is a non-starter." *Id.*

83. *The Environmental Counterattack*, N.Y. TIMES, Feb. 5, 1996, at A14.

84. John H. Cushman Jr., *Businesses Scaling Back Plans to Defang Federal Regulations*, N.Y. TIMES, Feb. 3, 1996, at A1.

85. John H. Cushman Jr., *House GOP Chiefs Back Off Stiff Anti-Regulatory Plan*, N.Y. TIMES, Mar. 6, 1996, at A19.

86. Michael Wines, *Borrowing Authority of U.S. Is Extended Three Weeks*, N.Y. TIMES, Mar. 8, 1996, at A20.

87. Michael Wines, *The Budget Truce: The Overview: House and Senate Vote to Approve '96 Spending Bill*, N.Y. TIMES, Apr. 26, 1996, at A1; Jerry Gray, *The Budget Truce: The Details: Both Congress and Clinton Find Cause for Cheer in the Final Budget Deal*, N.Y. TIMES, Apr. 26, 1996, at A22.

88. Interview with Nancy Marvel.

89. Interview with Ann Lassiter.

of 1996. They contributed to a significant drop in the Agency's enforcement output levels, i.e., number of administrative enforcement actions taken, number of civil case referrals to the DOJ, amounts of civil penalties collected, etc., for FY 1996.⁹⁰

Over the longer term, the budget impasse of 1995-1996 resulted in a substantial change in the political dynamics of Washington, D.C., at least with respect to environmental policies. The Republicans' spring 1996 retreat on environmental issues proved relatively lasting, at least on a publicly visible level. Throughout the rest of the Clinton presidency, in fact, the Republican party attempted to reposition itself in the public mind as champions of the environment.⁹¹ Prior to the end of FY 1995, the Republicans had also retreated from their insistence that the Superfund statute be amended to eliminate strict, joint and several liability for responsible parties.⁹² Their disagreements with the Clinton Administration over environmental issues were greatly downplayed, even during the tumultuous period when President Clinton was impeached in the House and partisan bickering in Washington D.C., in general, was especially acrimonious and intensive. As Browner later assessed it:

In some ways, the Gingrich Congress was the best thing that ever happened to the EPA. We really drew a line in the sand with them over certain issues. For years after that, the Agency was relatively free of congressional directives and interference. We came out of it much stronger.⁹³

90. Interview with Sylvia Lowrance. Although these disruptions contributed significantly to the FY 1996 EPA enforcement output declines, it seems unlikely that they were its only cause. Interview with Mike Stahl. Regional office uncertainty over the importance of enforcement to EPA's top managers, combined with the temporary dislocations caused by the Agency's reorganization, also appear to have been factors leading to this temporary enforcement fall off. Interestingly, the FY 1996 EPA enforcement decline received relatively little public attention at the time, in large part because, from 1995 on, the Republican-dominated Congress showed no interest in conducting formal oversight of almost any aspect of EPA's performance. Interview with Dick Frandsen.

91. See, e.g., Richard L. Berke, *In a Reversal, GOP Courts the Greens*, N.Y. TIMES, July 2, 1997, at A1; Steven A. Holmes, *Republicans Trying Hard to Avoid Reprise of Past Year's Budget Battles*, N.Y. TIMES, June 17, 2000, at A8. Notably, the Republicans dropped much of the harsh rhetoric that had been employed in the heat of the budget dispute, in which some of their leaders had referred to Democrats as being part of an "eco-terrorist underworld," and had analogized EPA and its enforcement staff to "the Gestapo." See James Gerstensang, *GOP Clouds the Future of Environmental Protection*, L.A. TIMES, Dec. 25, 1995, at A1; 139 CONG. REC. S5141 (daily ed. Apr. 29, 1993) (statement of Sen. Wallop). The new Republican stance also made possible the passage of significant amendments to two important environmental statutes, the SDWA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). With respect to the SDWA Amendments, see John H. Cushman Jr., *Environment Bill's Approval Now Likely After Panel Vote*, N.Y. TIMES, June 7, 1996, at A28; John H. Cushman Jr., *Bill Would Give Water Customers Pollution Notice*, N.Y. TIMES, June 23, 1996, at A1; and *Federal Water Bill Will Pay for Repairs*, N.Y. TIMES, Aug. 1, 1996, at D22. For journalistic accounts of the amendments to FIFRA, see John H. Cushman Jr., *Pesticide Measure Advances in House, Without Rancor*, N.Y. TIMES, July 18, 1996, at A20; and *Food-Pesticide Overhaul Wins House Passage*, N.Y. TIMES, July 24, 1996, at A18.

92. John H. Cushman Jr., *Republicans Back Off Plan to Ease Polluters' Liability*, N.Y. TIMES, Sept. 29, 1995, at A28.

93. Interview with Carol Browner. Notably, however, the end of the budget controversy did not coincide with the end of all the Administration's differences with Congress over environmental enforcement issues. As the Clinton Administration DOJ's Assistant Attorney General for Environment and Natural Resources stated:

EPA's budget—including its allotment for enforcement—did (as we shall explore further) experience some significant decreases during the remainder of the Clinton years. Nonetheless, none of those monetary decreases were as dramatic, or as devastating, as EPA budget cuts that had been proposed by the leaders of the 104th Congress.

Beyond this, the policies and preferences of EPA's top managers took on a more distinctive form and shape in the aftermath of the budget impasse. With regard to enforcement, as Mugdan later recalled:

[F]rom then on, the signals from OECA changed. The message to the regions now was wait a minute, you misinterpreted us in the past. We never wanted less enforcement. We wanted more and better targeted enforcement. Yes, we want you to do compliance assistance; but we also want you to follow the "hard path" by taking actions and collecting penalties. We even expect you to overfile if a state enters into a clearly inappropriate settlement.⁹⁴

As we shall explore, with that unambiguous direction from headquarters, and the threat of elimination by a hostile Congress no longer present, in many regions, at least, EPA enforcement embarked on a period of notable success and accomplishment in President Clinton's second term in office.⁹⁵

There were stealth attacks on both DOJ and EPA enforcement. For example, there was a [legislative] proposal to change the intent standard in environmental criminal law from general intent to specific intent. Under that, there would have had to have been proof that people knew that, by their conduct, they were violating a particular regulation. That would have been much harder to prove than merely demonstrating that they knew they were discharging to a river. There were a series of those proposals. They were hard to explain to the public, but they would have had a dramatic effect on enforcement. In addition, we began to see budgets, particularly on the criminal enforcement side, that contained "earmarks" for specific programs. They said you should spend X amount of money on this type of case. But if you don't have this kind of case, what are you going to do? [Earmarks] cut into the budget. They disable EPA and DOJ from determining what the appropriate [enforcement] priorities are. We faced a number of those. EPA faced more, particularly in criminal enforcement . . . They always were [supportive of enforcement] priorities that did not focus on big, corporate polluters.

Interview with Lois Schiffer.

94. Interview with Walter Mugdan. EPA's focus also returned to numbers of inspections, enforcement actions taken, etc., as key measures of enforcement success in the period that followed the budgetary turmoil. Interview with Bill Muszynski.

95. See *infra* Section V entitled EPA Enforcement in Clinton's Second Term: Autonomy, Stability, and Solid Achievements. Outside of the enforcement area, the weakening of congressional opposition to environmental regulation allowed EPA's leaders to promulgate policies and regulations in Clinton's second term that were more protective of public health and the environment than had previously been possible. Thus, under the CAA, the Agency took the controversial step of creating (or tightening) the national ambient air quality standards for fine particulate matter and ozone. See John H. Cushman Jr., *Administration Issues Its Proposal for Tightening of Air Standards*, N.Y. TIMES, Nov. 28, 1996, at A1; John H. Cushman Jr., *Top EPA Official Not Backing Down on Air Standards*, N.Y. TIMES, June 1, 1997, at A1; Peter Passell, *Economic Scene: The Air Standards Are Set, But How Clean Is Clean Enough?*, N.Y. TIMES, July 3, 1997, at D2; John H. Cushman Jr., *D'Amato Vows to Fight for EPA's Tightened Standards*, N.Y. TIMES, June 25, 1997, at A13; John H. Cushman Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern Over Costs*, N.Y. TIMES, June 26, 1997, at A1;

IV. EPA's Institutional Enforcement Relationships During the Clinton Administration

One potential measure of the successfulness of a presidential administration's enforcement efforts at a federal administrative agency or department is the impact that administration has on the sensitive set of intragovernmental relationships that are an important aspect of federal enforcement work. These working relationships are often affected by past events—some of which may pre-date a given administration's term in office. Moreover, these relationships are sometimes entirely outside of federal officials' control. Nonetheless (at least within the limits just noted) the positions, attitudes, and actions of an agency's political appointees do, at least sometimes, have a most significant impact on both the agency's internal and its external government relationships respecting enforcement.

In this section, I will attempt to summarize the views and impressions of EPA and DOJ officials I interviewed as to seven key sets of intergovernmental relationships that concern EPA enforcement in the Clinton Administration. They include the relationships within EPA between the Agency's regional offices and its headquarters, and the interaction between EPA's enforcement attorneys and its staff enforcement engineers and scientists. They also concern the "external" relationships between those who do, supervise, or manage EPA enforcement activities and state environmental officials, the DOJ, offices of the U.S. Attorneys, Congress and the White House.

With respect to the working relationship of EPA's headquarters and EPA's regional offices in the Clinton years, little consensus emerged among those whom I interviewed. A clear plurality—but not a majority—of the people I spoke with expressed partial or full satisfaction with the way that relationship had functioned during the Clinton era.⁹⁶ This appears to have been particularly the case in the Superfund

program, where differences that arose tended to be ironed out in frequent headquarters/regional conferences at the staff and mid-management levels.⁹⁷

Other people I interviewed perceived some improvement in headquarters-regional relationships, in the enforcement area, during Clinton's second term in office.⁹⁸ Those individuals differed, however, as to how and why those improvements occurred. Thus, some participants felt that headquarters' upgraded its working relationship the most with regional offices that participated in large-scale sector-based enforcement initiatives.⁹⁹ Another senior EPA enforcement official, on the other hand, noted Clinton period second-term improvements in the extent of headquarters/regional cooperation mainly in regional offices that had chosen to restructure their organizations in order to recreate regional enforcement divisions that reported directly to the OECA.¹⁰⁰

Still other members of EPA and the DOJ's enforcement staff emphasized the inherent variability of EPA headquarters' enforcement relationship with the Agency's regional offices. Of that group, some interviewees described the relationship as "cyclical" within each Region.¹⁰¹ Others noted high levels of variability based upon the environmental medium in which particular issues arose¹⁰² and differing professional styles and personalities of EPA's managers and staff members.¹⁰³

Another subset of the individuals whom I spoke with were more negative (to one degree or another) in their assessment of EPA headquarters' relationship with regional office enforcement personnel in the Clinton period. Some regional office enforcement officials, for example, complained that the level of knowledge, experience, and expertise of the headquarters' enforcement staff declined over this time.¹⁰⁴ This perceived decline seems consistent with the view that the headquarters staff had become "overseers and second guessers" of regional decisions in particular cases, as opposed to the providers of valuable information as to, e.g., what other Regions were doing as to similar problems, what national policies were being developed by the OECA, and what the trends were likely to be with regard to EPA's budget.¹⁰⁵

Some participants noted that, as was always traditionally true at EPA, conflicts between headquarters and the regional offices in the enforcement area often centered on whether considerations of national consistency outweighed the Regions' need for flexibility in resolving problems and settling priorities consistent with unique regional or local circum-

Matthew L. Wald, *Court Overturns Air Quality Rules*, N.Y. TIMES, May 15, 1999, at A1; Linda Greenhouse, *Court to Hear Clean Air Test of Congressional Authority*, N.Y. TIMES, May 23, 2000, at A22; and Linda Greenhouse, *Supreme Court Roundup: Justices Broaden Their Look at the Clean Air Act*, N.Y. TIMES, May 31, 2000, at A19. The Agency also approved final rules that would cut emissions from heavy-duty buses and trucks. See Matthew L. Wald, *EPA to Issue Tougher Rules on Diesel Fuel*, N.Y. TIMES, May 17, 2000, at A1; and Douglas Jehl, *New Rules to Cut Diesel Emissions*, N.Y. TIMES, Dec. 21, 2000, at A1. Additionally, it set stricter emission standards for cars and light trucks. Matthew L. Wald, *Stricter Pollution Controls Set for Cars and Light Trucks*, N.Y. TIMES, Dec. 21, 1999, at A29. Under the CWA, EPA increased the regulation of polluted runoff from feedlots and other agricultural sources. David Stout, *To Save Waterways EPA Will Tighten Regulation of Big Farms*, N.Y. TIMES, Mar. 5, 1998, at A19. The Agency issued a new set of regulations regarding state water quality standards and total maximum daily load requirements. Matthew L. Wald & Steven Greenhouse, *EPA Institutes Water Regulations Before a Bill Blocking Them Becomes Law*, N.Y. TIMES, July 12, 2000, at A17. Moreover, EPA established tighter rules regarding the discharge of toxic materials by pulp and paper mills. John H. Cushman Jr., *EPA Seeks Cut in Paper Mill Pollution, But Not Elimination*, N.Y. TIMES, May 21, 1997, at A21. The Agency proposed strict regulation, under the SDWA, of arsenic in tap water. John H. Cushman Jr., *EPA Proposes New Rule to Lower Arsenic in Tap Water*, N.Y. TIMES, May 25, 2000, at A20; and EPA established a policy of focusing on environmental protection standards on the risks that pollutants pose to the health of children. John H. Cushman Jr., *Children's Health Is to Guide EPA*, N.Y. TIMES, Sept. 12, 1996, at A14.

96. Interviews with Allyn Stern, Allan Zabel, Bert Frye, Bob Tolpa, Rett Nelson, Walter Mugdan, Steve Herman, Sylvia Lowrance, Larry Kyte, Kathleen Johnson, and Bill Munro.

97. Interviews with Larry Kyte, Kathleen Johnson, and Bill Munro.

98. Interviews with Steve Herman, Eric Schaeffer, Mike Walker, Walter Mugdan, Sylvia Lowrance, Bruce Buckheit, and Bill Muszynski.

99. Interviews with Bruce Buckheit and Bill Muszynski.

100. Interview with Sylvia Lowrance.

101. Interviews with David Nielsen and Noël Wise.

102. Interview with Rett Nelson.

103. Interviews with Felicia Marcus and a former EPA attorney who asked that I not identify him or her by name.

104. Interviews with George Czerniak, Gail Ginsberg, and Nancy Marvel. One EPA regional manager dissented from this view, observing that, in the RCRA area, EPA headquarters personnel provided helpful technical advice. Interview with Joe Boyle.

105. Interviews with Gail Ginsberg as well as a former EPA attorney and a current EPA enforcement manager, the latter two of whom made this observation on condition of anonymity.

stances.¹⁰⁶ Similarly, other EPA officials noted tensions in particular subject areas—such as with regard to pesticide enforcement cases, asbestos matters, lead in drinking water, and the levels of pollution control to be placed on sulfur dioxide and nitrogen oxide (NO_x) emissions in industrywide settlement agreements—areas in which regional and national priorities differed.¹⁰⁷

Many of the individuals I spoke with were wholly or partially pleased with the quality and professionalism of the interaction between EPA's enforcement attorneys and engineers in the Clinton years.¹⁰⁸ Others indicated that that set of relationships had improved over the course of the Clinton Administration,¹⁰⁹ particularly after the Agency reorganization of 1993-1994.¹¹⁰

In contrast, another subset of EPA enforcement officials viewed the attorney-scientist relationship as continuing to be mostly strained and troubled,¹¹¹ or at least highly variable.¹¹² Some attributed the Agency interdisciplinary tensions that they had identified to personality differences among particular sets of individuals,¹¹³ and the varied approaches of EPA regional managers¹¹⁴ during the 1990s. Other interviewees noted that, until relatively late in the Clinton Administration, EPA headquarters enforcement attorneys worked for higher pay than EPA headquarters enforcement engineers. This unfair disparity in compensation was evidently a source of some interdisciplinary tension and discontent during much of the Clinton era.¹¹⁵

Although it had fluctuations, and it included several periods of relative calm, the relationship between EPA enforcement officials and their counterparts in a number of state environmental departments and agencies was frequently stormy and contentious during the Clinton Administration. A number of EPA and DOJ enforcement officials whom I interviewed noted a great deal of variation—by state, by program, and by EPA Region—in the tenor of EPA's dealings

with the states.¹¹⁶ Many federal enforcement staff members and managers also expressed the view that EPA-state relations were often more cooperative at the career staff level than at upper management levels, where political and ideological factors tend to play a greater role.¹¹⁷

EPA and the DOJ did make an active effort to “reach out to the states” in the enforcement area.¹¹⁸ As a result, EPA and the states (usually acting through the offices of their attorneys general) acted as coplaintiffs in a number of federal civil enforcement matters,¹¹⁹ and EPA and the DOJ established cooperative relationships as well with state and local law enforcement officials with regard to some criminal enforcement cases.¹²⁰ Moreover, immediately following EPA's reorganization, the Agency's enforcement oversight of the states declined¹²¹; and EPA created a new, more flexible policy framework, the National Environmental Performance Partnership System (NEPPS), to govern a number of aspects of federal-state relations.¹²²

Notwithstanding NEPPS, however, after the middle of the 1990s, EPA tried to convince the states to continue following critical aspects of its traditional, deterrence-based, enforcement approach, as set forth in the Agency's 1986 Revised Policy Framework (RPF) for state-EPA enforcement agreements. As Clifford Rechtschaffen and David Markell have perceptively observed in their fine book, *Reinventing Environmental Enforcement and the State/Federal Relationship*,¹²³ this inconsistent federal approach had the unfortunate effect of sending “mixed signals” to the states as to what EPA truly expected of them. It resulted in increased state-level frustration with Agency oversight of state enforcement work. As one EPA regional enforcement coordinator described it: “NEPPS raised the expectations of some states that EPA would leave them alone. When that didn't happen, it raised their hackles.”¹²⁴

Some of EPA's initial policy changes, which the states generally favored, were lobbied for or supported by the En-

106. Interviews with Mike Stahl, Joe Boyle, John Warren, David Buente, and one present and one former federal government environmental enforcement attorney, both of whom requested anonymity.

107. Interviews with Bill Muszynski and an EPA enforcement staff member who asked that his or her name not be published.

108. Interviews with Nancy Marvel, Kathleen Johnson, Steve Rothblatt, Mimi Newton, David Nielsen, Bert Frey, John Lyons, Allyn Stern, Felicia Marcus, Bob Tolpa, George Czerniak, Michelle Benson, and Tinka Hyde.

109. Interviews with Mike Walker and Bruce Buckheit.

110. Interviews with Bill Muszynski and David Buente.

111. Interviews with George Hays and Cheryl Wasserman. Wasserman told me that the attempt made by the designers of EPA's reorganization to integrate enforcement attorneys and technical people into a single “headquarters office” led to a diminishment of stature for many of the non-attorneys, and a consequent loss of their programmatic perspectives. Interview with Cheryl Wasserman.

112. Interviews with Ann Nutt, Allan Zabel, Gail Ginsberg, Noël Wise, and John Rothman.

113. Interviews with Ann Nutt, Allan Zabel, Gail Ginsberg, John Rothman, Noël Wise, and Tinka Hyde. *Accord* Interview with Nancy Marvel. (Marvel observed that, in individual cases, “the quality of the [interdisciplinary] relationship totally depends on the competence level on both sides. . . . If there is an imbalance on either side, then there is a problem.”) *Id.*

114. Interview with Gail Ginsberg.

115. Interviews with Mike Stahl, Steve Herman, Ann Lassiter, and Eric Schaeffer. Mr. Schaeffer stated that “setting an artificial cap on technical staff pay and advancement was one of the worst personnel decisions of the Clinton era. It was grossly unfair to some of our most talented employees.” Interview with Eric Schaeffer.

116. Interviews with Mimi Newton, Gail Ginsberg, Nancy Marvel, Bruce Gelber, David Buente, Bob Kaplan, Noël Wise, Felicia Marcus, Tinka Hyde, John Rothman, and an EPA employee who requested anonymity. One interviewee particularly emphasized the extent to which, for internal political reasons, some of the EPA regional offices (especially in Regions IV, VI, and X) “always had both hands tied behind their backs in relating to the states.” Interview with George Hays.

117. Interviews with Sylvia Lowrance, Gail Ginsberg, Eric Schaeffer, Lois Schiffer, Steve Herman, Carol Browner, and an EPA enforcement official who asked that I not reveal his or her name.

118. Interviews with Rett Nelson, Gail Ginsberg, and Michelle Benson.

119. Interviews with Lois Schiffer, Bob Kaplan, John Cruden, Noël Wise, and Gail Ginsberg.

120. Interview with an EPA attorney familiar with the Agency's criminal enforcement program who prefers to remain anonymous.

121. Interviews with Ann Lassiter, Joe Boyle, Tinka Hyde, and an EPA enforcement official who asked not to be identified by name.

122. See U.S. EPA JOINT AGREEMENT TO REFORM OVERSIGHT AND CREATE A NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM (1995), available at <http://www.epa.gov/ocirpage/nepps/oversight.htm>. NEPPS sought to expand the role of the states in planning their delegated program activities in the context of individual “performance partnership agreements” with EPA. It also called for reduced EPA oversight of state performance in exchange for greater state accountability for environmental results, as measured by the “outcome” of the states' work. *Id.*

123. CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* (Env'tl. L. Inst. 2004).

124. Interview with Tinka Hyde.

vironmental Council of States (ECOS). That organization, composed of state environmental commissioners, was formed in 1993, to increase the influence and autonomy of state officials in environmental policymaking.¹²⁵ From the outset, ECOS expressed dissatisfaction with what it viewed as inflexible EPA oversight, burdensome reporting requirements, and a paucity of state input in EPA policy decisions. With regard to enforcement, a number of its members favored greater reliance on compliance assistance, the enactment of environmental immunity and privilege laws, and a reduced emphasis on traditional inspections, formal enforcement actions and penalties.¹²⁶

As the Clinton Administration progressed, state-federal enforcement relationships gradually became more strained. EPA began to increase its pressure on the states to make use of a more traditional deterrent enforcement approach.¹²⁷ This policy shift—which came in the aftermath of the Administration’s protracted budgetary struggle with Congress in 1995 and 1996 gave rise to angry protests from state officials, particularly during Clinton’s second term in office.¹²⁸ As Ginsberg described it, in this period ECOS developed “a bash-EPA orientation. They would invite people like Steve [Herman] and Sylvia [Lowrance] and other high-ranking EPA officials to come to their meetings, and then they would just attempt to humiliate them.”¹²⁹

Although it had multiple causes, a good deal of the animosity between EPA and state officials in the Clinton years seems to have been inspired by partisan rivalry. As Mike

Stahl later pointed out, during much of the Clinton period “37 or so governors were Republican, and EPA was run by Democrats. That fact alone led to friction.”¹³⁰

Whatever its precise genesis, however, many of the disputes between EPA and state environmental enforcement personnel in the Clinton era focused on a limited set of policy questions. One of these issues was a controversy over state privilege and immunity statutes. In the 1980s, in response to more aggressive environmental enforcement by both government agencies and private citizens, a number of companies had begun to conduct voluntary audits in order to make an independent, systematic review of their facilities’ compliance with environmental requirements. Some of those firms subsequently lobbied both Congress and the states for audit privilege and immunity laws.¹³¹ Although these companies were unsuccessful in gaining the passage of favorable federal legislation, they did convince nearly half of the states to pass some version of an audit privilege or immunity statute.¹³²

Throughout the Clinton Administration, EPA and the DOJ staunchly and consistently opposed these state laws on the basis that they severely undercut state enforcement efforts. The Agency threatened to revoke previously issued delegations, and withhold delegation of new authority for federal delegated environmental programs, until the states effectively repealed their audit and privilege statutes.¹³³ In the end, nearly all states that had enacted such laws did later modify or narrow them to EPA’s satisfaction.¹³⁴ Nonetheless, the battling that took place over this issue left a bitter taste in the mouths of some state environmental officials.

Another key point of dispute between EPA and the states concerned EPA’s occasional practice of overfiling, i.e., initiating a federal enforcement action after the completion of a state enforcement action for the same environmental violations. Such actions, which usually reflected EPA’s strong dissatisfaction with a state’s failure to assess sufficient pen-

125. For some interesting insights into the establishment and early history of ECOS, see *ECOS: Ten Years Putting the States on the Map*, in *ECOSTATES: THE JOURNAL OF THE ENVIRONMENTAL COUNCIL OF THE STATES* (2003).

126. In Eric Schaeffer’s view, “ECOS is an organization where a handful of very ideological commissioners . . . can end up driving resolutions and passing resolutions that the rest of the commissioners never heard of or are only vaguely aware of. Their position on enforcement was: ‘Feds, give us money and keep out!’” Interview with Eric Schaeffer.

127. Interviews with John Rothman and Tinka Hyde. EPA’s change of position was, in substantial part, a response to a report by the Agency’s Office of Inspector General that was highly critical of the enforcement efforts of the commonwealth of Pennsylvania and EPA’s Region III’s lax oversight of that state’s enforcement performance. Interview with Tinka Hyde. In contrast, as another EPA enforcement manager recalled this conflict, EPA/state tensions actually arose “over the fact that EPA was conducting its own program with a strong element of deterrence, which rankled some states where we were taking enforcement action.” That, more than any conscious decision by EPA to force states to take a different approach themselves, was the primary source of the disagreement in that person’s view. Interview with Mike Stahl.

128. Interviews with Bruce Buckheit and Bill Muszynski. See also John H. Cushman Jr., *States Neglecting Pollution Rules*, *White House Says*, N.Y. TIMES, Dec. 15, 1996, at A1.

129. Interview with Gail Ginsberg. *Accord* Interview with Lois Schiffer (“ECOS, as it was at that time, was not a helpful organization. Insofar as the then leadership of ECOS pitched it as “the States v. EPA,” it was then quite unhelpful. At that time, ECOS drove polarization.”). Steve Herman’s recollections of his own contacts with ECOS were more mild and diplomatic: “Some meetings with ECOS were confrontational, others were not. At ECOS we didn’t deal with day-to-day issues, we dealt with large policy issues. Thus, differences tended to be much sharper. However, we didn’t run into those questions at the individual state level.” Interview with Steve Herman. Similarly, Carol Browner told me “ECOS used to drive me nuts, but overall it was a worthwhile organization that gave [state] environmental commissioners a voice with EPA.” Interview with Carol Browner. Interestingly, Browner analogized EPA’s relationship with the states to “an arranged marriage.” She stated “we wouldn’t necessarily choose each other but we’re together, and hopefully we have a shared agenda. It is a relationship that has to be worked at.”

130. Interview with Mike Stahl.

131. In general, audit privilege laws bar the use of environmental audit documents and reports as evidence in environmental enforcement litigation and allow those papers to be withheld from public governmental disclosure. Immunity measures, in contrast, protect companies from sanctions for environmental violations if the violations are discovered in the course of an environmental audit, promptly reported to environmental authorities, and corrected within a specified time. The rationale for both kinds of laws is that they create needed incentives to conduct audits for companies that would otherwise forego systematic compliance reviews because of fear that any violations that they discover thereby will later be used against them by enforcement authorities or citizen suit plaintiffs.

132. RECHTSCHAFFEN & MARKELL, *supra* note 123, at 157.

133. EPA’s formal position with respect to the minimum enforcement authority that states with audit and privilege law must demonstrate to satisfy program delegation standards was set forth in Memorandum from Steven A. Herman et al., U.S. EPA, to Regional Administrators et al., U.S. EPA (Feb. 14, 1997).

134. Interview with Mike Walker. In 1995, EPA issued an audit policy (later revised modestly) that sought to encourage environmental auditing, without adopting a privilege and immunity approach. Under this policy, the Agency committed not to seek “gravity-based penalties” for firms that conduct audits, so long as the firm’s violations are identified voluntarily, disclosed to EPA promptly, and corrected expeditiously. However, the Agency may still decide to seek penalties to remove any economic gains that the company has realized as a result of its noncompliance. See *Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations*, 65 Fed. Reg. 19618 (Apr. 11, 2000). Steve Herman considers this policy to be one of the signal achievements of his time in office. Interview with Steve Herman.

alties to redress the violations in question, have tended to provoke bitter protests from state enforcement officials. Ultimately, the overfiling issue was addressed by the federal courts.

In 1999, in *Harmon Industries, Inc. v. Browner*,¹³⁵ the U.S. Court of Appeals for the Eighth Circuit invalidated an overfiled EPA administrative enforcement order that had assessed penalties under RCRA against a firm, which had previously entered into a consent decree with the state of Missouri covering the same violations. This surprising decision, which has subsequently been squarely rejected by several other federal courts,¹³⁶ resulted in an especially “cautious approach” to overfiling by EPA and the DOJ during the final years of the Clinton era. Regrettably, that self-imposed federal caution took away some of EPA’s negotiating leverage, both with individual violators and with recalcitrant states, because it undercut the perceived probability that EPA might overfile in any given case.¹³⁷

In stark contrast with EPA’s frequently troubled enforcement relationship with the states during the Clinton period, the Agency’s working relationship with the DOJ during the same era was generally harmonious. Some 22 of the officials I spoke with described the EPA-DOJ relationship as being either “excellent,” “great,” “respectful,” “good,” “co-operative,” “harmonious,” or “collegial.”¹³⁸ A far smaller number of interviewees mentioned that the Clinton era EPA-DOJ relationship varied by individual,¹³⁹ and/or made note of occasional contention between the organizations over questions of policy.¹⁴⁰

With respect to the kinds of issues that arose when the relationship did experience some frictions, a significant number of EPA and DOJ employees whom I spoke with referred to an ever-increasing shortage of DOJ attorneys to work on EPA enforcement cases.¹⁴¹ As George Czerniak, an experienced enforcement manager in EPA’s Region V’s program, put it:

DOJ has limited resources for [enforcement] cases. They can get consumed by very large cases. Cases you refer to them may not get filed for a couple of years. Then, when they do get filed, the cases may not proceed as quickly as you want them to.¹⁴²

135. 191 F.3d 894, 29 ELR 21412 (8th Cir. 1999).

136. For an analysis of those cases, see Joel A. Mintz, “*Enforcement ‘Overfiling’ in the Federal Courts: Some Thoughts on the Post-Harmon Cases*,” 21 VA. ENVTL. L.J. 425 (2003).

137. Interview with Gail Ginsberg.

138. Interviews with Ann Nutt, John Lyons, Allyn Stern, Steve Herman, John Rothman, Allan Zabel, Michelle Benson, Walter Mugdan, Tinka Hyde, George Hays, Nancy Marvel, Noël Wise, Kathleen Johnson, Gail Ginsberg, Eric Schaeffer, Sylvia Lowrance, Lois Schiffer, Bill Muno, David Nielsen, and Joe Boyle.

139. Interviews with several federal employees who preferred not to be identified. Another EPA attorney opined that the relationship varied from regional office to regional office. Interview with George Hays.

140. Interviews with Bruce Buckheit and Tinka Hyde. Buckheit told me: “[A]t times our relationship was contentious as we argued over things we were passionate about—usually about tactics rather than where to go. But that was never mostly the case. It was more like [we had occasional] differences within a family. We [at EPA] were never at war with the Department.” Interview with Bruce Buckheit.

141. Interviews with Gail Ginsberg, Mimi Newton, George Czerniak, Bert Frey, Eric Schaeffer, Bob Kaplan, David Nielsen, Rett Nelson, Ann Lyons, Tom Bramscher, Allen Zabel, and Michelle Benson.

142. Interview with George Czerniak.

Other common points of tension arose from the attitudes and perceptions of EPA and DOJ staff attorneys. As one EPA regional enforcement attorney saw it:

DOJ attorneys sometimes viewed themselves as superior to EPA attorneys, and as in charge of [enforcement] cases, despite their relative lack of experience. Also, DOJ often treated EPA with skepticism, as bean counters who go after smaller cases and ignore larger ones. [Additionally] DOJ sometimes rushed cases to settlement, despite EPA’s wishes.¹⁴³

Moreover, as EPA Region II manager Muszynski observed:

There were tensions as a result of DOJ concerns about taking weak cases and establishing bad national precedents. That view conflicted with EPA’s desire to be more assertive [in enforcement].¹⁴⁴

These occasional rivalries and tensions, however, should not obscure the extent to which EPA and the DOJ’s enforcement staff typically worked together effectively and harmoniously during the Clinton Administration. Substantial credit for that beneficial—and far from inevitable—situation must go to Assistant Administrator Herman and Assistant Attorney General Lois Schiffer. The smooth and respectful working relationship that those two political appointees established with one another set a healthy, positive tone for the rest of their respective organizations.¹⁴⁵ As Herman recollected:

DOJ was always brought in at the beginning when EPA was developing a policy, and Justice did the same thing with their policies that affected EPA. Lois Schiffer and I talked an awful lot. If a problem came up, we didn’t let it get out of hand. God knows, we didn’t always agree. But it was always handled in a professional way, with no backbiting, and always with the best interests of both agencies in mind. There was an awful lot of constructive collaboration present, which really paid off.¹⁴⁶

Schiffer’s observations were to the same effect:

I had hired Steve Herman at DOJ back in the 1970s. We were friends. That really helped because it meant that if our staffs were at loggerheads on a particular issue we would work it out together . . . We set an example for working things out between the agencies that our staffs observed and followed.¹⁴⁷

In contrast to its largely effective dealings with “main Justice,” EPA’s enforcement relationship with the offices of U.S. Attorneys in the Clinton years was played out on a much smaller stage. According to a number of EPA and DOJ people I spoke with, U.S. Attorneys offices are usually far

143. Interview with an EPA regional enforcement attorney who asked not to be identified by name.

144. Interview with Bill Muszynski. *Accord* interview with Larry Kyte (“DOJ’s attitude was that “they represent the United States, and not necessarily EPA. EPA’s attorneys were more inclined to support the Agency’s views. This caused some tension at times. Nonetheless, there was mutual respect.”).

145. Credit for EPA’s good enforcement relationship with the DOJ should also be given to John Cruden, a talented mid-level manager at the DOJ. As Walker put it, EPA/DOJ working relations in enforcement were “much improved, largely because of John Cruden. He’s a wonderful man. He has sympathy for what it is like to be a client working for DOJ. He has done a great job.” Interview with Mike Walker.

146. Interview with Steve Herman.

147. Interview with Lois Schiffer.

more interested in handling environmental criminal prosecutions than they are in initiating civil enforcement actions.¹⁴⁸ Their collective role in environmental enforcement in the 1990s was thus relatively minor.

The interest of U.S. Attorneys in environmental matters appears to have varied considerably from office to office.¹⁴⁹ Thus, in a few (mostly large) cities around the United States, U.S. Attorneys did voluntarily become involved in important EPA enforcement cases during the Clinton era.¹⁵⁰ For the most part, however, as noted above, those relatively autonomous political appointees chose not to involve themselves in redressing environmental violations during that period.

As we have previously seen, the lengthy budgetary dispute between the 104th Congress and EPA had significant short-term and long-run impacts on the Agency's enforcement efforts during the Clinton Administration. Congress' hostility to environmental regulation was also influential in other ways. From 1995 on, Congress' fundamental message to EPA altered dramatically. As David Nielson put it:

Expectations changed. In the late 1980s Congress' oversight focused on [the adequacy of] EPA's implementation of regulatory requirements. [During the mid-1990s] the focus on the Hill was on things like: Are you being too harsh on small businesses? Are you imposing penalties that are too great?¹⁵¹

As we have noted, the Clinton Administration's long battle with Congress in 1995-1996 culminated in what appear to be a "victory" for the opponents of drastic budget cuts for EPA and its enforcement programs. Nonetheless, using techniques that were far less visible to the public, from the mid-1990s forward, Congress made modest (but cumulatively significant) annual cuts in the money available for environmental enforcement at EPA and the DOJ.

In significant part, this was accomplished by what some EPA employees refer to as "Congress' cost-of-living allowance (COLA) trick." Congress mandated that all federal agencies and departments provide their employees with cost-of-living salary increases. At the same time, Congress did not appropriate any funds to pay for these required payroll increases. Federal agencies and departments (including EPA) were thus forced to economize on other items that were included in their supposedly "approved" and "funded" budgets in order to comply with Congress' dictates.

Federal agencies and departments have chosen to cope with this situation—which has continued into the Bush II

Administration—in several different ways. Some have "frozen" staff hiring, and saved money by diminishing the size of their staffs by attrition. Others have left staff positions (for which funds were appropriated) vacant for extended periods—a technique that tends to present the false impression that the agency or department has a larger work force than it actually does.

The most widely used response to the "COLA trick," however, has been for agencies to increase their salary pools by diverting funds from their "extramural budget," which (in EPA's case) is used to contract the services of needed expert witnesses and to pay for other, crucially important, enforcement litigation expenses. This approach has led to long-term imbalances. In particular, a number of EPA's regional offices have suffered to a very significant extent from the ever-growing resource crunch, which it created.

The budgetary situation in EPA Region V provides a useful illustration of this Agencywide financial problem. From FY 1996 to FY 2004, Region V's extramural budget decreased from \$1.46 million to \$746,000. Moreover, because Congress ordered EPA to use some of its extramural budget funds only for specially dedicated purposes, e.g., for enforcement on tribal lands and lead paint inspections, Region V had only \$438,500 available to it in extramural discretionary funds in FY 2004, a paltry sum relative to the Region's urgent need for those funds.¹⁵²

In addition to open budget cuts and the reduction of EPA enforcement funding through the COLA trick, Congress also interfered with the Agency's enforcement work in the latter part of the Clinton Administration by earmarking enforcement funds for particular, narrow purposes. It also sometimes included language in committee reports ordering that the Agency not engage in certain types of enforcement activities, e.g., settlements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) involving the removal of sediment deposits.¹⁵³

EPA's bickering with Congress clearly affected the outlook of the Agency's enforcement employees throughout the Clinton years. As one former DOJ official put it: "After the GOP took over the House, EPA felt tremendously under siege—the whole Agency. They felt their funding was going to be cut and that lots of other things would happen."¹⁵⁴ Some EPA employees had a sense of "looking over their shoulders" throughout the Clinton Administration, and of having to be careful not to have any of their cases become a "poster child" for antiregulatory forces on Capitol Hill.¹⁵⁵ As Herman expressed it: "We had to do our work very, very well and not make stupid mistakes that would serve to help the people who wanted to undercut enforcement The Agency was certainly a target for people who did not like it."¹⁵⁶

Finally, with respect to EPA's relationship with the White House during the Clinton Administration, a majority of the

148. Interviews with John Cruden, Nancy Marvel, Kathleen Johnson, Mike Walker, Lois Schiffer, Tom Bramscher, John Rothman, Mimi Newton, David Buente, Bill Muno, and Allyn Stern. Part of the reason for this may have been the fact that U.S. Attorneys were (and are) not permitted to handle civil EPA enforcement cases without prior approval of DOJ headquarters. No such approval was (or is) required, however, as a prerequisite to their prosecuting environmental criminal cases. Interview with John Rothman.

149. Interviews with Nancy Marvel, Arthur Haubenstock, Bob Kaplan, David Nielsen, Eric Schaeffer, Rett Nelson, Mike Walker, Joe Boyle, and Felicia Marcus. Tinka Hyde viewed that variation as being a function of the relative size and burdensomeness of the offices' case loads. Interview with Tinka Hyde.

150. In particular, the U.S. Attorneys offices in New York, Brooklyn, Las Vegas, Los Angeles, Chicago, Milwaukee, and San Diego were identified by people I interviewed as having been heavily involved in environmental enforcement cases, at one time or another, during the Clinton period. In all likelihood, this is an incomplete list.

151. Interview with David Nielsen. *Accord* Interviews with Walter Mugdan and David Buente.

152. Interview with Tinka Hyde. During the same time period, EPA Region V also lost 10% from its budgetary allocation for regulatory enforcement. The number of attorneys in the Region's Office of Regional Counsel declined from 116 to under 100 in FY 2002; and the number of full time employees in Region V's regulatory enforcement programs fell from 367 to 268. *Id.*

153. Interviews with Rett Nelson and John Lyons.

154. Interview with David Buente.

155. Interview with Kathleen Johnson.

156. Interview with Steve Herman.

enforcement officials I spoke with indicated that, as far as they were aware, the president and his staff consciously avoided any direct involvement in ongoing Agency enforcement matters.¹⁵⁷ As Herman observed: “The White House generally stayed out of enforcement. They appreciated that environmental enforcement was a law enforcement function. They tried to avoid even the appearance of manipulation.”¹⁵⁸

Notwithstanding its self-imposed lack of direct involvement in individual enforcement cases, however, the Clinton White House was still perceived as generally supportive of the Agency’s enforcement work by a number of EPA and DOJ enforcement personnel.¹⁵⁹ In part, this perception stemmed from the Clinton Administration’s firm defense of the Agency’s enforcement budget in its clashes with Congress. It may have also been a result of the fact that, on the rare occasions when Browner became involved in controversies with other federal agencies and departments over proposed EPA regulations, President Clinton consistently supported the positions that Browner had taken.¹⁶⁰

EPA’s relationship with the OMB, however, contrasted sharply with the cordiality of its ties with the rest of the White House. The OMB was sharply critical of some aspects of EPA management, and it often pressed the Agency to find new ways in which to economize. As Browner bluntly observed:

OMB was a pain in the ass, no two ways about it, and you know, in the end, [it was] not a helpful one. It could have been helpful but it was not. [OMB Director] Sally Katzen tried, to her credit, to be constructive. However, she was stuck with the work product of the OMB’s small staff, who just put the same junk out there all the time—the same stuff that those people had been grinding out for years. Sally Katzen tried hard to help us think creatively, but she didn’t really have the backup.¹⁶¹

V. EPA Enforcement in Clinton’s Second Term: Autonomy, Stability, and Solid Achievements

As we have seen, beginning in 1996, in the period that followed the Clinton Administration’s showdown with the 104th Congress over the federal budget, EPA enjoyed a period of relative freedom from congressional threats and interference. Additionally, the Agency’s reorganization was by then already completed, and its top managers communicated to the regional offices—unambiguously and with enthusiasm—their support for vigorous enforcement of environmental enforcement. These convergent conditions created fertile ground for the rapid growth of EPA enforcement, and for the implementation of some innovative enforcement approaches that yielded excellent results. As Mugdan thoughtfully observed: “The latter 4 to 5 years of the Clinton

Administration held their own against any comparable period in the Agency’s enforcement history.”¹⁶²

Perhaps the most significant new enforcement approach of this era was the vastly increased use of “targeted national enforcement initiatives.” At the direction of the OECA, EPA regional offices began to de-emphasize single facility/single medium enforcement cases. Instead, the Agency devoted many more of its enforcement resources to companywide, or industrial sectorwide, efforts to compel compliance and extract penalties. During the late 1990s, EPA and the DOJ proceeded with quite a few of these large-scale initiatives.

Under the leadership of Schaeffer and Buckheit, and with the DOJ’s full and active support, the Agency developed and brought comprehensive cases against violators in the petroleum refining, wood products, mini-steel mill, diesel engine, coal-fired electric utility, and farming industries, as well as against universities and against large municipalities found to have violated EPA’s requirements as to combined sewer overflows. These cases were typically preceded by intensive EPA investigations and analyses, a key purpose of which included “targeting” companies and industries whose exceptionally poor environmental compliance records made the initiation of large scale cases against them an efficient use of federal enforcement resources.¹⁶³ EPA also made an effort to bring its larger enforcement cases in populous areas, where people were more likely to be affected by pollution.¹⁶⁴

Targeted national enforcement cases were often managed by OECA staff attorneys and (after referral to the DOJ) by the DOJ lawyers. EPA regional office enforcement personnel were offered an opportunity to participate in those cases, and many in the regions did so. The targeted cases were frequently settled by consent decrees that mandated very substantial cutbacks in emissions, along with payment by the defendants of substantial civil penalties.¹⁶⁵

The largest targeted sectorwide initiative of the Clinton era involved the electric utility industry. In the late 1990s, EPA’s targeting efforts focused on which industrial sectors were “the dirtiest,” along with which sectors were growing the most rapidly. As Buckheit stated:

Coal consumption [in the United States] had increased greatly since the Clean Air Act Amendments were passed. Yet there had been virtually no new power plants built. So the question arose: where is all this additional coal burning happening? EPA’s investigation of that sector found approximately a 70% rate of noncompliance

157. Interviews with Gail Ginsberg, Eric Schaeffer, Steve Herman, Tinka Hyde, Mimi Newton, Allyn Stern, Bob Tolpa, Bill Muno, Bill Muszynski, Bob Kaplan, Rett Nelson, Sylvia Lowrance, Tom Bramscher, Ann Nutt, Walter Mugdan, Nancy Marvel, and David Buente.

158. Interview with Steve Herman.

159. Interviews with Mike Stahl and Lois Schiffer.

160. Interview with Carol Browner. Browner indicated that her working relationships with the heads of other agencies and departments in the executive branch were generally cordial and mutually respectful. *Id.*

161. *Id.*

162. Interview with Walter Mugdan.

163. Interviews with Sylvia Lowrance, Bob Tolpa, Gail Ginsberg, Steve Herman, David Nielson, Ann Nutt, George Czerniak, Eric Schaeffer, Tom Bramscher, Tinka Hyde, Rett Nelson, Bruce Gelber, and John Cruden.

164. Interview with an EPA enforcement manager who asked not to be identified by name.

165. For example, in its enforcement investigation of the diesel truck industry, EPA found that the industry had developed and were using engine software that could run the vehicle clean when it was being tested by the Agency, but then triple the NO_x emissions when the truck was on the highway (in exchange for much better engine fuel economy). That approach by the industry produced approximately 1 million tons/year of NO_x air pollutant emissions that EPA had not previously inventoried. The industry’s settlement agreement with the federal government resulted in over \$1 billion in injunctive relief, and the payment of substantial penalties. Interview with Bruce Buckheit.

with new source review (NSR) requirements. In 1999 [following referrals from EPA] the Justice Department filed lawsuits against 12 power companies representing approximately 40% of the megawattage in the country. [At EPA] we also continued to investigate another 40% of the megawattage.¹⁶⁶

Regrettably, as I have discussed in another article, EPA's continued investigation of electric utility noncompliance with new source review regulations was ended in the Bush II Administration for essentially political reasons.¹⁶⁷ Thus, the full potential of this particular, high priority, resource-intensive EPA enforcement initiative (as a means of forcing the abatement of millions of tons of the utility industry's air pollutants, and significantly improving public health) was never realized.

Part of the reason for the dramatic success of many of EPA's targeted enforcement initiatives in Clinton's second term was the fact that, from the mid-1990s forward, the Agency developed greatly improved methods of targeting for potential large-scale national enforcement cases; those included the use of enhanced computerized databases, such as IDEA/ECHO.¹⁶⁸ The implementation of these improvements, which one EPA participant described as "a very resource-intensive process,"¹⁶⁹ together with increased EPA use of other data bases (such as Public Utility Commission and Federal Energy Regulatory Commission records of utility capital projects) greatly enhanced the Agency's ability to do enforcement targeting that was far more accurate, swift, and effective.¹⁷⁰

In addition, the effectiveness of EPA's targeted enforcement initiatives, as deterrents to all other violations, was further enhanced by EPA's practice of publicizing its own enforcement objectives and achievements. During Clinton's second term, Schaeffer, Stahl, and their staffs routinely described EPA's new enforcement agenda (including its ongoing and planned initiatives) in a regularly published, widely subscribed to, OECA publication titled "Enforcement Alert."¹⁷¹ Browner and U.S. Attorney General Janet Reno also made it a frequent practice to appear together at press conferences, in order to publicize the filing and/or the settlement of large federal environmental cases.¹⁷² Beyond this, as Schaeffer described:

[W]e also wrote letters to some companies (refineries, telecom firms, metal finishers, municipalities, airlines) flagging compliance problems and inviting them to disclose and correct in exchange for a significant penalty reduction. We almost always got a good response to these initiatives. These were most effective where the compliance cost was fairly low, e.g., where it involved reporting instead of big capital spending, but it saved the Agency a lot of resources relative to the results we obtained.¹⁷³

Another significant EPA enforcement achievement of the late Clinton Administration was what one perceptive observer described as "a relatively dramatic increase in the criminal enforcement program."¹⁷⁴ In the early 1990s, at Congress' direction, as expressed in the Pollution Prosecution Act of 1990, EPA expanded its permanent criminal investigation staff from approximately 65 to nearly 200 investigators.¹⁷⁵ The Agency then established a number of criminal investigation "field offices" around the United States. This change "placed the criminal investigators much closer to the places they had to investigate, and dramatically increased their capabilities."¹⁷⁶ It also put the investigators in closer touch with local U.S. Attorneys Offices, who began playing more of a role in environmental criminal prosecutions.¹⁷⁷

As a result of these developments, together with considerable management attention to criminal enforcement on the DOJ side by Assistant Attorney General Schiffer, and a growing sophistication about environmental crime among federal district court judges, the federal environmental criminal enforcement effort "revved up into high gear" in the late 1990s.¹⁷⁸ EPA and the DOJ brought many more criminal cases than they had done in the past. Moreover, upon the conviction of criminal defendants, those cases resulted in more stringent jail terms than had been true previously.¹⁷⁹

With respect to Superfund, beginning in 1995 and continuing into President Clinton's second term, the Administration's emphasis shifted from the passage of "consensus legislation" that would have reformed the program to administrative reforms that the Agency could implement unilaterally to make the Superfund program (in Browner's words) "faster, fairer, and more efficient."¹⁸⁰ These reforms included, among other things, such measures as an increased emphasis on the completion of construction at Superfund sites, expanding the use of orphan shares and de minimis settlements, establishing de micromis contributor policies, targeting a wider range of potentially responsible parties, streamlining oversight costs, increasing community participation in site decisions, addressing the special problems of lending institutions, municipalities and legitimate recyclers, promoting CERCLA settlements more effectively, and establishing new measures of program success.¹⁸¹ Taken together, this reform package "defused" much of the criticism of the Superfund program, and it "got rid of a lot of the irritants that were creating part of the call for new legislation."¹⁸² The reforms also—at least to a modest extent—ap-

166. Interview with Bruce Buckheit. See also David Stout, *7 Utilities Sued by U.S. on Charges of Polluting Air*, N.Y. TIMES, Nov. 9, 1999, at A1.

167. See Mintz, *supra* note 5, at 10916-19.

168. Interviews with Eric Schaeffer, Walter Mugdan, Joe Boyle, and Cheryl Wasserman.

169. Interview with David Nielsen.

170. *Id.*

171. Interview with Eric Schaeffer.

172. Interview with Gail Ginsberg.

173. Interview with Eric Schaeffer.

174. Interview with David Buente. *Accord* Interviews with Mike Walker, Gail Ginsberg, and Lois Schiffer.

175. Interview with EPA attorney familiar with the criminal enforcement program who preferred to remain anonymous. *Accord* Interview with David Buente.

176. *Id.*

177. *Id.*

178. Interview with Mike Walker.

179. Interview with Rett Nelson.

180. Interviews with Carol Browner, Lois Schiffer, Steve Herman, Bill Muno, Kathleen Johnson, Michelle Benson, John Lyons, and Bill Muszynski.

181. A number of these administrative reforms were subsequently codified by Congress in the Small Business Liability and Brownfields Revitalization Act of 2003.

182. Interview with Steve Herman. *Accord* Interviews with Bill Muno, John Lyons, Lois Schiffer, Kathleen Johnson, and Bruce Gelber. As

pear to have promoted better functioning of the CERCLA program at the Agency.

Another useful enforcement innovation in the late 1990s was EPA's increased willingness, during that time, to forego civil penalties, in particular enforcement cases, in exchange for SEPs, i.e., environmentally beneficial activities by defendants that do not profit the defendants in any way and that provide sound environmental results.¹⁸³ Although the significance of SEPs is difficult to gauge, a number of EPA (and DOJ) enforcement professionals appear to agree with Ginsberg's judgment that SEPs have resulted in "some worthwhile community oriented projects and some good environmental results."¹⁸⁴

EPA's administrative enforcement program also took some steps forward in the late 1990s. EPA added a contingent of new administrative law judges to this program in the mid-1990s, a welcome change which greatly speeded up administrative enforcement under the Federal Insecticide, Fungicide, and Rodenticide Act, RCRA, and the CAA.¹⁸⁵ Following that, the Agency began to handle many more routine enforcement matters (including, e.g., asbestos national emission standards for hazardous air pollutant demolition/renovation cases and CAA automobile emission tampering cases) administratively, rather than referring them to the DOJ for civil litigation as had been done in the past.¹⁸⁶

EPA also continued to devote significant resources to multimedia enforcement cases. These cases were resisted by some members of the Agency's career enforcement staff, in both the regional program offices and headquarters.¹⁸⁷ Nonetheless, multimedia cases were supported by other career enforcement staffers, and also by a number of senior enforcement managers in the OECA and the Regions, as representing an effective use of scarce Agency enforcement resources to achieve favorable environmental results.

Finally, EPA's enforcement programs seem to have benefited, at least incrementally, from the Agency's adoption of additional measures of the successfulness of environmental enforcement work. After a lengthy, intensive evaluation of various potential enforcement metrics by a task force headed by Deputy Assistant Administrator Stahl, the Agency began to supplement its reliance on enforcement "outputs," e.g., number of inspections, penalties, etc., by attempting to measure the actual environmental impacts of its individual enforcement cases on a regular basis. This approach may well have the advantage of explaining the value of enforcement efforts "in lay person's terms."¹⁸⁸ Its adoption may also have goaded the Agency into taking bolder, industrywide enforcement cases because of their potentially greater environmental impacts.¹⁸⁹

Bruce Gelber put it, the Superfund administrative reform effort "was a real credit to EPA. They actually listened and did what was necessary." Interview with Bruce Gelber.

183. Some examples of SEPs may include monetary donations by the defendant for environmental scientific studies, dedications of tracts of land for local public parks, and agreements by the defendant to restore damaged natural resources in a particular location.

184. Interview with Gail Ginsberg. *Accord*, e.g., Interviews with Rett Nelson and Tom Bramscher.

185. Interview with Gail Ginsberg.

186. Interview with Bruce Gelber.

187. Interviews with George Czerniak and Gail Ginsberg.

188. Interview with Felicia Marcus.

189. Interview with Eric Schaeffer. At the same time, however, Schaeffer carefully noted that this approach to evaluating enforcement does

At the same time, however, the quantification of the environmental results of cases is an inherently "inexact science,"¹⁹⁰ and it certainly has no applicability to programs (like some aspects of) RCRA whose main focus is to prevent pollution.¹⁹¹ Thus, Lowrance may well have been correct when she stated: "I'm not sure that this effort can be taken much further without an enormous investment in new data collection—well beyond EPA's financial means."¹⁹²

Overall then, as we have observed, the second term of the Clinton Administration was a time of considerable progress and innovation in EPA enforcement. It is worth noting, however, that this period was something less than a "golden era" in the Agency's enforcement history. As we have seen previously, some of the problems that began in the early days of the Clinton period continued into its final four or five years. These included the lingering sense, on the part of some career staff members, that they still needed to "look over their shoulders" for the possibility of congressional interference with EPA enforcement work,¹⁹³ the slow but steady erosion in EPA and the DOJ's enforcement resources as a result of Congress' "COLA trick,"¹⁹⁴ the absence of adequate funding for certain aspects of the Superfund program due to expiration of the Superfund tax,¹⁹⁵ and the EPA's continuing, poor enforcement relationship with a number of state environmental agencies.¹⁹⁶

In the late 1990s, EPA also suffered from a series of misguided attempts to impose various inconsistent (and largely irrelevant) managerial approaches on the Agency's career staff. As one thoughtful, experienced Agency enforcement manager recalled:

Every three to four years, EPA seemed to change its overall management philosophy. This required a lot of training of the managers and it got in the way of the work. It was time consuming and completely "process oriented." This problem seemed to build to a crescendo until the end of the Clinton Administration. It was a boon to high-priced consultants. Yet [the management approaches they espoused] seemed totally unrelated to governmental regulatory programs.¹⁹⁷

Of the various management schemes imposed upon EPA during the Clinton years, the least beneficial appears to have been a governmentwide requirement, created by Vice President Gore's Reinvention of Government Program, that required every manager in the Agency to supervise no fewer

raise a number of issues that must be addressed. He ruefully observed that "you can report a 'record year' for injunctive relief or pollution reduction by settling only a few very big cases (e.g. with utilities or city wastewater plants) in a year." *Id.*

190. Interview with Gail Ginsberg. *Accord* Interview with Ann Lassiter. ("This was a very, very tough job. There were always a lot of unknowns . . . Over time we've gotten more systematic about doing it. But I still wouldn't take those numbers to the bank.")

191. Interviews with Mimi Newton, David Nielson, and Ann Lassiter. Mimi Newton also noted that measuring the amount of pollution cleaned up by enforcement cases tends to downplay the importance of some substances (such as nerve gas) which are extremely dangerous in small volumes. Interview with Mimi Newton.

192. Interview with Sylvia Lowrance.

193. See *supra* notes 155-56 and accompanying text.

194. See *supra* notes 151-52 and accompanying text.

195. See *supra* note 19 and accompanying text.

196. See *supra* notes 116-37 and accompanying text.

197. Interview with Gail Ginsberg. *Accord* Interview with an EPA regional attorney who asked that he or she not be identified by name.

than 11 employees. This unfortunate mandate, known to EPA employees as “the 1 to 11 ratio,” had a negative impact on EPA enforcement personnel, particularly in some of the Agency’s regional offices. As one enforcement official viewed it:

As a result [of the 1 to 11 ratio requirement] Region V had to take 45 to 50 people out of management and back into senior staff positions. No matter how you try to do that you are going to end up with unhappy people [The ratio requirement contributed to] a climate of distrust and discontent within the Region.¹⁹⁸

Similarly, from a headquarters perspective, Stahl was especially critical of the impact of the 1 to 11 ratio:

This had an impact on the reorganization. It torqued the structure of the [new] organization. It also required that some existing supervisors be placed in nonsupervising jobs after they switched from program offices to OECA. Many of them were very bitter about that. This caused morale problems for two to three years after the reorganization [was completed].¹⁹⁹

VI. Conclusion

As I was told by one former EPA attorney with a fondness for the writing of Charles Dickens: “EPA enforcement in the Clinton [A]dministration was neither the best of times nor the worst of times.”²⁰⁰ In fact, the period from January 1993 to January 2001 was an era of sharp contrasts, bitter partisan conflicts and, toward its end, some bold innovations and significant strides for the Agency’s enforcement efforts. The Clinton Administration’s first two years in office were clearly that Administration’s least distinguished period with respect to EPA enforcement work. However laudable their motives may have been during that time, the Agency’s top leaders were widely seen as sending mixed messages as to the importance of an assertive enforcement effort. They were also immersed in unproductive political wrangling with a Congress that, while controlled by Democrats, was

substantially antiregulatory in philosophy. Moreover, in that period, EPA’s enforcement program was in the throes of an Agencywide reorganization that was, on balance, only a partial success in streamlining and bolstering EPA’s enforcement efforts.

In late 1994 and 1995, the Agency experienced a major confrontation between the Administration and the Gingrich Congress over the size of the budget for a number of federal agencies and departments, prominently including EPA. This protracted partisan struggle led to a victory for the Clinton Administration that allowed EPA some measure of autonomy and “breathing room” for the remainder of the Clinton era. Nonetheless, among some of the Agency’s professional staff it also left a legacy of continuing anxiety and resentment. Moreover, through a low-visibility scheme known as the “COLA trick,” EPA’s opponents in Congress were able to continue to gradually erode EPA’s enforcement extramural budget, one of the Agency’s key budget accounts for enforcement work.

Finally, however, during President Clinton’s second term in office, EPA enforcement blossomed. Thanks to a more clear set of signals from EPA’s political appointees, a gradual “settling in” by all concerned to a recently reorganized enforcement structure, and the relatively smooth working relationship between EPA and the DOJ on enforcement matters, EPA and the DOJ were able to launch a number of “targeted enforcement initiatives” against multifacility companies—and entire industrial sectors—that yielded impressive results. Moreover, notwithstanding rocky relationships with ECOS and a number of individual states—along with some self-imposed distractions and dislocations caused by counterproductive managerial initiatives—EPA’s enforcement leaders fashioned a number of innovations (from SEPs to CERCLA administrative reforms) that moved EPA’s enforcement programs forward to new levels of achievement.

Clearly, the Clinton Administration’s EPA enforcement efforts were uneven—and even problematic—at times. Nonetheless, particularly toward the end of its tenure, that Administration gave responsible, stable leadership to an innovative, assertive, and well-coordinated federal environmental enforcement program. Its success has not since been duplicated.²⁰¹

198. Interview with an EPA manager who requested anonymity. *Accord* Interview with Gail Ginsberg. Another person I interviewed, who declined to speak for attribution, stated that “under reinvention, excellence took a back seat. Form over substance was what prevailed.”

199. Interview with Mike Stahl.

200. Interview with an EPA attorney who requested anonymity.

201. For a detailed analysis of EPA enforcement during the first term of the Bush II Administration, see Mintz, *supra* note 5.

APPENDIX A - List of Persons Interviewed

INTERVIEWEE	PLACE OF INTERVIEW	DATE OF INTERVIEW
Michelle Benson	San Francisco, Cal.	June 24, 2003
Joe Boyle	Chicago, Ill.	Mar. 4, 2004
Tom Bramscher	Chicago, Ill.	Mar. 3, 2004
Carol Browner	Washington, D.C.	May 17, 2004
Bruce Buckheit	Dulles Airport, Va.	June 18, 2003
David Buente	Washington, D.C.	June 17, 2003
Eric Cohen	Chicago, Ill.	Mar. 2, 2004
John Cruden	Washington, D.C.	Apr. 1, 2004
George Czerniak	Chicago, Ill.	Mar. 2, 2004
Rick Duffy	Washington, D.C.	Mar. 31, 2004
*Linda Fisher	Washington, D.C.	Apr. 14, 2004
Ben Fisherow	Washington, D.C.	Apr. 2, 2004
Dick Frandsen	Washington, D.C.	Feb. 3, 2004
Bert Frey	Chicago, Ill.	Mar. 3, 2004
Bruce Gelber	Washington, D.C.	Apr. 14, 2004
Gail Ginsberg	Ridgeway, Wis.	Mar. 8, 2004
John Gregory	Washington, D.C.	June 16, 2003
Arthur Haubenstock	San Francisco, Cal.	June 27, 2004
George Hays	San Francisco, Cal.	June 27, 2003
Steve Herman	Washington, D.C.	June 17, 2003
Arthur Horowitz	Washington, D.C.	Feb. 4, 2005
Tinka Hyde	Geneva, Ill.	Mar. 10, 2004
Kathleen Johnson	San Francisco, Cal.	June 23, 2003
Bob Kaplan	Washington, D.C.	June 17, 2003
Larry Kyte	Chicago, Ill.	Mar. 4, 2004
Ann Lassiter	Alexandria, Va.	Apr. 2, 2004
Sylvia Lowrance	Bethesda, Md.	June 18, 2003
Ann Lyons	San Francisco, Cal.	June 25, 2003
John Lyons	San Francisco, Cal.	June 24, 2003
Felicia Marcus	San Francisco, Cal.	June 23, 2003
Nancy Marvel	San Francisco, Cal.	June 26, 2003
Tom Mintz	San Francisco, Cal.	June 26, 2003
Walter Mugdan	New York, N.Y.	Mar. 30, 2004
Bill Muno	Chicago, Ill.	Mar. 2, 2004
Bill Muszynski	Philadelphia, Pa.	May 18, 2004

APPENDIX A (cont.)

INTERVIEWEE	PLACE OF INTERVIEW	DATE OF INTERVIEW
Rett Nelson	Chicago, Ill.	Mar. 3, 2004
Mimi Newton	San Francisco, Cal.	June 27, 2003
David Nielsen	Washington, D.C.	June 16, 2003
Ann Nutt	San Francisco, Cal.	June 25, 2003
Quentin Pair	Washington, D.C.	Feb. 4, 2005
Steve Rothblatt	Chicago, Ill.	Mar. 4, 2004
John Rothman	San Francisco, Cal.	June 25, 2003
Eric Schaeffer	Washington, D.C.	Apr. 13, 2004
Lois Schiffer	Washington, D.C.	Apr. 14, 2004
*Walker Smith	Washington, D.C.	Apr. 13, 2004
Mike Stahl	Washington, D.C.	Mar. 31, 2004
Allyn Stern	San Francisco, Cal.	June 24, 2003
*J.P. Suarez	Bentonville, Ark	May 21, 2004
David Swack	Washington, D.C.	Apr. 1, 2004
Dave Taliaferro	Chicago, Ill.	Mar. 3, 2004
Nicholas Targ	Washington, D.C.	Feb. 3, 2005
Bob Tolpa	Washington, D.C.	Mar. 31, 2004
David Ullrich	Chicago, Ill.	Mar. 5, 2004
Michael Walker	Washington, D.C.	Mar. 29, 2004
John Warren	Washington, D.C.	Mar. 29, 2004
Cheryl Wasserman	Washington, D.C.	June 16, 2003
Noël Wise	San Francisco, Cal.	June 26, 2003
Allan Zabel	San Francisco, Cal.	June 25, 2003

*Interviewee only discussed EPA enforcement in Bush II Administration and was thus not a source of information for this Article.

APPENDIX B - Standard Interview Questions**I. Preliminary Questions of a General Nature**

A. What position (or positions) did you hold which involved EPA enforcement work?

B. As you look back on each of the periods in the history of EPA's enforcement programs from 1993 to the present time in which you were personally involved (or were aware of), what do you consider the most significant events, developments, and trends?

C. As to those same periods, what do you view as the most important achievements in EPA enforcement programs, and the most significant problems which arose in those programs?

II. Questions Regarding Institutional Relationships in EPA Enforcement Work

A. How would you characterize the following sets of institutional interrelationships among EPA enforcement personnel since the end of 1992?

1. EPA regional enforcement people and EPA headquarters enforcement people.

2. EPA enforcement attorneys and EPA enforcement technical people.

B. How would you describe the institutional interrelationships between EPA enforcement people and the following other government entities since the end of 1992?

1. State personnel (including organizations of state environmental officials, state environmental agency employees, and state-elected officials).

2. DOJ attorneys and managers.

3. U.S. Attorneys and their professional staffs.

4. Congress.

5. Other federal agencies and departments.

6. The White House.