

Legal Framework of Enforcement of Environmental Laws in the United States

Border 2020 Enforcement Workshop

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Federal Perspective

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Questions Presented

- ▶ How is environmental enforcement achieved in the U.S.?
- ▶ Who has authority to enforce environmental requirements?
- ▶ How can transboundary cooperation or coordination help these efforts?
- ▶ What are some of the obstacles to using cross-border gathered intelligence?

**Law without enforcement
is just good advice.**

– Abraham Lincoln



ENFORCEMENT IS ESSENTIAL TO:

ENVIRONMENTAL RESULTS

EQUITABLE TREATMENT OF THE REGULATED COMMUNITY

CREDIBILITY OF LAWS AND INSTITUTIONS

REALIZING LONG TERM ECONOMIC ADVANTAGES

REQUIREMENTS

ENFORCEMENT

BEHAVIOR CHANGE

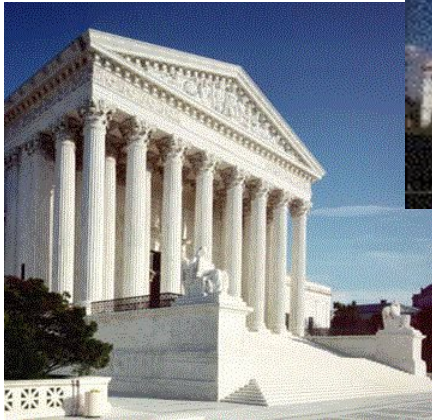


FEDERAL GOVERNMENT

U.S. Constitution is the supreme law of the land, and defines the legal relationship between the Federal and State governments

Courts *(Judiciary)*

- Interprets laws



President *(Executive)*

- Enforces laws



Congress *(Legislative)*

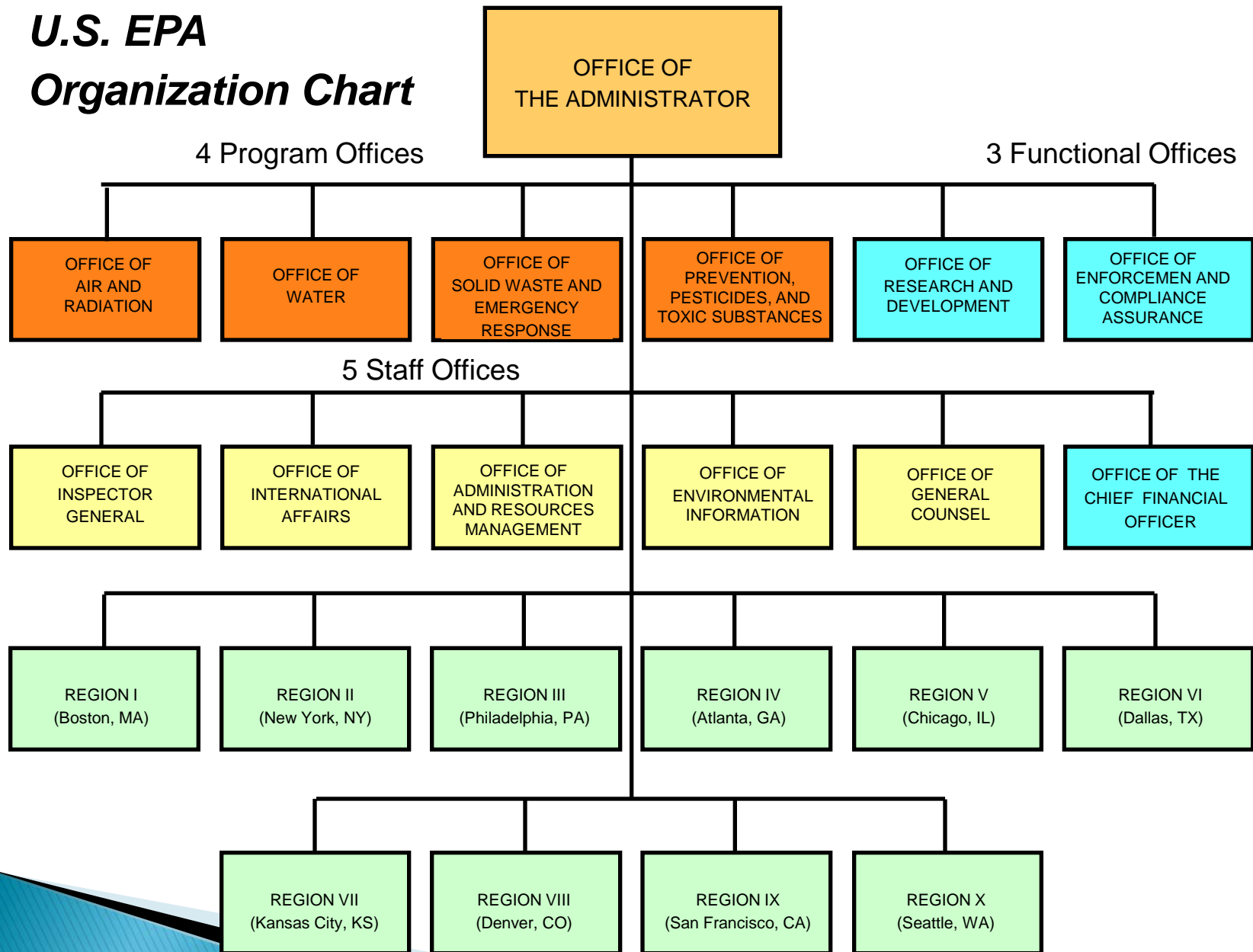
- Passes laws

U.S. EPA's Role in Environmental Programs

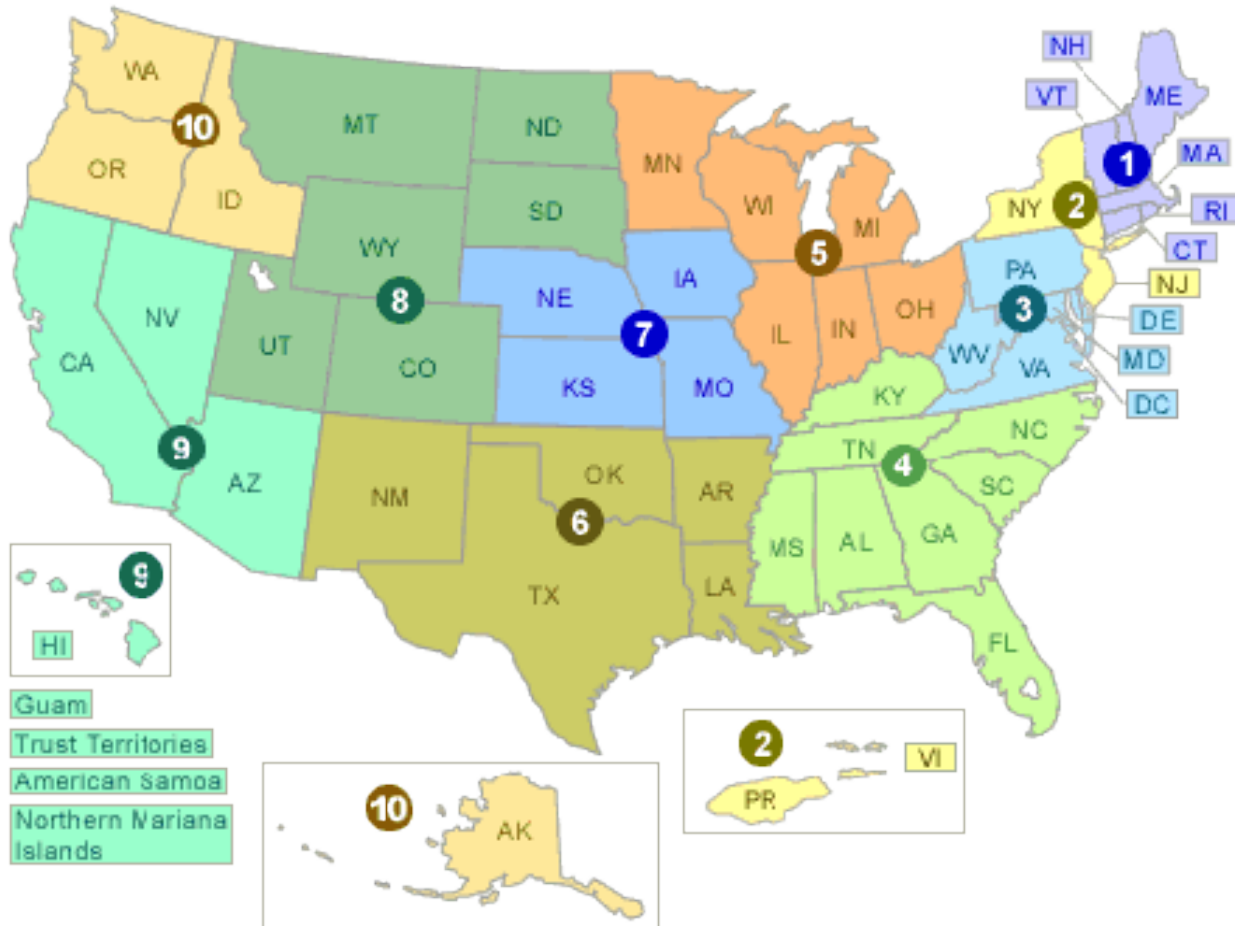
- ▶ The U.S. EPA Administrator is tasked with administering and enforcing most federal environmental laws.
- ▶ 17,000 employees divided between Headquarters and 10 Regional offices.
- ▶ Administers and enforces its own programs and oversees programs approved, authorized or delegated to State/Local/Tribal (S/L/T) agencies.



U.S. EPA Organization Chart



U.S. EPA REGIONAL OFFICES



U.S. EPA Programs Are Decentralized

- ▶ Over 80% of agency personnel are located in the Regions or field offices.
- ▶ U.S. EPA Office of Enforcement and Compliance Assurance coordinates enforcement nationally (OECA's 2012 budget was \$621 million).
- ▶ U.S. EPA assists S/L/T agencies with their inspection and enforcement programs through State and Tribal Assistance Grants (\$1.8 million for STAG in 2010).

U.S. STATES

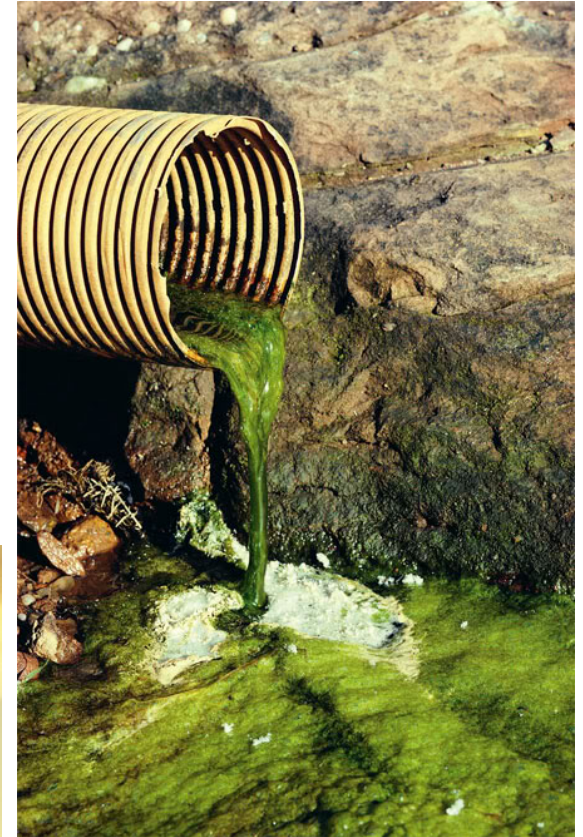


- Monitor environmental conditions.
- Implements delegated or approved federal programs.
- Enact state laws and operate unique state environmental programs.
- Operational activities such as issuing permits.
- Compliance and enforcement programs.

Major Environmental Laws Enforced by U.S. EPA

- **The Clean Air Act (CAA)**
 - Air quality and stationary/mobile air sources.
- **The Clean Water Act (CWA)**
 - Water quality and dischargers of pollutants.
- **The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)**
 - Cleanup of contaminated sites.
- **The Emergency Planning & Community Right-to-Know Act (EPCRA):**
 - Reporting requirements of releases and chemical management.
- **Federal Insecticide, Fungicide & Rodenticide Act (FIFRA)**
 - Regulation of pesticides.
- **The National Environmental Policy Act (NEPA)**
 - Environmental reviews for major agency actions.
- **The Resource Conservation and Recovery Act (RCRA)**
 - Cradle to grave regulation of hazardous waste.

Problems Being Addressed By Environmental Laws



U.S. EPA's Enforcement Authority

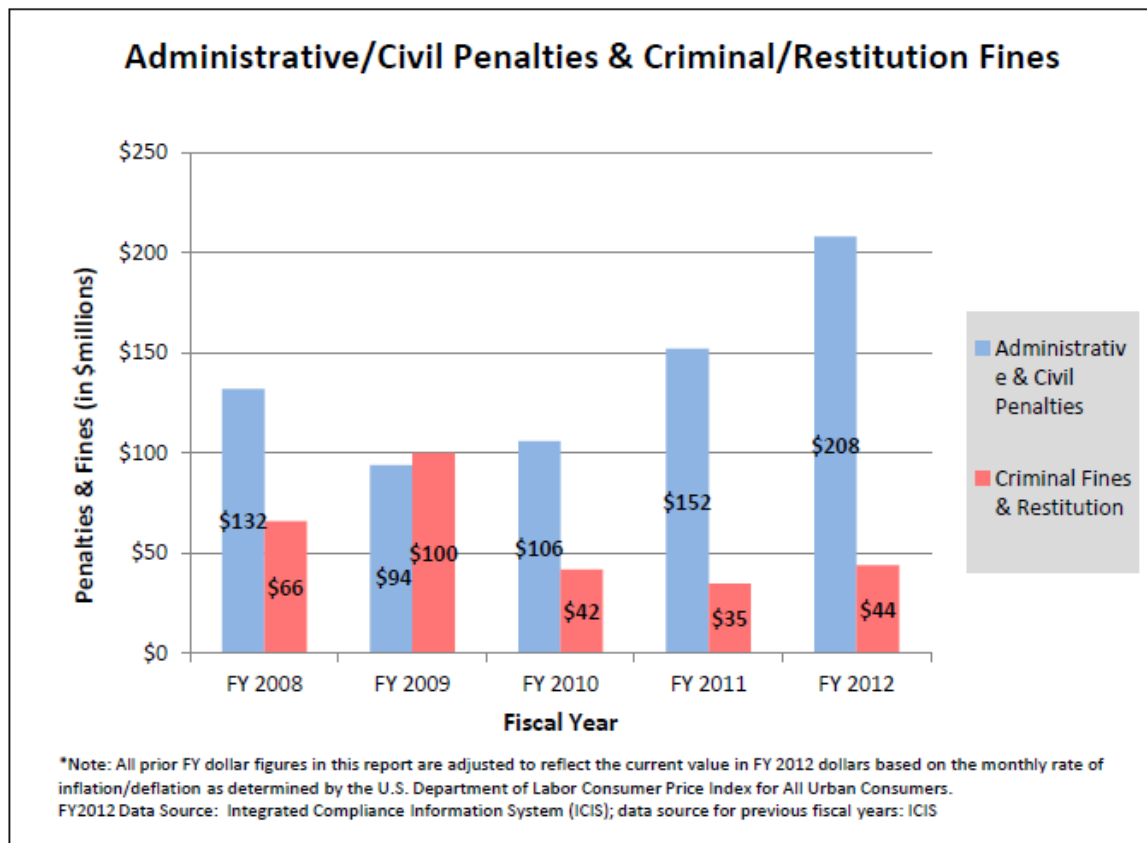
- ▶ Statute provides U.S. EPA authority to investigate violations, including for inspections.
- ▶ Two types of enforcement typically authorized:
 - Civil (penalties and injunctive relief)
 - Criminal (fines and imprisonment)
- ▶ Two options for civil enforcement:
 - Judicial
 - Administrative





FY2008-2012 Enforcement & Compliance Annual Results

Civil Penalties & Criminal Fines Assessed



- Penalties – both civil and criminal – play an important role in deterring violations.

- In FY 2012, EPA enforcement actions required companies to pay over **\$200 million** in civil penalties (administrative and judicial) – an all-time record amount.

- In FY 2012, EPA criminal prosecutions resulted in **\$44 million** in criminal fines and restitution.

Civil Judicial Remedies

- U.S. DOJ represents U.S. EPA in federal court.
- Legal remedies for civil judicial cases:
 - Penalties: Each statute specifies maximum amounts of civil penalties.
 - Injunctive relief: What is required to come into compliance.
 - Mitigation: Measures to address past harm (not statutorily based, but within equitable powers of the courts).



Civil Penalty Policies

- ▶ Civil Penalties are calculated pursuant to program-specific penalty policies.
- ▶ Each policy considers the following:
 - Potential for harm
 - Extent of deviation from requirements
 - statutory penalty limits
 - Good faith efforts
 - Degree of willfulness/negligence
 - History of non-compliance
 - Ability to pay
 - Economic benefit of non-compliance



Civil Enforcement Process

- ▶ Notice: Actions preceded with some sort of notice (notice of violation, show cause letter, etc.)
- ▶ Settlement: Cases often settle prior to going to trial:
 - *Judicial* – consent decree
 - *Administrative* – consent agreement and final order
- ▶ U.S. EPA will often pursue administrative enforcement instead of judicial:
 - easier and faster than a judicial action.
 - involves fewer outside parties.
 - But, limitations on size or nature of administrative relief.

U.S. EPA Administrative Hearings

- ▶ Follows standards in 40 C.F.R. Part 22.
- ▶ In front of an Administrative Law Judge.
 - U.S. EPA employees who are removed from rest of agency.
- ▶ Similar to a judicial trial, but more streamlined.
- ▶ Appeals: Final decisions by an ALJ may be appealed to the U.S. Environmental Appeals Board (EAB).
Appealable to federal court after that.



Supplemental Environmental Projects (SEPs)

- ▶ U.S. EPA created policy allowing companies to perform an environmentally beneficial project that warrants a mitigation of a civil penalty.
- ▶ Must not be otherwise required to perform or funded by the government.
- ▶ Types of projects (just a few examples):
 - Pollution Prevention
 - Environmental Restoration Planning/Preparedness
 - Pollution Reduction

Citizen Suit Provisions

- ▶ Most statutes have provisions for citizen suits.
- ▶ Requirements:
 - A citizen or citizen group must have standing;
 - The violations must be ongoing.
- ▶ Allow for recovery of attorney fees.



California State Perspective

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Regulatory Philosophy

- ▶ California Is a Pioneer in Environmental Protection
- ▶ Enforcement Is Pro-Business
 - Lack of Enforcement Leads to an Unfair Economic Advantage for Violators

California Regulatory Framework

- ▶ The California Environmental Protection Agency (Cal/EPA), through its Boards, Departments and Offices, develops, implements and enforces California's environmental protection laws.
- ▶ Many State programs are delegated to or shared with county or local agencies.
- ▶ Cal/EPA entities include:
 - Air Resources Board, Dept. of Toxic Substances Control, State Water Resources Control Board (overseeing the Regional Water Quality Control Boards), Dept. of Pesticide Regulation, CalRecycle, Office of Environmental Health Hazard Assessment

Key California Environmental Regulatory Programs

- ▶ California has accepted a number of delegated or approved federal programs, including:
 - Air programs (CAA PSD, NSR, SIPs): CARB, regional air pollution control districts
 - Hazardous waste programs (RCRA): Dept. of Toxic Substances Control, local Certified Unified Program Agencies (CUPAs)
 - Water programs (CWA): State Water Resources Control Board, Regional Water Quality Control Boards
 - Pesticide registration and regulation (FIFRA): Dept. of Pesticide Regulation

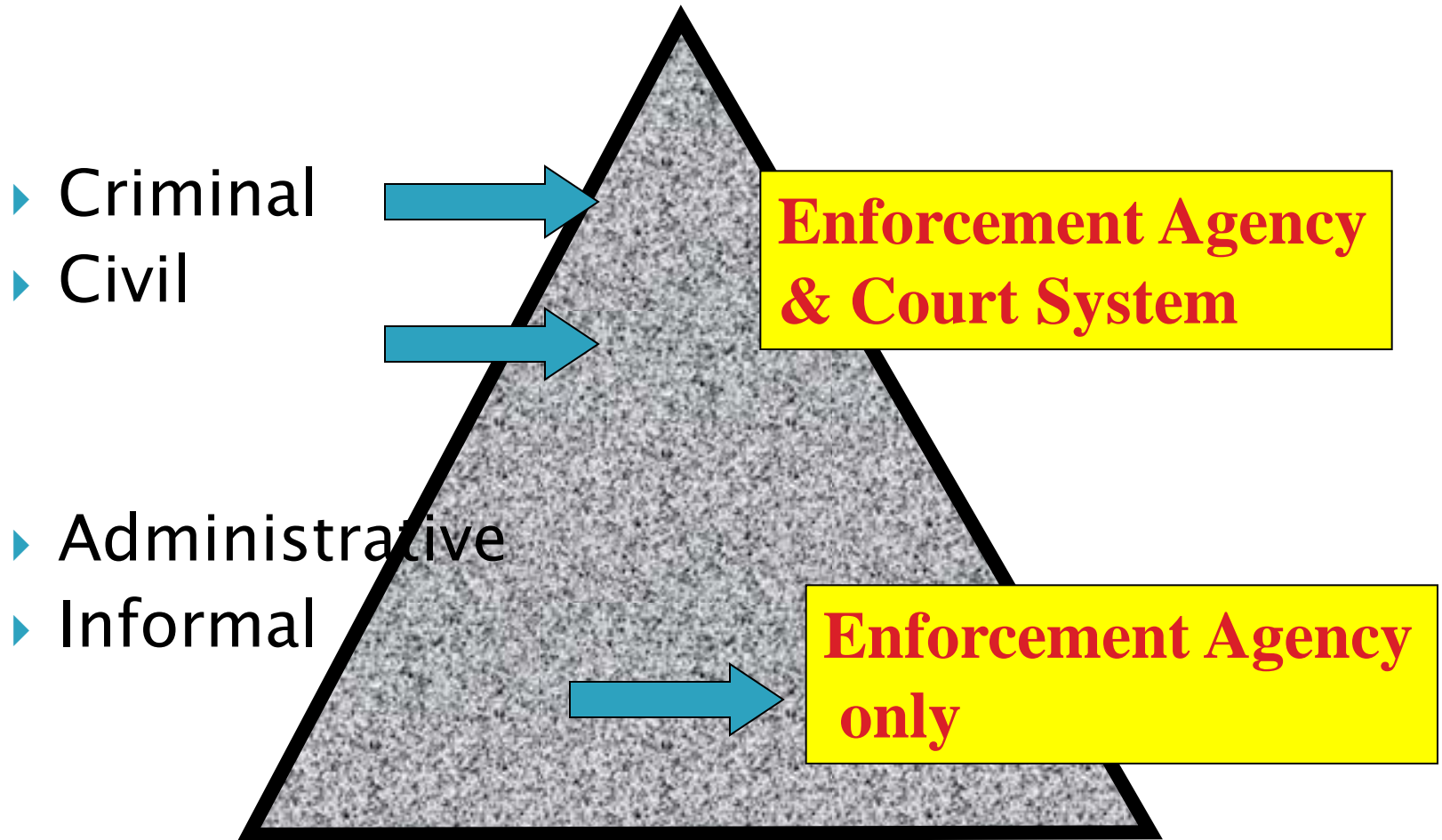
Key California Environmental Regulatory Programs (cont.)

- ▶ California also implements a number of non-federal environmental regulatory programs:
 - California Environmental Quality Act (CEQA)
 - Proposition 65 (warnings about cancer-causing chemicals)
 - California Global Warming Solutions Act of 2006 (AB 32)

State Implementation of Environmental Laws

- ▶ Just as with federal enforcement, state action may include:
 - Judicial or administrative enforcement;
 - Criminal or civil enforcement.
- ▶ California DOJ, through its Office of the Attorney General, is authorized to represent California agencies in court.
- ▶ County District Attorneys in California's 58 counties also have authority to enforce certain state environmental laws in criminal and civil prosecutions.

Enforcement Pyramid



Process of Discovering Violations

- ▶ State and local agencies have access to administrative inspectors and criminal investigators:
 - Follow up on tips by individuals or other agencies;
 - Focus on specific areas or industries; multi-jurisdictional TASK FORCES are very effective;
 - Commit to certain inspections schemes to receive EPA funding.

State Judicial Cases

- ▶ Filed in California state courts; follow state procedures.
- ▶ Can pursue either judicial or criminal cases in court.
- ▶ Trials similar to those in Federal District Court:
 - Complaint
 - Answer
 - Pre-trial discovery and motions
 - Intervention by 3rd parties
 - Dispositive motions, including for summary judgment
 - Decision or order by judge
 - Appeal



Supplemental Environment Projects (SEPs)

- ▶ Environmentally beneficial projects which a defendant/respondent agrees to undertake to settle an enforcement action, but he/she is not otherwise legally required to perform.
- ▶ Applies to administrative and civil, not criminal actions.
- ▶ Cal/EPA has recommended guidance:

[calepa.ca.gov/Enforcement/Policy/Default.h
tm](http://calepa.ca.gov/Enforcement/Policy/Default.htm)



Criminal Enforcement

- ▶ Criminal enforcement is meant to punish knowing or reckless violators (largely retributive).
- ▶ Most environmental federal and state environmental statutes have provisions for criminal enforcement.
- ▶ Types of claims:
 - General claims
 - Knowing endangerment
 - Filing false reports
 - Specific claims
 - CWA – intentional discharges
 - RCRA – treatment without permit

Criminal/Civil Coordination

- ▶ There can be parallel proceedings (civil and criminal):
 - Care must be taken in criminal–civil communications
 - Ex. No civil inspections merely to support criminal investigation;
 - Double Jeopardy/Res Judicata is a concern.
 - Corporate office doctrine:
 - Prosecutor looks to include officers where practicable

Working together to Enforce in the Border Region



Enforcement in the Border Region

- ▶ U.S. and state laws do not apply extraterritorial unless specified by statute:
 - CERCLA has been applied across the border when release into the U.S. occurs (Teck Cominco Metals case).
- ▶ The U.S. and states can prioritize where resources are spent for investigations and/or enforcement activities.
- ▶ Some statutes have specific importation/exportation requirements, including TSCA, RCRA and CAA.

Benefits to Environmental Enforcement of Cross-Border Coordination

- ▶ Shared information is helpful for targeting inspections and locating potential violators.
- ▶ Shared information could be used in enforcement actions on one side of the border or the other.
- ▶ Agency cooperation could assist successful cross-border enforcement of judgments.



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Evidentiary Issues for Use of intelligence Gathered Cross-Border

- ▶ Cross-border evidence could be used in a trial in the U.S.:
 - The Hague Evidence Convention allows for discovery.
- ▶ Depositions and trial testimony from Mexican citizens could be used in a trial in the U.S.
 - But, process set forth in Hague Convention may be lengthy;
 - Could be voluntary depositions at a U.S. consulate.

Enforcement Against a Person/Company Residing in Mexico

- ▶ A violator in the U.S. may flee across the border or be a Mexican citizen or corporation.
 - For example, a maquiladora who violates U.S. law but resides in Mexico.
- ▶ To sue an individual in Mexico in U.S. court, some hurdles:
 - Establish personal jurisdiction – need minimum contacts.
 - Amenable to service – State long arm statutes allow for this.
- ▶ Certain conventions on effectuating service:
 - Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
 - Inter-American Convention on Letters Rogatory.

What We Collectively Seek to Avoid:

