Do Voluntary Compliance Programs Really Improve Environmental Law?

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Cary Coglianese & Jennifer Nash, Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's 'Flagship' Voluntary Program, 38 **Harv. Envtl. L. Rev.** 1 (2014).

Cary Coglianese and Jennifer Nash have added yet another thoughtful contribution to the debates over whether voluntary compliance programs can significantly improve environmental law and policy. This thorough and careful empirical review of the most important voluntary environmental compliance programs is essential reading for anyone interested in environmental law and policy.

In the 1990's and early 2000's, a strong strain in environmental legal scholarship argued that environmental regulation was too punitive, inflexible, and rigid. According that scholarship, regulation punished regulated parties who sought, in good faith, to comply with the law; it imposed regulatory standards without regard to the benefits of the regulation as applied to a particular regulatory party, or of the feasibility or appropriateness of compliance for a particular regulatory party; it was unable to keep up with complex and rapid economic and technological change. Many of these critiques were initially raised and made prominent by Bob Kagan and Eugene Bardach, beginning with their 1982 book *Going by the Book: The Problem of Regulatory Unreasonableness*.

In response to these critiques, academics, politicians, and policymakers sought to make environmental law in particular, and administrative law in general, more flexible, more responsive to economic and technological change, and more positive in the incentives it gave to regulated parties. "New governance" administrative scholars developed new tools for regulation and standard setting in environmental law. Eric Orts proposed the use of "reflexive environmental law," in which regulation sought to make regulated parties more proactive about how they could reduce environmental damage, through (for instance) reporting requirements about firm environmental performance. Similarly, Charles Sabel, Archon Fung, and Brad Karkkainen called for revamping environmental regulation to create a "rolling-rule" system in which localities would set standards at the levels they thought appropriate, and central authorities would ensure regular and frequent monitoring and distribution of information about the success of those regulatory standards. Their basic idea was that the monitoring and production of information would provide impetus for constant, "rolling" improvements in environmental performance by localities, without the need to resort to rigid "command-and-control" regulation. (For an excellent summary of the literature and these themes, see this piece by Orly Lobel.)

An important element of many of these reforms was to encourage greater use of voluntary measures to achieve environmental goals. If some regulated parties will seek to comply with, or exceed, existing environmental standards for reasons independent of the possibility of regulatory sanctions, then treating those parties as if they were violators might be counterproductive, as Kagan and Bardach noted. Reformers argued that voluntary measures allow for flexible and immediate responses to environmental problems, without concerns about industry obstruction or legislative inertia. They can be tailored to local conditions.

State and federal environmental agencies in the 1990's began experimenting with a wide range of voluntary measures to try and provide positive rewards to those regulated parties who met and exceeded regulatory standards. EPA developed programs such as Project XL and 33/50. At the time these programs were quite controversial, and EPA has since discontinued a number of them. However, EPA still has a substantial number of voluntary programs in operation,

and many states have continued their programs as well.

Cary Coglianese and Jennfier Nash have produced what is perhaps the definitive assessment of how successful these voluntary programs have been. Coglianese and Nash's piece is a close analysis of EPA "flagship" voluntary program, the National Environmental Performance Track. The Performance Track program operated for approximately eight years, and it included hundreds of companies. Those companies promised to meet and exceed EPA regulatory standards in return for publicity, recognition, and some modest relaxation of regulatory burdens (such as reduced inspection requirements). It was designed to ensure active and ongoing improvements by companies in environmental performance, and to facilitate cooperative and collaborative relationships between EPA and regulated parties. Coglianese and Nash collected an impressive amount of empirical research in conducting their assessment: analysis of EPA data on individual firm characteristics and compliance; interviews and close analysis of a small sample of firms; a survey of a wide range of facilities both within and outside of Performance Track.

Coglianese and Nash's conclusion based on their study – and on a long history of research that Coglianese, Nash and others have led on similar voluntary programs – is that voluntary programs don't produce much environmental benefit. EPA never was able to demonstrate that regulated facilities that participated in the Performance Track had better environmental outcomes than facilities that did not participate; in fact, the only major difference is that participating facilities were more likely to value outreach and cooperation with the public and the government than those that did not participate. Moreover, participation in this program, even with hundreds of participants, was a tiny fraction of the total number of entities regulated by the EPA.

As Coglianese and Nash note, one of the problems with voluntary programs is that to get substantial participation in them, agencies must provide substantial regulatory relief (or other tangible benefits). The Performance Track's rewards simply were not enough to encourage widespread participation. But in order to justify large benefits, the EPA has to ensure that the regulated parties are truly making substantial, additional compliance efforts above and beyond the minimum standards – something that was not cost-effective or feasible for many of the participating parties. Coglianese and Nash frame this is a matter of political reality – if EPA did not impose strong demands in return for substantial regulatory benefits, it would face political pressure from Congress or environmental groups. I would add that if EPA did give those benefits without seeking major contributions from the regulated parties, which would be tantamount to rolling back regulatory standards.

The results of Coglianese and Nash's study are important for environmental law in many ways. First, they provide another example of the important role that empirical research can play in the field.

Second, their work provides an important contribution to the debate over regulatory flexibility and "new governance" in environmental law. It is certainly true that voluntary government-run measures were only one component of various "new governance" proposals. "New governance" scholars noted an important role for government coercion in producing the information that would result in improved environmental performance, and they also noted the possibility that non-governmental pressures and organizations might create strong incentives for increased environmental performance. But voluntary government-run measures were still an important component of many "new governance" proposals. Coglianese and Nash's work should prompt us to reevaluate the role of voluntary government-run measures in "new governance" reform proposals.

Third, their work indicates that voluntary measures are not a panacea. Indeed, to the extent that they depend on regulatory relief to inspire performance, they may not have a lot of potential. Instead, non-legal factors will be much more important drivers of voluntary measures – as Kagan himself concluded in a co-authored study of environmental behavior by paper mills.

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