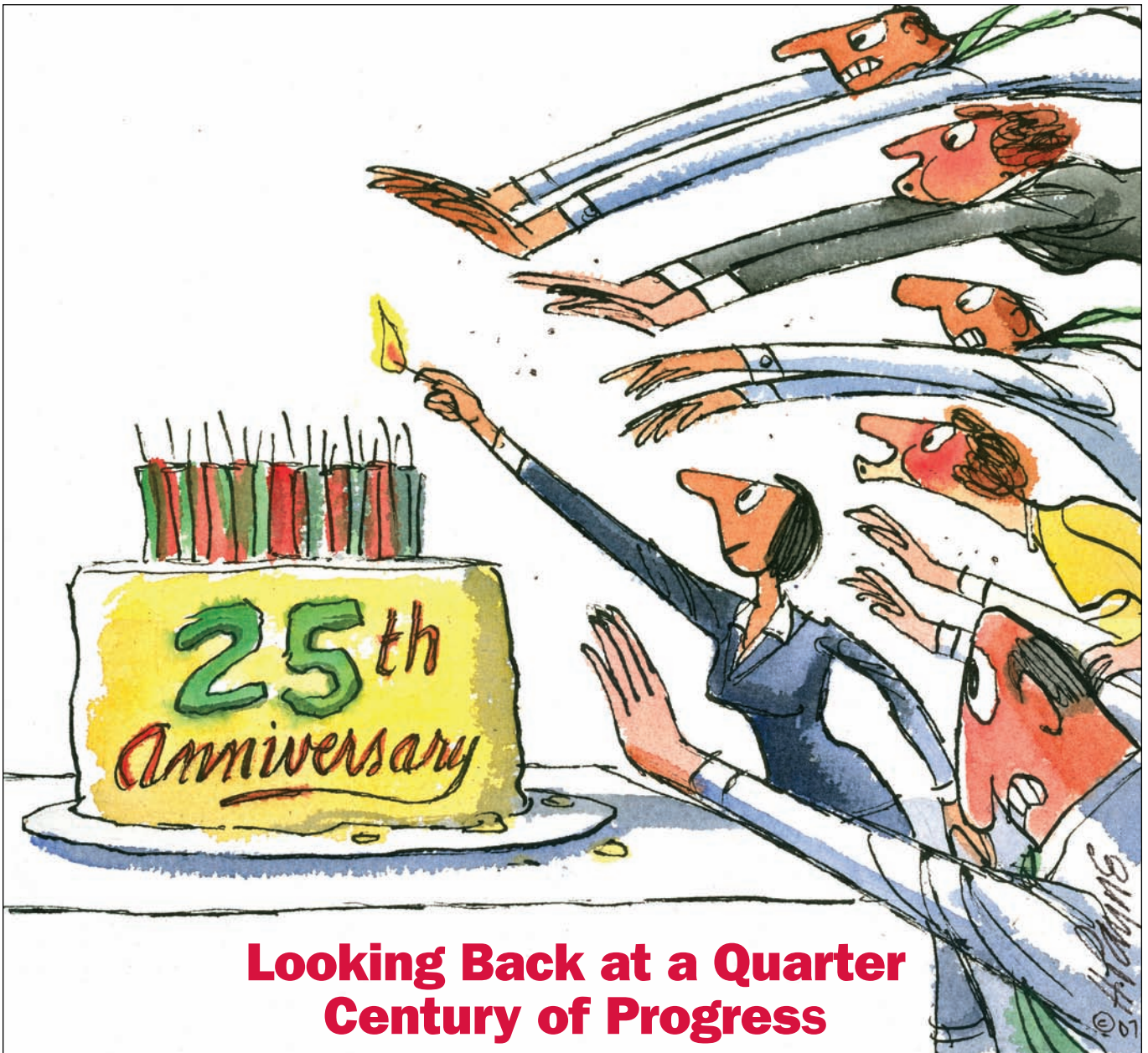


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Advancing Environmental
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**Looking Back at a Quarter
Century of Progress**

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Balancing the Equities

Facilities in noncompliance may want to keep a unit running while the violation is rectified, arguing in court that the benefit to the community from continuing to operate exceeds the benefit of avoiding the excess pollution. But many states and federal circuits do not allow such common sense judicial weighing, ceding too much power to permitting agencies

James E. Smith

A major U.S. refinery has developed a process that enhances its production. It applies for a permit during the design phase and then proceeds to construction and startup. Unfortunately, this new unit emits pollution in excess of its permit due to an innocent error in estimating emissions. Upon realizing the problem, the company goes to the state air permitting authority with what seems to be a simple request: that the agency issue an order allowing the refinery to operate slightly in excess of its permit for 18 months while modifications can be made. During this time, the refinery proposes to continue to produce the heavily demanded gasoline and fuel oil that are its major products.

Surprisingly, the refinery meets resistance from the agency's staff, who do not seem to believe that the company made an honest error. Management regrouped and consults its environmental counsel. The engineers review the calculations, all of which show that the pre-construction estimates were in good faith and that recent experience shows that a more lenient permit would be in line with the control technology requirements of the current regulations.

The refinery engineers schedule a followup meeting with the agency's permitting staff, and they ask their lawyer if they can take a hard line. After all, any fair, open-minded judge would see that the authorities are being arbitrary in not agreeing to the firm's proposal and that the

agency is putting local jobs and fuel supplies at risk. The equities are so clearly in the refinery's favor, how could it lose if the agency remains unreasonable?

The lawyer responds that, in this state, a judge will not listen to those arguments — courts will not “balance the equities” when an entity is not in compliance. The firm's only option is to work something out with the agency. The refinery engineers and managers learn that, in this state, a skilled environmental trial lawyer will be of no help under these facts if the agency refers the matter to the state's attorney general.

The facts of this case are, in simplified form, based on real disputes in Texas, where state courts will not balance the equities in cases of non-compliance with an environmental permit. And Texas is not the only jurisdiction that prohibits courts from considering any equities, no matter how compelling.

When an agency brings a lawsuit based on non-compliance with environmental laws, the government often seeks an injunction against ongoing violations. Some courts will apply the traditional notion of balancing the equities in determining whether, and to what extent, to issue an injunction against ongoing noncompliance of environmental laws. Companies often want to employ equitable arguments, stating that job losses, or even the destruction of an otherwise lawful business, will result from an order requiring immediate cessation of non-compliance. In such cases, firms often try to convince the court to allow it some additional time.

In some states and some federal circuits, courts may not permit ongoing non-compliance; they must order that non-compliance cease immediately, regardless of the consequences. As in the case of sentencing guidelines and other restrictions on a court's discretion, this one-size-fits-all approach may produce more predict-



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able results, but it also prevents courts from injecting common sense and a knowledge of a local community's interest. Restricting a trial judge's discretion while sitting in equity cedes too much power to bureaucrats, who are often more removed from the real world than a local judge. Especially with ever-more-detailed environmental regulations, those jurisdictions that do not allow a court to balance the equities effectively give the environmental regulators the power to operate a facility, even when the ongoing non-compliance is minimal compared to the facility's benefit to the local community.

Companies facing ongoing noncompliance with an environmental statute must know the judicial landscape in which they operate. Unfortunately, certain jurisdictions take a strict approach on this issue and do not allow their trial courts to exercise any discretion, and companies must beware when operating in them. While some states apply the doctrine of balancing the equities, not all states have decided this issue, and Texas rejects that doctrine.

The Threat of an Injunction

Injunctive relief has been a common part of environmental enforcement, even predating most of the well known statutes. Not too long ago, virtually all environmental enforcement was done under the common law doctrines of nuisance and trespass. These doctrines allowed the courts to issue orders to the company requiring cessation of the nuisance or trespass, under penalty of contempt of court.

Virtually all state and federal environmental statutes include injunctive relief as part of the mix of tools that an agency has when bringing an enforcement action. While some of these statutes give guidance on the manner in which courts are to consider injunctions, many simply mention injunctive relief. And agencies routinely plead that the circumstances are appropriate for an order to cease operating.

Today, courts generally determine whether, and to what extent, to issue an injunction based on three factors: the likelihood of irreparable harm; whether the likelihood of that harm is outweighed by the likelihood of harm to the defendant if the injunction were granted; and the general public interest. For most lawsuits, courts prefer the solutions to be the payment of

money, rather than an injunction that requires or forbids some action. When necessary to protect parties from ongoing nuisances or trespasses, however, courts issue injunctions.

It is not surprising that governmental entities often plead for injunctive relief in environmental enforcement cases, given the consequences that can come from violating an injunction. Most notably, because an injunction is an order of a court, persons who violate it, or who facilitate violation of it, can be subject to sanctions from the court, including fines and even incarceration. Moreover, enforcing an alleged violation of an injunction is often much easier than enforcing the underlying environmental violation. The governmental entity generally does not need to file a new lawsuit and the notice and other procedural requirements are much easier.

It can be easier for agencies to threaten incarceration via injunctions than through formal criminal charges

In most situations, the person accused of violating an injunction has no right to trial by jury and is generally subject to the discretion of the judge who entered the injunction in the first place. At times, it is easier for agencies to threaten or obtain incarceration via injunctive relief than through formal criminal charges. In the case of the refinery discussed above, management has excellent arguments that the public interest would not be well served with an injunction requiring immediate strict permit compliance. The state agency appears to be taking an unreasonably hard-line position, and the refinery will think that one role for the courts is to put some limits on environmental agencies run amok. No doubt they think that a good law firm, perhaps with the right mix of legal quality and political connections, will get for the refinery in court what it cannot seem to get at the agency, a fair hearing. At least in some jurisdictions, the company may be in for a rude awakening. Courts in these jurisdictions cannot even hear public interest equitable arguments.

Getting Relief From Relief

Federal courts in general have discretion regarding whether and to what extent to issue injunctions for ongoing environmental noncompliance. In many if not most instances, federal courts should balance the equities and pay regard to public consequences when considering injunctive relief, even in the face of ongoing environmental noncompliance. In *Weinberger v.*

Injunctive relief, found in virtually all federal and state statutes, has been a prominent feature in environmental law

Romero-Barcelo (1982), a case that involved clear ongoing violations of the Clean Water Act by the Navy, the Supreme Court stated that the district court had the power to undertake a traditional balancing of the equities approach when considering whether or not to issue an injunction. In another case, *U.S. v. Marine Shale Processors* (1996), the Fifth Circuit Court of Appeals explained that in an egregious case a federal court may find the environmental violation so serious as to preclude any balancing, but doing so is within the court's discretion. However, the appeals court also indicated that the trial court should make clear if it undertook the balancing and determined that an injunction was necessary or if the violations were so egregious that the court did not undertake the balancing.

In a more recent case, *Northern Cheyenne Tribe v. Norton* (2007), the Ninth Circuit also agreed that courts should invoke the balancing of the equities and mentioned that the Supreme Court directed lower courts to do so in patent cases. Likewise, in *Kucera v. Department of Transportation* (2000), Washington State became one of the few state courts that have squarely addressed equity balancing, agreeing that a court must balance the equities. However, the Supreme Court of Oregon, sitting en banc in hearing *State ex rel. Cox v. Davidson Industries, Inc.* (1981), determined that the underlying legislation controlled whether and when the courts should balance equities. In Oregon, if the legislation says that a court "may" issue an injunction, then it should balance the equities, but if the legislation says "shall," then the court should not.

Unfortunately, most state supreme courts have not spoken on the issue, even though more and more

Federal courts can generally balance the equities but most state supreme courts have not addressed the issue

environmental enforcement is in state courts, especially with so many federal environmental programs delegated to states. When an environmental program is delegated, companies generally face the possibility of enforcement in state or federal courts, or both.

The Seventh Circuit took a tougher, and perhaps more absolute approach, at least where the plaintiff is a governmental entity and the public health may be at interest. In *U.S. EPA v. Environmental Waste Control* (1990), the court said that in such cases, injunctive relief is proper "without resort to balancing." Some states that have examined the issue take an approach as tough, if not tougher, than that announced by the Seventh Circuit. For example, Indiana courts have stated that unlawful acts against the public interest should be enjoined with-

out regard to balancing (*Rees v. Panhandle Eastern Pipeline*, cited in *National Salvage & Service Corp. v. Commissioner of Indiana Department of Environmental Management* (1991)).

In Texas, home to our hypothetical facility, where the environmental statute calls for the court to issue an injunction when an environmental statute is being violated, "the doctrine of balancing the equities has no application to statutorily authorized injunctive relief." (*State v. Texas Pet Foods* (1979)). This decision was reaffirmed in *State v. Associated Metals & Minerals Corp.* (1982), in which the Texas Supreme Court ruled that a trial court did not have the authority to grant any kind of compliance schedule to permit ongoing violations of an air permit while the owner was constructing new facilities if the state environmental agency did not agree to this approach. An injunction that allowed, at least in part, for ongoing violations of an environmental statute was not within the power of a court, and only the Texas environmental agency could grant such relief (which could be in the form of an administrative order or emergency permit modification).

Thus, in Texas, ongoing violations of an environmental statute must be subject to an injunction, and that injunction must order the cessation of all noncompliant acts, once the case is filed in a court. A state court does not have the discretion to refrain from issuing such an injunction if ongoing violations are apparent. A state court also does not have the authority to give a compliance schedule that constitutes the allowance of technical noncompliance for some period of time.

The reasoning for a court's refusal to balance the equities can be based on a concept of separation of powers. When an agency, which is an executive branch entity, determines permit limits, a court order that has the effect of modifying those limits, even for a brief time, is undertaking executive rather than judicial powers, according to this reasoning. Thus, in jurisdictions that take a strict view of separation of powers, courts will not balance the equities if doing so would mean that the court would be effectively modifying the permit. In other jurisdictions the reasoning is not as theoretical but simply says that the agencies have already balanced the equities in the permit process, and therefore courts need not, and should not, go through the process again.

It is important to note that in those states, and perhaps federal courts in the Seventh Circuit, that reject any balancing of equities, arguments regarding job loss or other contributions to the community of the allegedly noncompliant facility will not be heard by a court; they can only be heard before the agency, either in a formal proceeding or, more likely, in infor-

mal meetings between the company representatives and the agency. In contrast, these arguments can be heard in some of the other state courts, and in many of the federal courts.

In the hypothetical case of the refinery discussed above, lawyers will need to make any equitable arguments to the state permitting authority. If the agency has a reputation for being reasonable, the restrictive role of the courts may not be a practical problem. However, political changes are often much quicker than changes to legal precedent. If the regulated community noted an increasingly hard nosed agency, it may want to get some legislative relief — for

In most states, a facility out of compliance will have to make an equitable argument with the agency, not the court

example, an express statutory provision that, even in environmental cases, courts should still balance the equities when determining whether, and to what extent, to enjoin violations of a permit.

In similar cases, agencies sometimes have used the non-compliance situation to extract further concessions. For example, the agency may agree to a short-term modification in order to install additional controls but may condition this on the refinery's agreeing to withdraw its contest to permit limits on a completely unrelated unit within the refinery, and accept what the agency wants on that permit. After the company has negotiated the best deal it can, it may again check with its lawyer to see if it has any other options. In the restrictive jurisdictions, the answer is that, if the refinery has obtained the best deal it can from the agency, even agreeing to concessions regarding an unrelated unit, the lawyer can do nothing else to help.

Not the Court of One's Choosing

All 50 states have environmental statutes, and many of them have the authority to enforce federal statutes. As such, companies facing environmental enforcement need to be aware not only of the approach that federal courts may take but also the possibility that the enforcement will be in a state court. Moreover, state and federal environmental officials often coordinate regarding enforcement matters. Thus, even if all of the negotiations prior to formal enforcement are with U.S. EPA or another federal agency, it is still often possible for the state to file the enforcement action, especially if, as in Texas, relevant case law gives more strength to the governmental entity on a key issue.

While in many states this coordination leads to

federal filing, either in addition to or in lieu of state filing, if the potential for balancing of equities is at stake, the governmental entities may decide that the state court provides for stronger enforcement. Companies that think that they are being treated unfairly and that the governmental is not properly considering the facility's contribution to the community in dealing with their environmental noncompliance situation should keep in mind the possibility that a court will simply not hear such arguments. Companies should be prepared for the possibility that their operation is in a state that has not yet decided this issue, and their state may adopt the Texas approach. If state law is unclear, the firm needs to prepare for the worst possible scenario.

It is important for companies to try their best to negotiate with the agency, as the agency has significantly more power to accommodate ongoing noncompliance. An agency can generally issue an order that provides for a compliance program, in which some noncompliance will be allowed for a limited period of time, perhaps while a new permit is processed or a physical change is made to the facility. Agencies always have such power; courts do not necessarily.

Even in a jurisdiction where the judge can balance the equities, this is no guaranty of any flexibility toward a company with an ongoing environmental noncompliance. Judges have a strong preference for strict compliance with environmental statutes and often reject arguments based on jobs or other contributions to the community, even when they undertake a balancing of the equities approach in a particular case. Moreover, appellate courts almost never change a trial court's decision whether, and to what extent, to enjoin an environmental violation. A company should assume that it has virtually no chance to overturn on appeal the issuance of an injunction by a trial court, if the company has an ongoing environmental noncompliance.

Judges prefer strict compliance and often reject arguments based on jobs or community interests even when they balance the equities

If, for some reason, environmental noncompliance cannot be avoided, companies must use their best efforts to try to resolve any enforcement issues with the agency, either state or federal, and avoid having the case go to court. At least in some courts, judges will be unable to listen to any argument regarding balancing the equities, and will be forced to enter an injunction requiring the immediate cessation of all environmental noncompliance, even if that means job losses or the destruction of an otherwise lawful business. •