

[REVISED FINAL VERSION – July 3, 2020]

ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE

Instructor: Randolph L. Hill
Summer 2020, Term Three, July 6–16
9:00a.m.–12:00p.m. (online)

This course is an introduction to the theory and practice of enforcement of the federal pollution control laws. The course will first discuss the basic regulatory structure of the pollution control laws and the administrative, civil judicial, and criminal enforcement tools available to federal and state regulators to ensure compliance with those laws. The course will then delve into the practice of civil enforcement, including methods for investigating and establishing potential violations, selection of the appropriate enforcement response, calculation of penalties, use of supplemental environmental projects or other innovative remedies, and practical issues arising in citizen suit enforcement. The course will also discuss key issues related to criminal enforcement, including establishment of the elements of the offense and considerations of mental state requirements and the burden of proof. Finally, the course will discuss alternatives to traditional command-and-control regulation and enforcement for gaining compliance with environmental standards.

Prerequisites

Environmental Law; Administrative Law may also be helpful.

Textbooks and Other Reading Materials

- 1) Mintz, et al., Environmental Enforcement, Carolina Academic Press 2007 [2018 paperback reprint edition], ISBN 978-1-5310-1030-0 (including 2012 Supplement, available on TWEN)
- 2) Anderson, et al., Environmental Law Practice 4th ed., Carolina Academic Press 2018, ISBN 978-1-5310-0531-3
- 3) Supplemental Materials Available on TWEN for This Course

A couple of notes about the Anderson book:

- 1) Some of the textual material covers the same topics as Mintz. These are noted on the syllabus as “recommended.” Read these if you want a different perspective. Material that is unique to Anderson is listed as “required.”
- 2) There are several problems and exercises in the book. Except for Exercises 2.1-2.3, you need not study them in detail.

Problem Sets

We will do several problems together in class. For certain of these problems, it will be helpful to think about them and have possible answers ready in advance. [You will do the Anderson Exercises in groups, which will be assigned towards the end of the first week.] Some of the problems are in in Mintz; others were written by me as short handouts. For convenience, I’ve listed them below in one place. None of these are graded and you do not need to prepare or submit anything in writing. Just be ready to discuss.

Session 2

1. Hill Problem 2.1 (“Modern Technology and the Fourth Amendment”) (on TWEN)
2. Mintz page 48: review DMR and look for permit violations
3. Mintz Problem 8-1 (page 325)

Session 4

1. Hill Problem 4.1 (“Possible Defenses in Civil Enforcement Cases”) (on TWEN)
2. Mintz Problem 4-2 (page 154)
3. Anderson Exercise 2.1 (page 138)

Session 5

1. Anderson Exercise 2.2 (page 139) [prepare before class; discuss in class]
2. Anderson Exercise 2.3 (page 140)

Session 6

1. Hill Problem 6.1 (“Mens Rea in Crim. Env’tl Enforcement Cases”) (on TWEN)
2. Mintz Problem 6-2 (page 335)

Session 7

1. Hill Problem 7.1 (“Citizen Suits After Gwaltney”) (on TWEN)
2. Exam Sample Problem 1 (will be available on TWEN the day before)

Session 8

1. Exam Sample Problem 2 (will be available on TWEN the day before)
2. Mintz Problem 9-1 (page 367)

Mini-Lectures

For each class session, I will record a lecture of 15-30 minutes or so, depending on the topics. The recordings of those will be available on TWEN and also in the “Mini-Lectures” channel for our Microsoft Teams class. The purpose of these mini-lectures is so you don’t have to listen to me talk so much online during the class session, in the hope the class sessions will be more interactive (and shorter!). Please watch the lecture before the relevant class session when you do the readings for that class.

Online Class Practices and Procedures

The class will be taught via Microsoft Teams. Please download the Teams app. to your computer and join the class via the internet. I’ve provided a copy of the class link below, and you should also have received an email inviting you to join and also inviting you to the class meetings.

If you lose your internet connection, you can, in a pinch, call into the class with the numbers listed below. But you won’t be able to participate as effectively in the discussion and won’t be able to see anything I’m displaying. All classes will be recorded in Teams for playback later if you lose connectivity. Please note that, per ABA rules, class attendance is required, so please don’t plan simply to rely on the recorded class sessions.

[Join Microsoft Teams Meeting](#)

+1 213-293-2313 United States, Los Angeles (Toll)
(833) 827-2530 United States (Toll-free)
Conference ID: 531 644 247#

I will use Teams as the meeting space and to store recorded copies of each class and each mini-lecture. Everything else you need will be on TWEN. If I need to contact you, I will use email. To contact me outside of class, it’s best to use my personal email address: <rlhill1@cox.net>. Please note that there are 2 lower-case letter “l”s and then the number “1” at the end of my address, and don’t leave out the lower-case “l” as the second letter.

During class, please turn your camera on and keep your mike muted except when speaking. If you would like to ask a question, please use the “raise hand” feature of Teams. You can also type questions into the Chat box, but I may not see them. Please do not use the Chat box except to contact me with a question or if I invite answers or comments using it.

If you haven’t yet taken a class in Teams, I encourage you to practice with it before class starts on the first day. I will schedule a brief “test class” on the afternoon of Sunday, July 5th (4pm Eastern time) for anyone who’d like to test-drive Teams before Monday. You can also click on the following links if you need more instruction on how to:

Attend a meeting in Teams: [video](#).
Raise a hand: [article](#).
Chat in a meeting: [video](#).

Evaluation

There will be an take-home final examination beginning on Thursday, July 16th, and will be due on Sunday, July 19th at 6:00pm Eastern time. The exam will be blind-graded. More details and a sample exam will follow. Class participation is encouraged, but will not form a part of the final grade.

List of Readings for Each Class Session

NOTE: Please read/watch the first assignment prior to the first class.

July 6 -- Session 1: Introduction to Environmental Enforcement

- Required:
- a) Mintz 3-14, 31-37, 79-83, 111-112, 211-213
 - b) Anderson 3-6, 75-81
 - c) Shimshack, “Monitoring, Enforcement, & Environmental Compliance: Understanding Specific & General Deterrence” (EPA 2007) 1-18, 22-27 (skim only) [available in Course Materials on TWEN]
 - d) EPA Enforcement Results for FY 2019 (skim charts) [available in Course Materials on TWEN]
 - e) Grumbles, “Crooks and Nannies” [available in Course Materials on TWEN]
 - f) Inside EPA, “FY 19 Budget Seen as ‘Huge Blow’ to EPA Enforcement Programs” (Feb. 14, 2018) [available in Course Materials on TWEN]
 - g) Watch: Session 1 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]
- Recommended:
- a) Anderson 103-108
- Optional:
- a) Adler, “Bean Counting for a Better Earth,” *Regulation* (Spring 1998) 40 [link available in Course Materials on TWEN]

July 7 -- Session 2: Detecting Violations; Voluntary Disclosures

- Required:
- a) Mintz 39-67, 314-325
 - b) Anderson 97-102
 - c) EPA, “On-Site Civil Inspection Procedures,” 85 Fed. Reg. 12,224 (Mar. 2., 2020) (skim) [available in Course Materials on TWEN]
 - d) Hill Problem 2.1 [available in Course Materials on TWEN]
 - e) Watch: Session 2 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]
- Recommended:
- a) Anderson 88-96 (omit Problems 2.2, 2.3, and 2.4), 143-150
- Optional:
- a) EPA, Statistics on EPA/State Air, Water, & Hazardous Waste Inspection and Enforcement (skim) [link available in Course Materials on TWEN]
 - b) EPA, Fact Sheet on Audit Policy (May 15, 2018) [available in Course Materials on TWEN]

July 8 -- Session 3: Government Enforcement Response to Detected Violations; Administrative Enforcement

- Required:
- a) Mintz 14-31, 83-94, 105-109
 - b) Mintz 2012 Supplement 6-10 [available in Course Materials on TWEN]
 - c) Anderson 108-114 (to end of subsection “c”)
 - d) Anderson 133-141 (Exercise 2), 365-378 (skim)
 - e) EPA, “Revised Policy Framework for State/EPA Enforcement Agreements (1986) 21-25 [available in Course Materials on TWEN]
 - f) Inside EPA, “EPA Enforcement ‘Discretion’ During Pandemic Prompts Early Concerns” (Mar. 26, 2020) [available in Course Materials on TWEN]
 - g) Boston Globe, "Mass. is Enforcing Its Environmental Rules Less" (Mar. 8, 2017) [link available in Course Materials on TWEN]
 - h) Watch: Session 3 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]

- Recommended: a) Anderson 81-83, 116 (subsection “e”), 132-133 (to beginning of Exercise 2)
- Optional: a) EPA, “Interim OECA Guidance on Enhancing Regional-State Planning on Compliance Assurance Work in Authorized States” (Jan. 22, 2018) [available in Course Materials on TWEN]
- b) EPA, “Language Regarding Judicial Review of Certain Administrative Enforcement Orders Following the Supreme Court Decision in *Sackett v. EPA*” (Mar. 21, 2013) [available in Course Materials on TWEN]
- c) EPA, “Enforcement Response Policy for EPA’s 2013 Vessel General Permit” (Dec. 27, 2013) [available in Course Materials on TWEN]
- d) Letter to Grumbles and Frosh, “Decreases in Environmental Enforcement” (May 5, 2016) [available in Course Materials on TWEN]
- e) EPA, “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” (Mar. 26, 2020) [available in Course Materials on TWEN]

July 9 -- Session 4: Civil Judicial Enforcement Practice

- Readings: a) Mintz 113-125, 131-158 [omit Problem 4-1]
- b) Mintz 2012 Supplement 11 [available in Course Materials on TWEN]
- c) Anderson 121-123
- d) Anderson 133-141 (reread) [We will go through Exercise 2.1 together in class]
- e) DOJ Memo, “Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants” (Mar. 12, 2020) 1-2, 16-19 [available in Course Materials on TWEN]
- f) Hill Problem 4.1 [available in Course Materials on TWEN]
- g) Watch: Session 4 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]
- Recommended: a) Anderson 114-116

- Optional a) EPA, “Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy” (Mar. 10, 2015) [available in Course Materials on TWEN]

July 13 -- Session 5: Civil Judicial Enforcement Practice (Part 2); Civil Cleanup Enforcement

- Readings: a) Anderson 133-141 (reread as necessary), 365-378 (reskim as necessary) [We will go through Exercises 2.2-2.3 together in class]
- b) Mintz 159-171, 181-187, 194-201, 209-210
- c) Mintz 2012 Supplement 18-23 [available in Course Materials on TWEN]
- d) Watch: Session 5 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]

- Recommended: a) Anderson 194-196, 200-201, 211, 217, 234

- Optional: a) Anderson 236-245

July 14 -- Session 6: Criminal Enforcement

- Readings: a) Mintz 211-256 [211-213 is a reread]
- b) Mintz 2012 Supplement 29-33 [available in Course Materials on TWEN]
- c) United States v. Boldt (1st Cir. 1991) [available in Course Materials on TWEN]
- d) Hill Problem 6.1 [available in Course Materials on TWEN]
- e) Transactional Records Access Clearinghouse, “EPA Criminal Prosecutions Down by Half in Last Five Years” (Oct. 24, 2016) [link available in Course Materials on TWEN]
- f) Transactional Records Access Clearinghouse, “Federal Criminal Environmental Prosecutions Continue to Fall” (Feb. 1, 2018) [link available in Course Materials on TWEN]
- g) Watch: Session 6 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]

- Optional:
- a) U.S. Courts, “Environmental Crime Tops List by Organizations” (Dec. 22, 2016) [link available in Course Materials on TWEN]
 - b) Inside EPA, “EPA Official Says CWA Jurisdiction Uncertainty Might Deter Enforcement” (June 12, 2018) [available in Course Materials on TWEN]

July 15 -- Session 7: Citizen Suit Enforcement

- Readings:
- a) Mintz 257-303 [omit Problems 7-1 and 7-2]
 - b) Mintz 2012 Supplement 34-35 [available in Course Materials on TWEN]
 - c) Anderson 175-180 [omit Problem 3.5]
 - d) Friends of the Earth v. Laidlaw Env’tl Services 528 U.S. 167 (2000) (Kennedy, J., concurring) [available in Course Materials on TWEN]
 - e) Hill Problem 7.1 [available in Course Materials on TWEN]
 - f) Save the Valley v. EPA (N.D. Ind. 2002) [available in Course Materials on TWEN]
 - g) **Watch: Session 7 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]**

July 16 -- Session 8: Other Tools to Obtain Compliance; Wrap-up

- Readings:
- a) Mintz 305-314, 325-336, 352-363, 367
 - b) Anderson 63-65
 - c) Inside EPA, “Acting EPA, DOJ Officials See Compliance Assistance Boost Under Trump” (May 19, 2017) [available in Course Materials on TWEN]
 - d) Inside EPA, “New Technology Seen Boosting ‘Targeted’ Enforcement, Regulation” (Oct. 8, 2019) [available in Course Materials on TWEN]
 - e) Environmental Governance Data Initiative, “A Sheep in the Closet” (May 2019) 73-77 [available in course materials on TWEN] [rest of the report is optional]
 - f) Washington Post, Editorial (May 3, 2012) [link available in Course Materials on TWEN]
 - g) Boston Globe, Article on EPA Oil & Gas Enforcement (May 30, 2012) [link available in Course Materials on TWEN]

- h) Watch: Session 8 Mini-Lecture [available in Course Materials on TWEN and in the “Mini-Lectures” channel on Microsoft Teams]
- Optional:
- a) EPA, Slides on Next Generation Compliance (2013) [available in Course Materials on TWEN]