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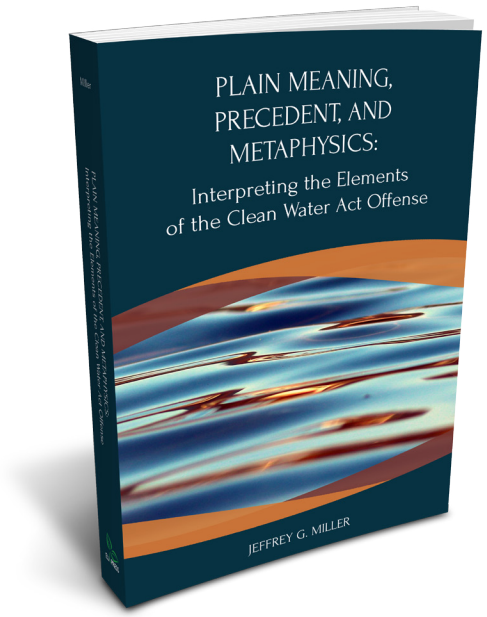
Plain Meaning, Precedent, and Metaphysics:

Interpreting the Elements of the Clean Water Act Offense

By Jeffrey G. Miller



This book provides definitive and comprehensive analyses and understandings of each of the first four elements of a Clean Water Act offense: addition, pollutant, navigable waters, and point source. Disputes over the interpretations of these statutory terms have produced a steady stream of reported decisions since the initial implementation of the statute. Even after four decades, many of these issues are unresolved and new issues continue to arise. Judicial decisions and interpretations, however, are not the only materials studied for the analyses in this volume. Significant legislative history and administrative interpretations are analyzed as well. This book also examines what, if anything, can be learned about the process of statutory interpretation itself from studying the interpretations of the elements.

Plain Meaning, Precedent, and Metaphysics: Interpreting the Elements of the Clean Water Offense is a must-have for those who practice water law, those who teach it, and those who study it. In addition to offering in-depth analyses of each of the core elements of a CWA offense, the book provides readers useful tables and charts to better understand statutory intepretation in this continuously evolving area of law.

About the Author

Jeffrey G. Miller served as a Professor of Law at Pace Law School for 25 years before his retirement in 2013. He served as its Vice Dean for Academic Affairs, Associate Dean of Graduate Studies, and Associate Dean of Environmental Programs. He has focused his teaching and scholarship primarily on water pollution, hazardous waste management, enforcement of environmental law, and citizen suits. He has written three books, several chapters, and numerous articles on these and related subjects.

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Under Siege — Again

Federal environmental enforcement is threatened under EPA Administrator Scott Pruitt, echoing the Anne Gorsuch years. But enforcement provides the force that is needed both in achieving compliance and in encouraging responsible companies to innovate and reduce costs

Cheryl E. Wasserman founded the Environmental Governance Institute International following 43 years in senior positions in EPA's policy and enforcement offices. She led the Steering Committee and developed the Policy Framework on the State-Federal Enforcement Relationship 1984-94 and co-founded the International Network for Environmental Compliance and Enforcement.

Over the 47 years of EPA's existence, the United States has realized the benefits of both strong federal and state enforcement. The Trump administration's proposed agency budget for 2018 signaled its intentions to drastically curtail the federal role by proposing to eliminate funds to pursue civil and criminal actions supporting air, water, and hazardous waste requirements in states implementing EPA-delegated programs — which is to say, virtually all states. This is the wrong course. It will damage the effectiveness of programs protecting public health and the environment in ways from which it will be difficult to recover.

Lessons we might have learned more than thirty years ago make the case today. During the first years of the Reagan administration, federal enforcement declined precipitously in the face of severe cutbacks, staff reorganization, and reduced priority initiated by Administrator Anne Gorsuch. The public backlash to these actions provided enough political pressure to force the president to ask for her resignation.

The agency's first administrator, William D. Ruckelshaus, returned to that role. Strong federal environmental enforcement took center stage, as it had when Ruckelshaus shaped EPA as an institution a decade before. He knew then that a credible environmental agency was needed to earn the public's trust in the nation's will and ability to address their growing alarm over rivers that caught fire, dead fish washed ashore on lakesides, and urban air that was too unhealthy to breathe. The situation the nation found itself in is now difficult to imagine, unless you travel to China to see what happens when economic growth is not coupled with environmental stewardship.

The last time we relied solely on the states to address pollution was before EPA was created by President Nixon in December 1970. The spate of environmental laws enacted in the decade just before and following the first Earth Day introduced a different model, one with a strong national program and a primary state role but with continued federal enforcement and oversight. Indeed, EPA was given parallel enforcement authority and responsibility, even in states with delegated or approved programs.

Upon his return to the agency, Ruckelshaus tried to rev up the engines of federal enforcement but met with resistance. By 1984 it was clear that enforcement was not recovering. Following the Gorsuch reorganization, most enforcement staff was transferred into the program offices. I was asked to join the then skeletal office of enforcement. I was named to head a new office of Compliance Policy and Planning to coordinate policies and strategies across all the programs. To jump start enforcement we organized a national conference where Ruckelshaus challenged EPA staff to beef up enforcement, recalling how he used the tools at hand back in the day when he served as deputy attorney general in the state of Indiana — enforcement actions based on just the water samples collected from his red pickup truck.

Upon hearing about his impassioned appeal for increased federal enforcement, the states were up in

arms at the specter of a more aggressive federal EPA running roughshod just to increase the numbers — so called bean counting. EPA and the states were winding down a successful enforcement initiative aimed at major air and water sources. They wanted to ensure the sources installed pollution control equipment. They needed new direction to address continuing compliance concerns in a manner which would ensure a sustained effort that would not be vulnerable to any future assaults on enforcement. With the support of then Deputy Administrator Alvin Alm, we created a thirty-member Steering Committee on the State-Federal Enforcement Relationship, with representatives of each of the associations of state and local environmental officials that had been created for air, water, waste, pesticides, and toxic chemicals. We also included state environmental commissioners, EPA headquarters enforcement program directors, deputy regional administrators, and regional counsels. Within two and a half months we negotiated a unanimously applauded and until now enduring Policy Framework on the State-Federal Enforcement Relationship.

The successful formula for both strong state and federal enforcement was to respect state primacy in delegated and approved programs, avoid duplication, and provide mutual accountability. We agreed upon common principles for a successful enforcement program, aligning theory and practice. Success included four elements for creating deterrence: a credible likelihood of detection, a swift and sure response, appropriate sanctions, and the perception of the first three.

The presumption of state primacy shifts to federal action in cases where the state had failed to take "timely and appropriate" enforcement for significant violations. EPA committed to develop, cooperatively with the states, federal policies to define significant violations, appropriate timeframes, and circumstances for which penalties are needed for deterrence, not just a return to compliance after violations were detected. The agency and states also developed program-specific implementing policies. EPA committed to develop national priorities in consultation with the states and to take state priorities into account when overseeing their performance. The Policy Framework agreements established performance measures and reinforced the importance of timely and accurate facility-specific reporting on compliance status and enforcement actions, monthly coordination, and quarterly discussion of enforcement status and actions.

Federal enforcement could be expected not only when a state failed to take timely and appropriate enforcement action against significant violators, but also if a state requested assistance or when enforcing a previous federal enforcement action. The feds would be expected to step in when important to set legal or national program precedents — rare cases of first impression in law or those fundamental to establishing a basic element of the national compliance and enforcement program. Finally, EPA would play a role in circumstances of repeat violators where state action had proven unsuccessful.

Any federal enforcement would be pursued in a manner that did not undermine a strong state program, including joint press releases, opportunity for joint action, and penalty sharing where joint action was taken. Finally, federal oversight would be constructive, tailored to a state's past performance and focused on both past accomplishments and areas needing improvement.

From 1984 to 1993, we amended the Policy Framework several times with the help of the steering committee. The amendments issued by the deputy administrator described penalty-sharing arrangements for joint enforcement. They clarified how EPA would implement multimedia enforcement, addressed the relationship when criminal enforcement action was pursued at the federal level, refined definitions of when a state penalty was sufficient to constitute "appropriate enforcement," and clarified how the federal agency would implement nationally managed or bundled enforcement cases to enhance the impact and deterrence value of individual state and EPA cases against a specific violator or type of violation. These policies balance the unique deterrence value of federal enforcement and state primacy and avoid duplication and "federalizing" of specific types of violations and violators.

In the three decades since the Policy Framework was adopted, circumstances have changed. Without question, states now have greater capability to implement compliance and enforcement programs. New technologies to monitor and report compliance, plus advances in information access via the internet, electronic reporting, and spatial mapping, also contribute to improved accountability and oversight of state enforcement.

While the ability of states to implement and enforce federal environmental programs is not in question, this capability does not eliminate the need for a strong federal role. Federal enforcement ensures that the benefits of national environmental laws are achieved in all 50 states and territories and threats to public health and the environment are not prolonged

due to inaction. A state may lack resources or expertise for individual cases, or may lack sufficient penalty authority or equivalent consequences to effectively deter violations in the first instance or to succeed in getting a repeat violator into compliance. And state programs may be subject to implicit or explicit political or economic pressure to avoid taking hard cases.

States are not monolithic; uneven state capability and will to enforce is always going to exist. These gaps are not an abstract concern when you consider the consequences. Federal enforcement prevents a race to the bottom. Lax environmental enforcement can be offered as a competitive advantage by a state in attracting industry and jobs despite competing evidence that communities with strong environmental programs gain competitive advantage derived from clean and healthy working and living conditions for employees.

Even the most committed states will admit they depend upon the "Gorilla in the Closet" — the threat of federal enforcement — to help garner the cooperation of their violators to come to the table and more quickly resolve their non-compliance and penalties. Today, the gorilla is being locked in the closet.

Federal environmental statutes encourage citizens to play a role in holding both state and federal enforcers to account by empowering direct action against a violator. Without the threat and reality of federal enforcement, this burden unduly falls on citizens, who clearly lack the resources and expertise of the federal government. Citizen suits seeking to force EPA to implement mandatory enforcement language in the statutes must also overcome longstanding court deference to the practical need for case-by-case prosecutorial discretion. It also is unclear what significant reductions in EPA's enforcement budget will mean for citizen access to facility-specific compliance and performance data upon which they rely. Finally, citizen enforcement crucially depends upon access to the courts. Supreme Court decisions largely written over the last decade by the late Antonin Scalia have steadily narrowed standing and limited the ability of citizens to lay claim to penalties in such actions, thus reducing their resources for pursuing enforcement.

This brings us to the important role of EPA's criminal enforcement program to secure the integrity of the entire national environmental enterprise, but which is also inexplicably subject to proposed budget cuts and elimination in delegated states. With its powerful threat of incarceration and fines, criminal enforcement focuses on illegal activities outside the framework of the program's requirements. It uniquely deters fraudulent reporting and recordkeeping, supporting what is the backbone of the national compliance-monitoring system. The threat of jail time can be particularly persuasive in preventing corporate officials from turning a blind eye to the actions of their employees or from sending mixed signals that expediency trumps caution — as happened in the Deepwater Horizon disaster.

EPA has unique criminal enforcement authorities and capabilities that the states lack. In the 1990s, following terrible incidents related to improper handling of hazardous waste, toxins, and pesticides, including notorious incidents of indiscriminate "midnight dumping" in local rivers and streams, environmental statutes were amended to upgrade EPA's criminal enforcement authorities to include felonies. A separate statute mandated a staff level of at least 200 skilled investigators with experience and training in both traditional law enforcement and environmental investigation, reporting to headquarters but housed across the country. EPA has a world class forensics laboratory at the National Enforcement Investigations Center in Denver, Colorado.

Criminal enforcement lies outside the purview of traditional state and tribal environmental program operations. Successful coordination among federal, state, and local prosecutors is both complex and critical. EPA and the Department of Justice have played an essential role, creating regional cooperative mechanisms focused on illegal hazardous waste shipments and disposal that crosses state boundaries.

Both federal civil and criminal prosecutions offer a more powerful deterrent for the very reason that they set a national precedent, an essential federal enforcement role. Consider the attention now paid to Flint, Michigan, where contaminated drinking water poisoned its citizens and fraudulent testing and reporting delayed enforcement action.

Predictably, when federal enforcement is removed from the equation not only will states disinvest in compliance and enforcement but so will businesses, putting even more pressure on state enforcement programs. Perception plays a big role in making limited enforcement actions broadly effective in deterring violators. Redirecting EPA enforcement away from states with delegated or approved programs will have a significant impact for the very signals it sends. Even a hint that EPA enforcement may be weakened has a cascading reduction in efforts to comply with and enforce the law.

This happened both with a deliberate effort to diminish federal enforcement during the Gorsuch days and surprisingly when EPA began to invest more heavily in pollution prevention and compliance incentives. Even with a balanced program with strategic use of both carrots and sticks — to add compliance

promotion to monitoring and enforcement — it became apparent that any talk about compliance-oriented programs was often misconstrued as a weakening of enforcement.

Enforcement rewards companies that comply by leveling the playing field. Business risk increases in times of uncertainty — and these are such times. The delay and overturning of key regulations is very disruptive of business decisions. A sort of paralysis may set in even in the most responsible companies with the uncertain future of EPA regulations and their impact on state actions.

While there is no guarantee of improved performance, well-managed companies tend to have better compliance records because they have the environmental management systems, data management systems, auditing, performance incentives, and training fully integrated into their business practices. Management awareness of what is happening in the trenches has an enormous impact on worker safety and health. The U.S. sentencing guidelines for environmental crimes recognizes these efforts as an affirmative defense. Compliance brings with it diligence, and an attitude that all rules, not only environmental rules, but also company rules and practices, are followed. Introduce a lax attitude toward compliance, and these systems start to fray.

Inertia is not just a physical property, it is also a factor in human behavior. The second law of motion states that a body at rest stays at rest and a body in motion maintains its motion — in the absence of an outside force. Enforcement provides the force that is needed to overcome the status quo, both to achieve compliance and to innovate and improve performance while reducing costs.

As such, enforcement is a force for innovation and economic stimulus. An example from the chemical industry is the speedy adoption of infrared cameras. EPA inspectors began to use the cameras to detect leaks. The industry quickly adopted the technology because it saved product and reduced waste, both essential in an industry known for having small profit margins and stiff competition.

Internationally, disengagement of EPA in enforcement of our major statutes will undermine U.S. efforts to ensure fair trade through commitments by trading partners to enforce their own environmental laws, to curb transboundary pollution affecting our citizens, and to ensure that imports and exports comply with U.S. environmental laws and treaty obligations. The G-8 environment ministers have concluded that a national-level enforcement component is necessary to effectively coordinate and address illegal trade under international agreements.

In the 1990s, the United States exported the example set by strong cooperative federal and state enforcement. EPA co-founded with the Netherlands the International Network for Environmental Compliance and Enforcement. INECE is a global partnership of hundreds of countries and international organizations for which ELI now serves as secretariat. INECE is based on the idea that strong enforcement of environmental laws is critical to public health and ecosystem vitality, and that countries can share their best practices to mutual advantage.

Today, the principles in the EPA Policy Framework are accepted as the basis for international exchange and in formal UN agreements for sustainable development. How will other countries respond when the United States significantly cuts the federal environmental enforcement budget and role?

The Trump administration appears to be making a cynical calculation that the backlash the Reagan administration experienced in the 1980s will not be repeated. Despite compelling arguments for federal enforcement — that it ensures parity in protections across the country and equity for those who comply, undergirds a credible state enforcement program, drives compliance and innovation, pays for itself, saves lives, ensures health and prosperity, and creates jobs — enforcement has already been significantly eroded.

What we need is strong national leadership in favor of enforcement of environmental laws by states, tribes, and the federal government where needed, including in states and tribes with delegated or approved programs. The Policy Framework provides a model for state and federal enforcement working together within delegated states without the duplication that is falsely blamed as the rationale for its elimination. Let us not be fooled by calls for a partnership relationship with the states and less adversarial relationship with the regulated community, which while important, echo such calls from the past. History tells us that partnership is all well and good but cannot mean polluters do not need to know that if a state is not willing or able to enforce that the federal government will be there to do so, particularly when the violations are significant. Further, history tells us that an emphasis on compliance will not be effective unless coupled with firm and fair enforcement.

In closing, recall the example set by twice-Administrator Ruckelshaus, whose integrity and commitment to the mission was coupled with the wise recognition that without a visible federal enforcement role, promised protections, public trust, and opportunities for innovation will be lost and difficult to restore. Déjà vu. **TEF**