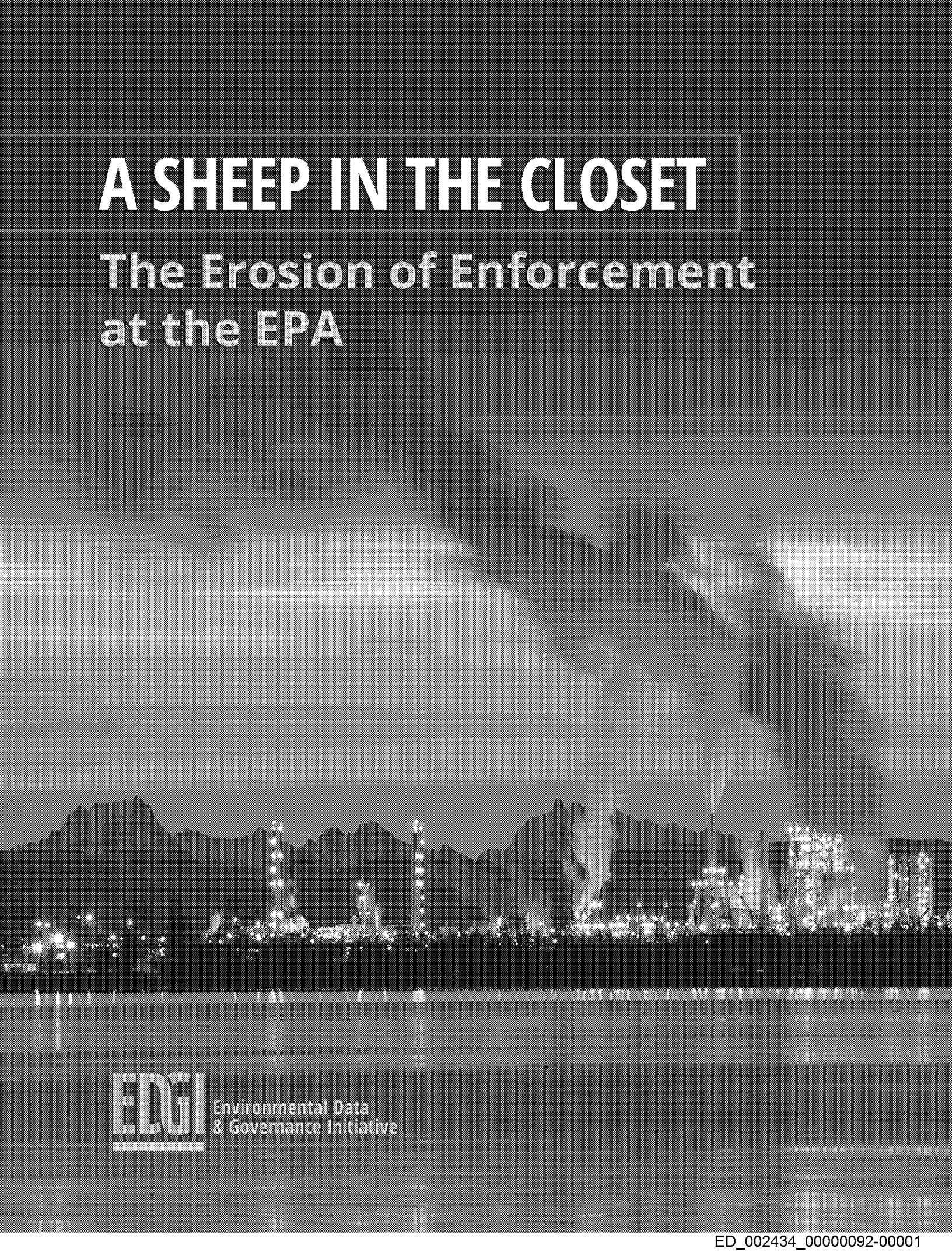
A SHEEP IN THE CLOSET

The Erosion of Enforcement at the EPA



EDGI Environmental Data & Governance Initiative

A SHEEP IN THE CLOSET

The Erosion of Enforcement at the EPA

Leif Fredrickson*
Marianne Sullivan*
Christopher Sellers
Jennifer Ohayon
Ellen Kohl
Sarah Lamdan
Alissa Cordner
Alice Hu
Katarzyna Kaczowka
Natalia Navas
Linda Wicks
EDGI
* Fredrickson and Sullivan contributed equally to this report

November 2018

The Environmental Data & Governance Initiative (EDGI) is a network of academics, developers, and non-profit professionals that promotes evidence-based policy-making and public interest science.

We acknowledge the efforts and support of EPA staff who participated in interviews & Public Lab. Technical and Content Reviewers: Matt Haber, Richard Andrews, Joel Mintz, Kelsey Breseman, Lindsey Dillon, Stephanie Knutson, Nick Shapiro. This study was supported in part by grants from the Packard and Doris Duke Foundations.

EDGI Environmental Data & Governance Initiative

https://envirodatagov.org
EnviroDGI@protonmail.com

TABLE OF CONTENTS

Executive Summary **3**

Introduction **9**

Reconsidering, Reducing, Reorganizing **12**

- Rewriting Rules 12
- Sheep in Gorilla's Clothing? 15
- Reducing Capacity and Expertise 19
- Reorganizing 22

The Plummet in Enforcement **24**

- How EPA Enforcement Works 24
- Enforcement Numbers 26

Why the Drop? **33**

- The EPA Administration's Public Explanations of Decline 33
- The EPA Administration's Internal View of Decline 36
- EPA Staff Explanations of Decline 44
- Shrinking Enforcement Budgets and Staff 44
- Industry Influence, Political Obstruction, and a Chilling Effect on Staff 49
- Cooperative Federalism—or, Leave States Alone 52
- Regulatory Rollbacks, Delays and Industry Pushback 58

Can the States Take Over the "Gorilla" Role? **60**

Conclusion **65**

Appendix **70**

ED_002434_00000092-00003

EXECUTIVE SUMMARY

This report by the Environmental Data & Governance Initiative (EDGI) examines environmental enforcement at the U.S. Environmental Protection Agency (EPA) nearly two years into the Trump administration. Since Donald Trump was elected, EDGI researchers have been conducting confidential interviews with EPA employees and recent retirees in various parts of the agency to learn about the Trump administration's efforts to reshape environmental policy and regulation at the federal level. To date, we have conducted ninety-seven in-depth interviews, most lasting from one to two hours, covering major changes that are taking place at the EPA. The majority of those interviews were conducted during the transition. This report, however, is informed by twenty-seven interviews with staff and recent retirees conducted over the last year since Trump has been in office and the agency has been headed by either Scott Pruitt or Andrew Wheeler. It also draws upon in-depth wide-ranging research into EPA data and documents as well as news coverage.

Our chief finding: No longer does the EPA seem so capable of fulfilling its mission to ensure competent enforcement of federal environmental laws. In place of that "gorilla in the closet" role characterized by its first administrator, William Ruckelshaus, it has become more of a sheep in the closet. The EPA's retreat, which shows little sign of stopping, has all but ensured significant deterioration of our nation's public health and environment in the years ahead.

During the interviews with EPA employees and recent retirees conducted over the last year, we heard repeatedly that enforcement in the agency across most or all programs is sharply down and that the agency is failing to ensure that key federal laws such as the Clean Air Act and the Clean Water Act are being properly enforced across the United States.

Further, EPA staff told us they are gravely concerned about strong messages coming from management telling them to step back from enforcement and let the states take over. They also report that they are getting increased pushback on enforcing environmental laws from the regulated community. Combined with budget cuts and dramatic staff losses, this is creating a situation where enforcement has sharply declined and the agency is at risk of failing in its mission to protect public health and environment from a wide range of threats.

ED_002434_00000092-00004

To assess the oft-repeated claim of staff that enforcement is sharply down at the EPA, we examined data from the agency including internal documents and data recorded in the Integrated Compliance Information System (ICIS) available through the EPA's Enforcement and Compliance History Online (ECHO). These sources show steep declines in enforcement and compliance actions and outcomes since the end of fiscal year (FY) 2017 on September 30, 2017.

Overall, major administrative, judicial and criminal enforcement actions have fallen:[1]

- Civil enforcement actions, which include both judicial and administrative cases, against regulated entities showed steep declines between FY 2017 and FY 2018.
- Conclusions of judicial cases (consent decrees and court orders, or CDCs) were down 22 percent from the previous year.
- Administrative orders requiring regulated entities to come into compliance (administrative compliance orders, or ACOs) were down 42 percent from the previous year.
- Administrative orders requiring polluting companies to pay the EPA back for the costs of cleaning up hazardous waste sites (Superfund administrative orders for cost recovery, or AOCs) fell to just eleven cases entered, down 54 percent from the previous year.
- Administrative orders requiring polluting companies to pay a fine (administrative penalty orders, or APOs)—the most common form of EPA enforcement action—were down 54 percent.
- Overall, these major types of civil enforcement actions (CDCs, ACOs, AOCs, and APOs) were at the lowest they have been in at least ten years.
- Although civil enforcement actions have been declining for years, that decline has generally accelerated in FY 2018, as measured by the average amount of decline and the range of decline in previous years (FY 2008 to FY 2017). For example, APOs declined an average of 6 percent from FY 2008 to FY 2017, with year-to-year declines ranging from 1 percent to 15 percent. But the decline from FY 2017 to FY 2018 was 54 percent.

[1] See section 3: The Plummet in Enforcement, for explanations and examples of EPA enforcement actions and outcomes.

ED_002434_00000092-00005

- Criminal enforcement is also down under the Trump administration. In FY 2018, only fifty-four criminal cases were settled in the past fiscal year, compared to eighty-seven in FY 2017, eighty-one in FY 2016, and more than one hundred every year going back to FY 2010.

Financial penalties and costs imposed on regulated industries are also sharply down.

- Federal civil judicial penalties in 2018 of $28 million were less than half those in 2014 ($62 million), the lowest in financial penalties imposed since 2006.
- The costs for regulated entities to comply with the law as a result of legal action taken by the EPA was also sharply down. Compliance costs were lower in FY 2018 ($3.6 billion) than they have been in at least twelve years. From FY 2006 to FY 2016 (the Barack Obama administration and the end of the George W. Bush administration) average annual compliance costs were $10 billion.
- The stark drop in penalties and compliance costs are even starker when these numbers are adjusted for inflation.

Drops in enforcement have happened across most EPA programs. An internal EPA analysis obtained by EDGI showed important declines in civil enforcement cases started ("initiations") and in cases concluded in most major programs between midyear 2017 and midyear 2018. (The main exception was the Safe Drinking Water Act). Among the hardest hit:

- The Resource Conservation and Recovery Act (RCRA) hazardous waste program showed a 17 percent decline in case initiations and a 23 percent decline in case conclusions.
- The Clean Water Act National Pollution Discharge Elimination System showed a 36 percent decline in case initiations and a 38 percent decline in case conclusions.
- The Clean Air Act Stationary Source program showed a 52 percent decrease in case initiations and a 38 percent decline in cases conclusions.

Enforcement has fallen off significantly in all regions of the United States since December 2016.

ED_002434_00000092-00006

The largest percentage decreases in civil enforcement have come in:

- Region 1 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, and ten tribal nations), which experienced a 26 percent decline in case initiations and a 42 percent decline in case conclusions.
- Region 3 (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia), which experienced a 40 percent decline in case initiations and a 38 percent decline in case conclusions.
- Region 4 (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and six tribal nations), which experienced a 49 percent decline in case initiations and a 48 percent decline in case conclusions.
- Region 8 (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, and twenty-seven tribal nations), which experienced a 53 percent decline in case initiations and a 24 percent decline in case conclusions. Region 8 has traditionally been viewed as a region that is strong on enforcement.

The situation is likely to get worse because inspections—the starting point for enforcement—are also way down in FY 2018. At the midpoint of FY 2018, total inspections were down 33 percent from the previous year. Clean Air Act stationary source inspections in FY 2018 were down 35 percent from the average for those inspections between FY 2006 and FY 2017. EPA staff say that the declines in inspection will almost certainly mean that enforcement actions will fall further in the future.

The EPA's public justification for enforcement declines at best partly accords with the facts:

- The EPA argues that recent enforcement declines are part of a decade-long drop.
    - *Our analysis finds that declines in civil enforcement actions of several types are much steeper under Trump.*
- The EPA argues it is taking more informal initiatives to help industry comply with regulations.

ED_002434_00000092-00007

    - *But informal compliance actions have also declined sharply under Trump.*

- The EPA argues that while it is stepping back on enforcement, states are stepping up.
    - *But there is very little evidence to support this claim.*
        - The EPA's own data show that state and local enforcement of the Clean Air Act Stationary Source program and the Clean Water Act Discharge Permit System program has decreased during the Trump administration.
        - Fines imposed by state and local governments for pollution have also declined during the Trump administration. Between FY 2006 and FY 2016, inflation-adjusted penalties (2009 dollars) averaged $91 million per year. But the penalties in 2017 were only $38 million, and in FY 2018 they were $59 million. State environmental agencies are often poorly resourced, and many have also suffered funding cuts; therefore, they are ill-equipped to do more if the EPA does less.
        - State enforcement programs can be vulnerable to political interference from industry and elected officials.
        - Some states are not equipped to conduct complex inspections and enforcement actions; they do not have appropriately trained and experienced staff and they may not have the requisite equipment to inspect certain types of sites.
        - The EPA can generally impose larger fines on polluters than can states, which can act as a stronger deterrent.
        - Trump's FY 2019 EPA budget pursues deep cuts in state aid, which would further hamstring states.

In fact, as internal EPA documents show, EPA officials know that enforcement is in steep decline. Internally, they also acknowledge that these declines may well be due to changes made to the agency under Trump, including the greater leeway and solicitude for regulated industries, shrinking resources for enforcement, and the stepped-up oversight, inhibiting policies, and discouraging tone and rhetoric emanating from EPA leadership.

ED_002434_00000092-00008

EPA staff have their own perspectives on the significant enforcement decline at the EPA, many of them overlapping with reasons discussed internally by EPA management. Among the interacting factors they see as contributing to the downturn are:

- the antiregulatory philosophy of the Trump administration;
- the industry ties of key leaders;
- the threat of steep budget cuts along with significant loss of staff and expertise;
- increased industry influence within the agency and via the White House;
- increased pushback from industry against enforcement efforts;
- a "cooperative federalism" that in practice has meant extreme deference to states, with the EPA refusing to back up states in federal environmental law enforcement; and
- in the face of ongoing rule reconsiderations, uncertainty about which laws and rules to enforce.

Staff are deeply skeptical that states will be able to take over the EPA's enforcement role. They point out the large variability that already exists in state enforcement efforts and suggest this will only grow under the Trump administration's version of cooperative federalism. A state's ability to enforce depends on its own political will to provide its environmental agencies with staff and resources for the task. While some state governments will step up, many—if not most—will not. The EPA's own retreat from its backup enforcement or "gorilla" role is thereby likely to make our nation's environmental protection increasingly unequal—still rigorous in some states but ever-more porous and feeble in others.

Alongside the steep cuts to EPA budgets and staff and curbed rules the Trump administration has inaugurated and continues to seek, plummeting enforcement at the EPA under Trump rounds out a concerning picture of what has happened to this agency over the last two years.

ED_002434_00000092-00009

INTRODUCTION

The EPA remains an agency in crisis. With the personal foibles and excesses of former EPA administrator Scott Pruitt no longer in the headlines, the axe-waving hostility of the early Trump administration against the agency has given way to a quieter but no less destructive approach presided over by Acting Administrator Andrew Wheeler. With less spectacle and more competence, Wheeler has continued to undermine the EPA's long-standing role as a mainstay of our nation's environmental stewardship.

Today, nearing the midpoint of Trump's presidential term, the switch in EPA leadership from Pruitt to Wheeler has turned out to be more superficial than substantive. It has not so much halted as sustained the pro-industry, antiregulatory remaking of the EPA begun under Pruitt. At risk are the protections this agency has provided to millions of Americans, not just from the impending threat of climate change but from pollutants, toxic products and wastes, and a host of other environmental dangers.

Now led by a former coal lobbyist and erstwhile chief of staff for Senator James Inhofe, Washington's best-known climate-change denier, the EPA is being transformed in ways that turn the original rationale for the agency on its head. The EPA was formed in 1970 precisely because states were not enforcing tighter environmental regulations themselves. Burning rivers and choking air pollution were the most obvious manifestations of the failures of state-based environmental governance, and of the need for a strong federal agency. The Republican tapped as the first EPA administrator, William Ruckelshaus, famously saw the EPA's role as that of a "gorilla in the closet," prepared to take action against polluters when states either could not or would not take action.[2]

While not always living up to the Ruckelshaus ideal, the EPA's partnership with the states, undergirded by its ability to lean on polluters when states do not, has been

[2] William D. Ruckelshaus, "William D. Ruckelshaus Oral History Interview," Michael Gorn, interviewer, *EPA Web Archive*, January 1993, https://archive.epa.gov/epa/aboutepa/william-d-ruckelshaus-oral-history-interview.html. There is now a sizeable scholarly literature on this notion, summarized in Paul Verbruggen, "Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation," *Regulation and Governance* 7, no. 4 (December 2013): 512–532, https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12026.

ED_002434_00000092-00010

critical to the gains in environmental quality since the 1970s. But the EPA under Trump has not just refused to play "gorilla"; it has been systematically dismantling its very capacity to do so.

This study follows up on our earlier investigation, *EPA Under Siege*, released in June 2017.[3] Here we draw upon twenty-seven subsequent interviews conducted with current and recently retired EPA staff over the past twelve months as well as the EPA's own data and documents and media reports. Our evidence points to a major thread tying together the multifarious ways that the EPA's charges, capabilities, and practical work are being reconfigured during the Trump era. They are turning the agency into a different animal altogether, not so much a gorilla as a sheep in the closet.

As the Trump administration has consolidated its control over the EPA, it has set about shearing the agency's reach and power along many fronts, from budget and staff cuts to appointments to a systematic reconsideration of earlier rule makings to proposed new restrictions on its use of science. Chief among its targets, we have found, yet little noted in recent media coverage, has been that part of the agency's work that has long ensured its "gorilla" role: enforcement.

As the agency's overseeing and punishing arms, its claws and teeth, enforcement is critical to effective environmental and health protections. Without it, our laws as well as the regulations implementing them become meaningless, too easy to circumvent. Official efforts to encourage voluntary compliance will likely prove ineffective if there is little or no prospect of more forceful follow-up.[4] Yet, while passing legislation, approving budgets, and drawing up regulations all require public reportage and feedback, the EPA's general enforcement practices do not, even though they are ultimately its chief means for compelling adherence to its rules and laws.[5] Additionally, what information the Trump-era EPA does release about its

---

[3] Christopher Sellers, Lindsey Dillon, Jennifer Liss Ohayon, Nick Shapiro, Marianne Sullivan, Chris Amoss, Stephen Bocking, Phil Brown, Vanessa De la Rosa, Jill Harrison, Sara Johns, Katherine Kulik, Rebecca Lave, Michelle Murphy, Liza Piper, Lauren Richter, and Sara Wylie, *EPA Under Siege: Trump's Assault in History and Testimony* (Environmental Data & Governance Initiative, June 2017), https://100days.envirodatagov.org/epa-under-siege.

[4] Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices*, rev. ed. (Austin: University of Texas Press, 2013), 1–2; Dietrich H. Earnhart and Robert L. Glicksman, *Pollution Limits and Polluters' Efforts to Comply: The Role of Government Monitoring and Enforcement* (Palo Alto, CA: Stanford University Press, 2011), 4; and *Fiscal Year 2007 Performance and Accountability Report Highlights: Environmental and Financial Progress*, EPA-190-R-08-001 (Washington, DC: U.S. Environmental Protection Agency, January 2008), 27.

[5] The public can comment on specific settlements and consent decrees.

ED_002434_00000092-00011

enforcement activities comes buried in obscure enumerations and legal terminology whose real significance may be downplayed or distorted, making accountability doubly difficult.

Now, however, even prior to the agency's public release of its enforcement figures for the fiscal year ending September 30, 2018, the ongoing impact of the Trump administration on EPA enforcement has already become clear. It is in the midst of a historic nosedive.

ED_002434_00000092-00012

RECONSIDERING, REDUCING, AND REORGANIZING

The EPA increasingly bears the imprint of a White House that, since January of 2017, has made no secret of its disdain for this agency and its work. Over and over again, the EPA has described its own regulations as "intrusive" and so burdensome to industry as to "kill jobs."[6] The agency itself has thereby taken up a kind of rhetoric pitting the environment against the economy, wielded by the agency's detractors within extractive and polluting industries and their lobbyists. Not just Trump and Pruitt but the new acting administrator has largely embraced this rhetoric about the EPA, also long circulating among the Heritage Foundation and other right-wing think tanks, and the antiregulatory agenda that follows from it. Thereby, they are placing our nation's public health and the future of our planet in increasing jeopardy.[7]

Rewriting Rules

Over the past few months, Andrew Wheeler has added his voice to the chorus of Trump political appointees seeking to correct their agencies' alleged excesses, to curb regulations seen as needless, burdensome for industry, and harmful to the economy. Among the changes with the new administrator, career staff have welcomed Wheeler's greater kindness and solicitude toward them, and he has been more vocal and fluent than Pruitt in promising, for instance, that the "EPA takes its Clean Air Act responsibilities seriously" and will not touch "health-based standards." Yet he too prioritizes a promise of "regulatory certainty" for those regulated, disregarding the many toxic uncertainties this agency's retreat is imposing on communities that have long counted on its protection.[8] While less reluctant than his

---

[6] White House, "Fact Sheets: President Donald J. Trump's Year of Regulatory Reform and Environmental Protection at the EPA," December 14, 2017, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-year-regulatory-reform-environmental-protection-epa/.

[7] "Heritage Foundation: Background," *Desmog* (blog), n.d., https://www.desmogblog.com/heritage-foundation, accessed October 18, 2018; and Timothy Cana, "EPA Chief Defends Rule Rollbacks While at Children's Health Event," *The Hill*, October 1, 2018, https://thehill.com/policy/energy-environment/409280-epa-chief-defends-rule-rollbacks-at-childrens-health-event.

[8] Andrew Wheeler, "Andrew Wheeler: EPA Offers Regulatory Certainty," *Toledo Blade*, August 25, 2018, https://www.toledoblade.com/opinion/Op-Ed-Columns/2018/08/25/Andrew-Wheeler-Environmental-Protection-Agency-EPA-offers-regulatory-certainity/stories/20180825054 ("responsibilities"; "certainty"); Cana, "EPA Chief Defends Rule," ("health-based").

ED_002434_00000092-00013

predecessor to speak of all the benefits gained from our investment in clean air, clean water, and clean soil, Wheeler has continued nearly all of the strategies initiated by Pruitt for curbing its capacity to regulate and protect.

The major reconsiderations of EPA rule makings begun under Pruitt (Figure A, Appendix) are still going forward. While the proposed weakening of fuel-efficiency rules for cars and trucks was announced under Pruitt, the Wheeler-led EPA has formally proposed other major rule reconsiderations: an Affordable Clean Energy rule (to replace the Obama administration's Clean Power Plan), and the weakening of rules covering mercury emissions from power plants and monitoring and repair of methane leaks in oil and gas production. All of these measures promise to lighten the agency's duty to enforce.

Wheeler has recently promised that the writing of new agency rules will return to what was deemed the standard best practice in earlier administrations, with those composing them "encouraged to reach out broadly for the views of interested parties" first within the agency and then beyond.[9] Yet he has not applied that standard retroactively to any of the rule rollbacks begun under Pruitt.

Pruitt-era reconsiderations were written in ways that "completely abandoned, subverted, [and] disregarded . . . the long-established regulatory development process . . . that has been in place in the agency for . . .decades."[10] Stories circulate within the agency about how Pruitt and other political appointees like Bill Wehrum, now chief of the air office, huddled in hallways to settle upon key rule revisions, leaving the agency's own scientists and legal and policy experts out of the loop. As one EPA staff member we interviewed described it, "you don't really meet with these people. They meet with themselves . . . there's this cocoon around them."[11] As the agency's political appointees have taken it upon themselves to rewrite major rules and other policy directives that had been finalized only after years of scientific and public input, the results have closely conformed to changes called for by industries and conservative think tanks and have augured fewer and laxer rules for the agency to enforce.

---

[9] Andrew Wheeler, "Message from the Acting Administrator," *EPA Website*, August 2, 2018, https://www.epa.gov/sites/production/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf.
[10] Confidential interview with EPA employee, conducted by EDGI staff.
[11] Confidential interview with EPA employee.

ED_002434_00000092-00014

While few documents are as yet publicly available to corroborate who has had the most input on these decisions, there are numerous indications that conservative think tanks like the Heritage Foundation as well as the host of industrialists, trade groups, and lobbyists flocking to meet with top appointees have indeed been influential.[12] Among the examples, coal magnate Robert Murray has long pushed for a reconsideration of a 2011 mercury emissions rule for coal-fired power plants that is now ongoing.[13] And as the *Washington Post* has confirmed, the agency's own Office of the Science Advisor was not consulted as officials crafted a rule to restrict the kinds of science on which the EPA could rely, even though Pruitt held closed-door meetings on the measure at Heritage. While we don't know exactly what was said there, we do know that the Heritage Foundation as well as the chemical and energy industries strongly supported the unsuccessful legislation on which the proposed rule is based.[14]

Also with little input from their own agency's technical experts, EPA political appointees have taken it upon themselves to rewrite long-standing policy directives below the level of formalized rule makings. Such is the case, for instance, with a "Once In, Always In" rule for toxic polluters under the Clean Air Act, consolidated through a 1995 guidance memo to ensure continuing oversight of facilities that have emitted large quantities of the most toxic pollutants like lead, arsenic, and benzene. It has now been overridden by Trump political appointees. With large swaths of industry no longer obliged to comply with the law's strict requirements for updated pollution controls, one study suggests that if California were to adopt this change,[15] twice as much toxic air pollution would be emitted each year in that state alone—exposing many to greater risks of cancer, birth defects, and brain damage.[16]

---

[12] Judith Eilperin, "Emails Reveal Close Rapport between Top EPA Officials, Those They Regulate," *Washington Post*, July 1, 2018, https://www.washingtonpost.com/national/health-science/emails-reveal-close-rapport-between-top-epa-officials-those-they-regulate/2018/07/01/6c5a62b6-7642-11e8-805c-4b67019fcfe4_story.html?utm_term=.7e85ebb03776.

[13] Coral Davenport and Lisa Friedman, "The EPA's Review of Mercury Rules Could Remake Its Methods for Valuing Human Life and Health," *New York Times*, September 7, 2018, https://www.nytimes.com/2018/09/07/climate/epa-mercury-life-cost-benefit.html?module=inline.

[14] Stefan Mufson and Chris Mooney, "EPA Excluded Its Own Top Science Officials When It Rewrote Rules on Using Scientific Studies," *Washington Post*, October 3, 2018, https://www.washingtonpost.com/energy-environment/2018/10/03/epa-excluded-its-own-top-science-officials-when-it-rewrote-rules-using-scientific-studies/?utm_term=.7e7542421b0d; and Robin Bravender, "Pruitt to Unveil 'Secret Science' Effort Today—Sources," *E&E News*, April 24, 2018, https://www.eenews.net/stories/1060079891.

[15] California is unlikely to adopt this rule change given the state's support for environmental quality and public health; however, the study illustrates the magnitude of the potential problem.

[16] EPA, "Reducing Regulatory Burdens: EPA Withdraws 'Once in Always in" Policy for Major Sources under Clean Air Act," January 25, 2018,

ED_002434_00000092-00015

A host of other efforts to curb the EPA's reach have carried over from Pruitt to Wheeler via delays, extended deadlines, and withdrawals from pending lawsuits.

Although Wheeler has recently put the Pruitt-proposed rule limiting regulatory science on the back burner, his ongoing revision of the mercury rule may have a similarly constricting impact on many future EPA rule makings.[17] Reportedly, the new rule will only allow the EPA to count benefits from reducing exposures to toxin(s) targeted by a given rule—in this case, mercury emitted by power plants—and not the co-benefits that are also likely, such as from reduced particulate pollution. That would constitute another revision of a long-standing agency practice, with far-reaching consequences for rule makings to come.[18] All these changes add up to a comprehensive campaign to shorten both current and future versions of the EPA's "gorilla" arms.

Sheep in Gorilla's Clothing?

The EPA's current political leadership has itself drawn heavily from regulated industries' hires and allies, contributing to the speed and precision with which changes are being made (Figure 1). Pruitt's replacement, Andrew Wheeler, has come under scrutiny for his years spent as a powerful energy lobbyist. The pattern extends beyond the EPA's current administrator to appointed leaders of the EPA's most important offices. A list compiled by the Center for Public Integrity shows that a majority of the approximately four dozen political appointees to the EPA previously worked for coal, oil, and chemical industries or for climate-change-denying politicians, most notably the ubiquitous Oklahoma senator,

---

https://www.epa.gov/newsreleases/reducing-regulatory-burdens-epa-withdraws-once-always-policy-major-sources-under-clean; "Once In Always In" Guidance for Major Sources under the Clean Air Act," *Environmental Law at Harvard,* 2018, accessed October 15, 2018, http://environment.law.harvard.edu/2018/02/always-guidance-major-sources-clean-air-act/; Meredith Hankins, "Trump Administration's Quiet Policy Change Could More Than Double Hazardous Air Pollution in California," *Legal Planet*, October 9, 2018, Available at https://legal-planet.org/2018/10/09/trump-administrations-quiet-policy-change-could-more-than-double-toxic-air-pollution-in-california/. http://environment.law.harvard.edu/2018/02/always-guidance-major-sources-clean-air-act/.

[17] Timothy Cana, "EPA Puts Science 'Transparency' Rule on Back Burner," *The Hill*, October 17, 2018, https://thehill.com/policy/energy-environment/411839-epa-puts-science-transparency-rule-on-back-burner.

[18] Davenport and Friedman, "The EPA's Review of Mercury Rules."

ED_002434_00000092-00016

Inhofe.[19] Worrisomely, many of those in charge of fulfilling the agency's "gorilla" role have backgrounds of encouraging a sheepish solicitude toward the former clients and employers they now regulate.

Nancy Beck, for instance, now deputy assistant administrator of the Office of Chemical Safety and Pollution Prevention (OCSPP), oversees implementation of the nation's laws on toxics substances and pesticides. Beck was previously a senior director for the American Chemistry Council, a powerful industry group that repeatedly challenged the EPA's science on toxic substances and pressed for the agency to narrow the scope of its risk evaluations.[20] Working with Beck at the OCSPP is Erik Baptist, also a deputy assistant administrator as well as senior counsel. Baptist previously served as a lawyer for the American Petroleum Institute where he lobbied in favor of deregulating the oil and gas industry and worked to roll back policy on renewable fuels.[21]

Then there is Bill Wehrum, now heading the Office of Air and Radiation and thereby responsible for administering the Clean Air Act. As a lawyer, he fought to weaken air pollution rules on behalf of Koch Industries, notorious opponents of environmental regulations and funders of far-right groups and politicians as well as trade associations such as the American Petroleum Institute, the American Fuel and Petrochemical Manufacturers, and the Utility Air Regulatory Group. In his EPA post, Wehrum has moved quickly to implement rule and policy changes that benefit his former clients.[22]

Similarly, the EPA's Office of Enforcement and Compliance Assurance (OECA), the branch of the agency most centrally concerned with enforcement, is now headed by Susan Parker Bodine, a former lawyer and lobbyist. In her earlier job she defended a host of companies and trade groups directly affected by the Superfund, Clean Air,

---

[19] The Center for Public Integrity, "Most of the 46 Political Appointees Working at EPA Previously Worked for Climate Change Doubters or Industry," https://www.publicintegrity.org/2017/11/09/21274/most-46-political-appointees-working-epa-previously-worked-climate-change-doubters.

[20] Eric Lipton, "Why Has the EPA Shifted on Toxic Chemicals? An Industry Insider Helps Call the Shots," *New York Times*, October 21, 2017, https://www.nytimes.com/2017/10/21/us/trump-epa-chemicals-regulations.html.

[21] Michael Biesecker, Juliet Linderman, and Richard Lardner, "What Swamp? Lobbyists Get Ethics Wavers to Work for Trump," *AP News*, March 8, 2018, https://www.apnews.com/2e23b380a1ec4232abde917d8796d7a6.

[22] Eric Lipton, "As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients," *New York Times*, August 19, 2018, https://www.nytimes.com/2018/08/19/us/politics/epa-coal-emissions-standards-william-wehrum.html.

ED_002434_00000092-00017

and Water Acts. While some EPA staff respect her professionalism, she previously represented the American Forest and Paper Association, whose member companies have hundreds of EPA enforcement actions issued against them, and she also worked as chief counsel for the Senate Environment and Public Works Committee under Senator Inhofe.[23]

Working alongside Bodine at OECA is Deputy Assistant Administrator Patrick Traylor. Traylor was previously a lawyer who defended Koch Industries and other energy industry giants, including Dominion Energy and TransCanada, responsible for the contested Atlantic Coast and Keystone XL pipelines, respectively.[24]

Most of the top officials currently at the Office of Water, which is responsible for implementing the Clean Water Act and Safe Drinking Water Act, have worked to protect industry from environmental protections. This includes Assistant Administrator David Ross who, as former assistant attorney general of Wyoming, challenged the EPA's Clean Water Rule and represented agricultural interests in a lawsuit over EPA's Chesapeake Bay cleanup plan.[25] Also in high-ranking positions at this office are Dennis Lee Forsgren, a former attorney for a fossil fuels lobbying firm;[26] Ann Wildeman, a former dairy lobbyist; and Owen McDonough, who worked for the National Association of Homebuilders and challenged the Clean Water Act's impact on developers.[27]

Another political appointee plucked from the Koch brothers' universe, David Dunlap, is currently leading the EPA's Office of Research and Development (ORD). Dunlap, a longtime chemical and fossil fuel executive, was recently selected to be deputy

---

[23] Kevin Bogardus, Corbin Hiar, and Arianna Skibell, "EPA: Enforcement Pick Shrugs off Conflict-of-Interest Concerns," *E&E News*, July 31, 2017, https://www.eenews.net/stories/1060057347; and Sharon Lerner, "Donald Trump's Pick for EPA Enforcement Office Was a Lobbyist for Superfund Polluters," *Intercept*, May 24, 2017, https://theintercept.com/2017/05/24/donald-trumps-pick-for-epa-enforcement-office-was-a-lobbyist-for-superfund-polluters/.

[24] Bogardus, Hiar, and Skibell, "EPA: Enforcement Pick Shrugs off Conflict-of-Interest Concerns."

[25] Ariel Wittenberg, "Possible Water Chief 'a Lawyer's Lawyer' Who Sued the EPA," *E&E News*, July 27, 2017, https://www.eenews.net/stories/1060058019.

[26] Lee Fang, "EPA's new Water Safety Official Is a Lobbyist with Deep Ties to the Dakota Access Pipeline," *Intercept*, June 28, 2017, https://theintercept.com/2017/06/28/epas-new-water-safety-official-is-a-lobbyist-with-deep-ties-to-the-dakota-access-pipeline/.

[27] Merrit Kennedy, Trump Aims to 'Eliminate' Clean Water Rule", *NPR*, February 28, 2017, https://www.npr.org/sections/thetwo-way/2017/02/28/517016071/trump-aims-to-eliminate-clean-water-rule.

ED_002434_00000092-00018

assistant administrator amid a major reorganization of the offices housed under the ORD.

At the EPA's Office of General Counsel, which is the chief legal advisor to the EPA, is David Fotouhi, a former industry lawyer with clients such as General Electric and the petroleum refinery company Tesoro Corp. (now Andeavor),[28] and Justin Schwab, a former lawyer whose past clients include the utility giant Southern Company. Schwab has been a central actor in the repeal of the Clean Power Plan.[29]

Appointees with similar backgrounds also lead the Department of Justice (DOJ), which works closely with EPA enforcement by taking over many civil and criminal cases and also advocates on behalf of EPA policies in court. When he was a senator, Attorney General Jeff Sessions himself often intervened to oppose EPA enforcement action, especially on behalf of Alabama's Drummond Coal.[30] The DOJ's environment division, which handles its EPA-related work is headed by the attorney who defended BP after the Deepwater Horizon oil spill, Jeffrey Bossert Clark.[31]

Given their new bosses, career staff working in enforcement in both the EPA and the DOJ have good reason for getting more cautious about aggressive pursuit of polluters, whatever their own convictions about how to do their job. With so many who have long fought EPA's "gorilla" function now in charge of it, those working under them have been forced to contemplate how sheeplike they should become.

---

[28] Kevin Bogardus and Amanda Reilly, "Pruitt aide Didn't Have to Sign Trump Ethics Pledge," *E&E News*, March 20, 2018, https://www.eenews.net/stories/1060076851/print.
[29] Robin Bravender, "A Specialist in Green Drama Is Killing the Climate Rule," *E&E News*, September 11, 2017, https://www.eenews.net/stories/1060060183.
[30] Russ Choma and Nick Schwellenbach, "Jeff Sessions Has a Huge Conflict of Interest in a Federal Bribery Case—and It Keeps Getting Worse," *The Hill*, March 8, 2018, https://www.motherjones.com/politics/2018/03/jeff-sessions-has-a-huge-conflict-of-interest-in-a-federal-bribery-case-and-it-keeps-getting-worse/.
[31] Dino Grandoni, "The Energy 202: Trumps Puts Former BP Oil Spill Lawyer in Charge of Environmental Law Enforcement," *Washington Post*, October 12, 2018, https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/10/12/the-energy-202-trump-puts-former-bp-oil-spill-lawyer-in-charge-of-environmental-law-enforcement/5bbf88411b326b7c8a8d1948/.

ED_002434_00000092-00019

Office of Research and Development

Jennifer Orme-Zavaleta, Principal Deputy Assistant Administrator

Bruce Rodan, Associate Director for Science

David Dunlap, Deputy Assistant Administrator for Research & Development

Chris Robbins, Acting Deputy Assistant Administrator for Management

Mary Ellen Radzikowski, Acting Associate Assistant Administrator

Office of Chemical Safety and Pollution Prevention

Vacant, Assistant Administrator

Charlotte Bertrand, Acting Principal Deputy Assistant

Nancy B. Beck, Deputy Assistant Administrator

Erik Baptist, Deputy Assistant Administrator

Louise P. Wise, Deputy Assistant Administrator

Arnold Layne, Acting Associate Assistant Administrator for Management

Office of Enforcement and Compliance Assurance

Susan Bodine, Assistant Administrator

Lawrence Starfield, Principal Deputy Assistant Administrator

Patrick Traylor, Deputy Assistant Administrator

Office of the Administrator

Andrew Wheeler, Acting Administrator

Henry Darwin, Chief of Operations

Ryan Jackson, Chief of Staff

Helena Wooden-Aguilar, Acting Deputy Chief of Staff

Office of Air and Radiation

Bill Wehrum, Acting Administrator

Elizabeth Shaw, Career Deputy Assistant Administrator

Clint Woods, Deputy Assistant Administrator

Office of General Counsel

Matthew Z. Leopold, General Counsel

David Fotouhi, Principal Deputy General Counsel

Elise Packard, Acting Deputy General Counsel

Dave Cozad, Acting Deputy General Counsel

Justin Schwab, Deputy General Counsel

Office of Water

Dave Ross, Assistant Administrator

Dennis Lee Forsgren, Jr., Deputy Assistant Administrator

Anna Wildeman, Deputy Assistant Administrator

Benita Best-Wong, Acting Principal Deputy Assistant Administrator

Dr. Owen McDonough, Senior Science Advisor

Figure 1: Organizational chart for key EPA offices and their top staff. Highlighted in red are political appointees who previously worked for fossil fuel, chemical, agricultural, or real estate industries that challenged environmental protections or alongside top D.C. climate-change deniers. Vacant seats are in blue. Sources: The Center for Public Integrity, "Most of the 46 Political Appointees"; and Center for Responsive Politics, "Lobbyists in (and out of) the Trump Administration," Opensecrets.org, accessed November 1, 2018, https://www.opensecrets.org/trump/lobbyists. For other sources, see footnotes in text discussion of these individuals.

Reducing Capacity and Expertise

In addition to installing industry-aligned insiders in top regulatory positions, the administration retains overall designs for the agency that are reflected in its continuing resolve to drastically shrink the EPA's budget and workforce. While the Republican Congress restored most EPA funds that the administration sought to cut

ED_002434_00000092-00020

for FY 2018,[32] Trump officials again asked for large cuts for FY 2019 across most of the agency's programs. This time they are seeking a 26 percent reduction overall, which would draw down the agency's budget by $2.58 billion. They are also proposing to reduce the number of EPA employees to 12,250 full-time equivalents (FTEs), to bring staffing levels to their lowest level since the Reagan cuts of the early 1980s. While Congress has already pushed back against the administration's extreme cuts proposed for FY 2019, even the Senate's alternative, maintaining FY 2018 levels, will make for one of the agency's smallest budgets of the last thirty years in real dollars.[33]

Budget cuts are not the only way to shrink a government agency. The absence of new hiring has combined with a buyout offered in September 2017, taken by over seven hundred employees, to shrink the EPA workforce by attrition. It fell by 8 percent between fiscal years 2017 and 2018 alone (measured in FTEs). (The federal fiscal year runs from October 1 of the previous year, to September 30 of the year included in the fiscal year's name). The agency's total workforce is down by 16 percent since 2013 and 21 percent since peaking around 2000.[34]

The EPA offices with the biggest workforce reductions over the last year (FY2017 and FY2018) suggest which parts of the agency are being most targeted for downsizing. The largest drops, of just over 15 percent, came in the Office of International and Tribal Affairs (OITA) and in the Office of Inspector General (OIG). Already the smallest office at headquarters, OITA was also slated in the FY 2019 budget to lose most, if not all, support for tribal and U.S.–Mexico border programs. The OIG reviews EPA operations and expenditures and had drawn attention for its scrutiny of decisions made by former administrator Pruitt. Three other offices lost more than 10 percent

---

[32] Our earlier report, *EPA Under Siege*, reflects on the severity of the threat and possible consequences of the Trump administration's 31 percent proposed cut for FY 2018. Congress did not adopt many of these cuts, but the agency was in a state of budgetary limbo for months under continuing budget resolutions.

[33] EPA, "FY 2019 Budget in Brief," February 2018, https://www.epa.gov/sites/production/files/2018-02/documents/fy-2019-epa-bib.pdf; the Environmental Protection Network offers the 26 percent cut figure as corrective to the agency's official 23.3 percent calculation. According to the Environmental Protection Network, the agency was planning a deeper, 34 percent cut for FY2019 but restored funds at the last minute after a budget agreement to allow increased domestic spending. Environmental Protection Network, "Understanding the Full Impacts of the Proposed FY2019 EPA Budget," March 18, 2018, https://www.environmentalprotectionnetwork.org/wp-content/uploads/PDF/Understanding-the-Full-Impacts-of-the-Proposed-FY-2019-EPA-Budget-March-14-2018.pdf.

[34] Email from Daniel Coogan to Rachel Stanton, "FW: FTE's--Re: Freedom of Information Act Request EPA-HQ-2018-006907," May 16, 2018 (response to FOIA request EPA-HQ-2018-006907; publicly available on EDGI website); and Sellers et al., *EPA Under Siege*, Figure 3, "Total EPA Workforce."

ED_002434_00000092-00021

of their staff in the past year: the Office of Air and Radiation (in charge of regulation of air pollution and radiation threats including greenhouse gases), Office of Research and Development (which handles much of the agency's in-house as well as contracted scientific work), and, not surprisingly, Office of Enforcement and Compliance Assurance.[35]

The Pruitt-initiated, systematic effort to diminish the agency's long-standing reliance on science and evidence-based policymaking has shown few signs of slowing under Wheeler. While the push to restrict science used in rule making through a "transparency" standard has been delayed until 2020, Wheeler has shown no interest in revoking directives and appointments that have tilted advisory boards toward scientists on industry payrolls. Investigators holding EPA grants are still not allowed on the Science Advisory Board, even as Wheeler has also shut down the Office of the Science Advisor (which includes a science integrity office, by folding these into the Office of Science Policy).[36] Other long-serving scientists on advisory boards and in key positions, such as Ruth Etzel of the Office of Children's Health Protection, continue to be pushed or rotated out.[37]

As agency scientists and engineers read the writing on the wall, many are leaving of their own accord. Among departing staff, they comprise the largest chunk counted as attrition (excluding buyouts): 43.4 percent of those leaving in FY 2017 and 45.5 percent in FY 2018.[38] As this expertise drains away, the EPA is losing its ability to grapple both with older environmental problems that have proven recalcitrant, like lead and toxic air pollutants, and with unanticipated newer ones, from climate change to perfluorooctanoic acid (PFOA).

Losing this expertise alongside other staff and budget reductions—being starved and shrunken, losing weight and shedding muscles—the EPA is progressively jettisoning its ability to act gorilla-like.

---

[35] Email from Daniel Coogan to Rachel Stanton, "FW: FTE's."
[36] Dan Boyce, "EPA to Dissolve Office of Science Adviser," *NPR*, September 26, 2018, https://www.npr.org/2018/09/29/653013054/epa-to-dissolve-office-of-science-advisor.
[37] Coral Davenport and Roni Caryn Rabin, "E.P.A. Places the Head of Its Office of Children's Health on Leave," *New York Times*, September 26, 2018, https://www.nytimes.com/2018/09/26/climate/epa-etzel-children-health-program.html.
[38] "Attrition FOIA December 1 2016 to Mar 31 2018 final" (Excel spreadsheet), (response to FOIA request EPA-HQ-2018-006907; publicly available on EDGI website).

ED_002434_00000092-00022

Reorganizing

Ever since President Trump's Executive Order 13781 (March 31, 2017) for "reorganizing the Executive Branch," EPA leadership has deliberated extensively over which programs to eliminate as "unnecessary" as well what current functions would, as the executive order puts it, "be better left to State or local governments or to the private sector through free enterprise."[39] The most drastic plans floated for the EPA's reorganizing have targeted its regional offices, where most enforcement as well as interaction with state agencies happen. By report of our interviewees, reorganization planners have considered transferring all regional administrative work back to headquarters, merging or closing some of the regional offices, and moving some regional EPA employees into state environmental agencies.

Members of Congress from both sides of the aisle have pushed back against the rumors of regional office closures in their own districts. Back in April 2017, for instance, Rep. Fred Upton joined Republican as well as Democratic colleagues in decrying a report that Chicago's Region 5 office might be closed.[40] Riders voted onto budget legislation explicitly forbade the agency from doing so. Thus far, with the EPA regional offices largely left out of the administration's formal reorganization plan for the executive branch, political pressures appear to have stymied the most aggressive designs for them.[41] Staff reductions in the regional offices over the last year have stuck near the 8 percent average for the agency as a whole, ranging from 7.4 percent to 9.4 percent—with the Chicago region losing 7.6 percent.[42]

The reorganization plan now in process for the regions appears more anodyne. All regional offices are to rearrange their structure to more closely mirror that at EPA

---

[39] Executive Office of the President, "Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch," *Federal Register*, March 13, 2017, https://www.federalregister.gov/documents/2017/03/16/2017-05399/comprehensive-plan-for-reorganizing-the-executive-branch.

[40] Michael Sneed, "Sneed exclusive: City Could Lose Its EPA Regional Office," *Chicago Sun-Times*, April 25, 2017, https://chicago.suntimes.com/news/sneed-exclusive-city-could-lose-its-epa-regional-office/; and Michael Gerstein, "Mich. Reps Urge Pruitt to Keep Chicago EPA Office," *Detroit News*, April 27, 2018, https://www.detroitnews.com/story/news/politics/2017/04/27/epa-letter-pruitt/100993862/.

[41] Eric Katz, "EPA's Planned Office Closure Could Run Afoul of Congressional Mandate," *Government Executive*, April 3, 2018, https://www.govexec.com/management/2018/04/epas-planned-office-closure-could-run-afoul-congressional-mandate/147170/; and Office of the President, *Delivering Government Solutions in the 21st Century Reform Plan and Reorganization Recommendations*, June 2018, https://www.performance.gov/GovReform/Reform-and-Reorg-Plan-Final.pdf.

[42] Email from Daniel Coogan to Rachel Stanton, "FW: FTE's."

ED_002434_00000092-00023

headquarters, after decades of autonomous development.[43] However, current and former EPA employees suspect the reshuffling is laying groundwork for a further shearing of staff and operations, even as the political leadership tightens its reins on regional monitoring and enforcement work.[44]

Smaller reorganizations already accomplished may now be affecting enforcement as well as cleanup activities. Early in Pruitt's term, the Office of Environmental Justice was shifted out of OECA (which oversees enforcement) into the administrator's office, removing it further from day-to-day work of inspecting, permitting, and fining. Have overburdened and at-risk communities, the main concern of this Environmental Justice office, paid a price? One other change, the shrinkage and then closure of a project office in Hanford, Washington, suggests that some may have: the neighbors of one of the largest and most toxic former nuclear facilities at Hanford.[45] The recent appointment to the agency's environmental justice advisory committee of an executive at CH2M Hill, a private waste handler working at Hanford, raises further questions about the EPA's operations at one of the nation's most challenging hazardous waste sites.[46]

Through these many changes, as the new leadership has tightened its grip over the EPA, it has deliberately set out to curb its regulatory capabilities and character. Even as career staff and Congress have often stood in their way, Trump political appointees have seemed determined to alter the agency's very DNA, to render it less aggressive or effective against environmental malefactors and less protective of our air, water, soil, and health. Not surprisingly, the consequences have been accumulating, none more so than in that realm where the EPA exercises its sharpest bites.

---

[43] "EPA Readies Regional Office Reorganization Plan For Congress' Review," *Inside EPA*, October 5, 2018, https://insideepa.com/daily-news/epa-readies-regional-office-reorganization-plan-congress-review.
[44] Abby Smith, "Trump's EPA Makeover Could Put Regional Offices on Shorter Leash," *Bloomberg Environment*, September 26, 2018, https://news.bloombergenvironment.com/environment-and-energy/trumps-epa-makeover-could-put-regional-offices-on-shorter-leash.
[45] Jordan DeWitt, "Who's Watching Hanford? EPA Presence Dwindling," *Northwest Public Broadcasting*, November 15, 2017, https://www.nwpb.org/2017/11/15/whos-watching-hanford-epa-presence-dwindling/; and Reorganizational Proposal [Abandonment of Hanford Project Office], March 12 [?], 2018; (response to FOIA request EPA-HQ-2018-006907, publicly available on EDGI website).
[46] Emily Atkin, "The EPA's New Environmental Justice Adviser Has a Plutonium Problem," *New Republic*, March 8, 2018, https://newrepublic.com/article/147325/epas-new-environmental-justice-adviser-plutonium-problem.

ED_002434_00000092-00024

THE PLUMMET IN ENFORCEMENT

The EPA's enforcement of federal environmental laws is plummeting, alarming staff responsible for ensuring clean air, water, and other protection from toxic hazards for people and communities. The EPA's own figures show enforcement downturns across the board in almost every health-protecting federal environmental program from the Clean Water Act, the Clean Air Act, and Superfund to the Resource Conservation and Recovery Act (RCRA, a program mandating the safe handling and disposal of hazardous waste).

How EPA Enforcement Works

To understand what these numbers show, a brief explanation is in order of how EPA enforcement works. In 1970 President Richard Nixon created the EPA as a "strong, independent agency" tasked with a "broad mandate" to control pollution. Congress then passed a raft of environmental legislation that it charged the EPA with administering, a job that included conducting research, writing regulations, and enforcing those regulations.[47] For most environmental laws, the EPA and the states divvy up enforcement duties. In general, states have carried out, and continue to carry out, most enforcement actions while the EPA takes on bigger cases, often with the help of the DOJ.

The details of federally run enforcement practices vary across laws, but generally they happen as follows. The EPA assists regulated entities (businesses, municipalities, and so on) to facilitate their complying with the law while also monitoring them for violations. Monitoring may consist of information requests and self-reporting from industries, electronic data collection, and on-site inspections. The EPA also gathers tips from citizens. If it finds a violation, its teeth and claws start to show. It may initiate an informal enforcement action, such as sending a notice of

[47] Leif Fredrickson, Christopher Sellers, Lindsey Dillon, Jennifer Liss Ohayon, Nicholas Shapiro, Marianne Sullivan, Stephen Bocking, Phil Brown, Vanessa de la Rosa, Jill Harrison, Sara Johns, Katherine Kulik, Rebecca Lave, Michelle Murphy, Liza Piper, Lauren Richter, and Sara Wylie. "History of US presidential Assaults on Modern Environmental Health Protection." *American Journal of Public Health* 108, no. S2 (2018): S95–S103.

ED_002434_00000092-00025

violation or a warning letter.[48] Or it may initiate formal enforcement actions, which are of two main types: *civil* enforcement actions (for violations of civil code) and *criminal* enforcement actions (for violations of the criminal code).

For civil violations, the EPA can pursue *administrative* or *judicial* enforcement actions. The most common enforcement actions are administrative, which entail the agency itself issuing a formal notice of violation or an order requiring compliance. There are many different categories of administrative enforcement actions, reflecting the variety of mechanisms available for compelling compliance as well as the confinement of some types of action to enforcement of particular laws. Administrative orders may be the result of unilateral action from the EPA or a negotiated settlement between the EPA and the regulated entity. In addition to ordering compliance, administrative orders may include penalties, and they may include agreements that violators must undertake projects to improve environmental or human health in affected communities. The latter are called Supplemental Environmental Projects (SEPs). The EPA estimates of the costs of compliance and the costs of SEPs, along with penalties, reflect the financial burden that its orders impose on violators of environmental laws.

Administrative enforcement actions are always for civil, as opposed to criminal, violations. They are the EPA's most commonly used enforcement mechanism. The next most common are civil *judicial* actions, which are civil cases pursued through a court. The DOJ pursues these cases on behalf of the EPA. Civil judicial cases are usually more serious violations than those pursued through administrative actions. These cases typically end in consent decrees, which are a form of court-ordered negotiated settlement. Court orders, including consent decrees, can impose civil penalties on violators, orders requiring them to come into compliance and clean up pollution (injunctive relief), and SEPs that repair or compensate for environmental damage they have caused.

Finally, in addition to *civil* actions (administrative and judicial) the EPA may pursue *criminal* enforcement actions, which is where it exercises its most gorilla-like might. It undertakes these actions against the most egregious violators of environmental laws. As in civil judicial cases, the DOJ prosecutes these on behalf of the EPA, working closely with EPA criminal investigators. Criminal cases can result not just in monetary penalties but in prison time for those held responsible.

---

[48] For Clean Air Act violations, the EPA is required to issue a notice of violation (an informal enforcement action) before formal enforcement actions. For other environmental laws, it has discretion to start with either an informal or a formal action.

ED_002434_00000092-00026

For most laws, the EPA can delegate authority to enforce the law to the states (as well as tribal governments). Most states have gained authorization to enforce federal environmental laws, such as the Clean Air Act and Clean Water Act, which is why most environmental enforcement actions are undertaken by state environmental agencies. Authorized states get federal funding to help them pursue enforcement. In states without authorization, the EPA enforces federal environmental laws. The EPA also takes up cases in authorized states when cases are too big or too complex for states or in situations when states are not adequately enforcing laws. Even when the EPA takes the lead on cases, settlements may include penalties paid to state and local governments. And vice versa: when states lead on cases, some settlement penalties may be paid to the federal government.

Enforcement Numbers

The OECA's annual report showed that, in FY 2017, the number of civil cases, criminal cases, defendants charged, and inspections had all declined considerably, in some cases to the lowest points in a decade or more.[49] Released in early 2018, those numbers drew considerable attention from the media and alarm among former EPA staff and environmental groups. The enforcement metrics now available for FY 2018 show even lower figures on almost all counts.

According to EPA's Integrated Compliance Information System (ICIS), civil enforcement actions in FY 2018 have declined, in some cases precipitously.[50] The

[49] Suzy Khimm, "EPA Enforcement Actions Hit 10-Year Low in 2017," *NBC News*, February 8, 2018, https://www.nbcnews.com/politics/white-house/epa-enforcement-actions-hit-10-year-low-2017-n846151; Umair Irfan, "How Trump Is Letting Polluters off the Hook, in One Chart," *Vox*, February 22, 2018, https://www.vox.com/energy-and-environment/2018/2/22/17036114/pollution-fines-trump-pruitt-epa ; and Public Employees for Environmental Responsibility, "EPA Agents Fighting Eco-Crime Drop as Security Detail Grows," *PEER*, June 21, 2018, https://www.peer.org/news/press-releases/epa-agents-fighting-eco-crime-drop-as-security-detail-grows.html.

[50] We downloaded this data from the Enforcement and Compliance History Online (ECHO) website, which incorporates Federal Enforcement and Compliance (FE&C) data from the Integrated Compliance Information System (ICIS). The data is available at https://echo.epa.gov/tools/data-downloads. When downloaded on October 10, 2018, the data for FY 2018 were the most up-to-date that were publicly available from the EPA. We combined data sets according to ECHO guidelines. Cases with no entered date were excluded. Notwithstanding any major errors or omissions corrected later by the agency, this ICIS data should be close to the final enforcement numbers published in the OECA's *Annual Report*, which will be released in late 2018 or early 2019. The ICIS numbers will probably not be exactly the same as the OECA *Annual Report*

ED_002434_00000092-00027

major categories of administrative and judicial actions (Figure 2) dipped to their lowest levels in over ten years. Consent decrees or court orders (CDCs) resolving judicial actions fell to 88, only 78 percent of what they were in FY 2017. Administrative compliance orders (ACOs) slumped still further to 339 cases entered, or 58 percent of the amount from the previous year. Two other kinds of actions veritably collapsed. Superfund administrative orders for cost recovery (AOCs) fell to just eleven cases entered, less than half of the 24 AOCs in FY 2017. And the most common type of administrative action, administrative penalty orders (APOs), were down to 563, just 45 percent of what they were the previous year. (For examples of EPA enforcement actions and outcomes, see Figure 3).

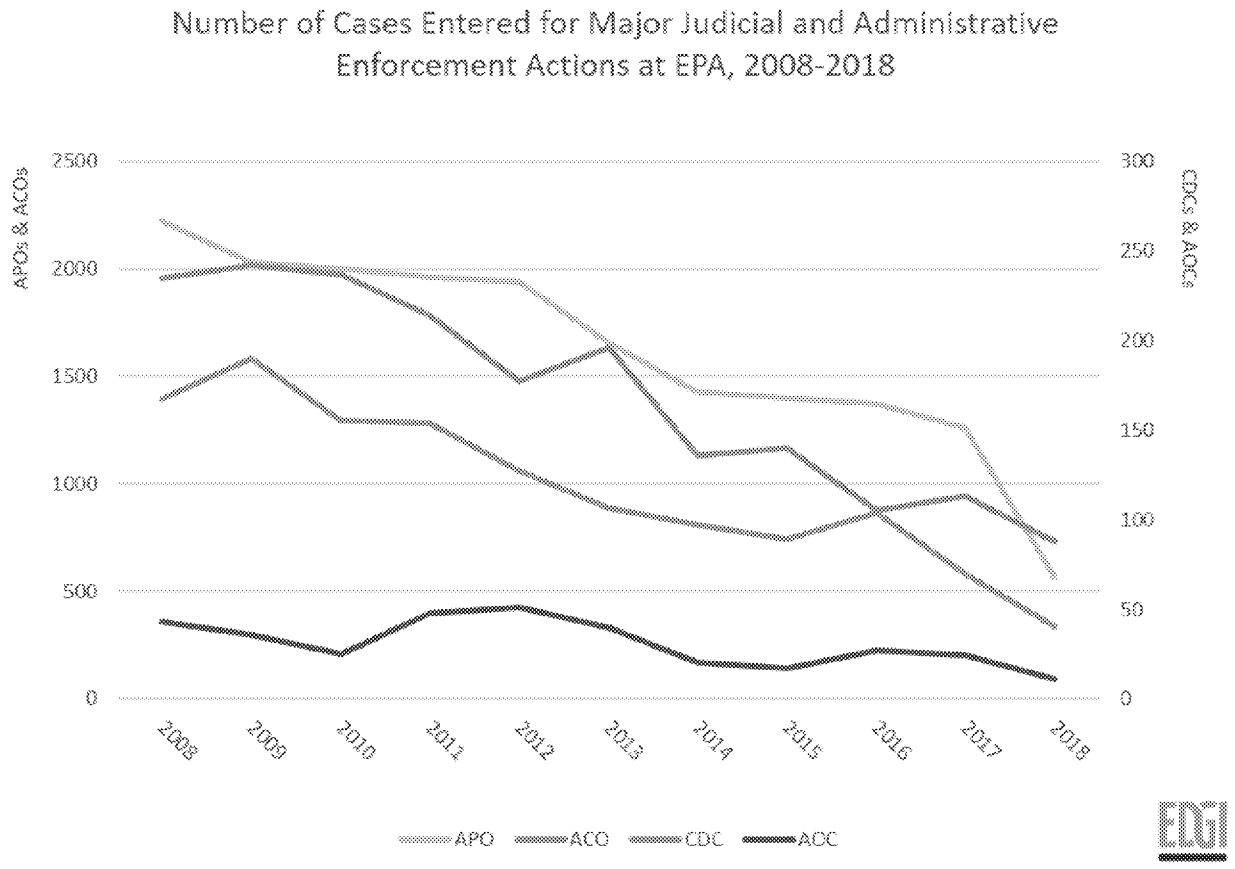


Figure 2: Major civil enforcement actions, both judicial and administrative, carried out by EPA. As the graph shows, these actions declined to their lowest levels in over ten years in FY 2018.

because EPA will fine tune the data (e.g., add missing dates, fix incorrect dates, combine duplicate cases, and so on). However, comparisons of data from OECA's *Annual Reports* with the ICIS data used here for fiscal years before 2018 show similar numbers back to FY 2006 and, most importantly, show virtually exactly the same *patterns* of change before FY 2018. But because the numbers are not exactly the same, we have compared the numbers from ICIS for FY 2018 with previous fiscal years using data from ICIS, as opposed to comparing FY 2018 ICIS numbers to numbers published in *Annual Reports*. Using ICIS data also allows some breakdowns that are not available in *Annual Reports*.

ED_002434_00000092-00028

Note: APO = administrative penalty orders; ACO = administrative compliance order; CDC = consent decree or court order; AOC = Superfund administrative order for cost recovery. Source: ICIS FE&C Data Set, downloaded from ECHO, Data Downloads, Environmental Protection Agency, accessed October 10, 2018, https://echo.epa.gov/tools/data-downloads.

Examples of Enforcement Actions and Enforcement Outcomes

Civil Judicial Case: The EPA and the DOJ file a case in federal court against a paper company with factories in several states that are in violation of the Clean Air Act.

Consent Decree: After the EPA and DOJ file a case in federal court against a brass foundry that was in violation of the Resource Conservation and Recover Act (RCRA), the federal government and the business agree to a set of measures requiring the foundry to certify that it is no longer illegally handling hazardous waste and develop a closure and cleanup plan for its illegal waste dumping operation. The agreement also includes penalties that will accumulate for each day the company is in violation of the agreed upon plan. The agreement is lodged in a court, and the court enters the agreement as a consent decree, making the agreement enforceable by the court in the same way a court order is.

Administrative Compliance Order (ACO): EPA issues an order (ACO) requiring a concentrated animal feeding operation whose discharges into a stream are in violation of the Clean Water Act to: mitigate discharges, hire an engineer to evaluate the company's waste discharges, and construct a new system for handling waste.

Administrative Penalty Order (APO): EPA issues an order (APO) requiring a fertilizer factory to pay a fine of $30,000 per day until the factory produces a Risk Management Plan, as required by the Clean Air Act, after the company failed to produce the plan as stipulated in an earlier compliance order (ACO) from the Agency.

Superfund Administrative Orders for Cost Recovery (AOC): The EPA remediates lead-contaminated soil at a former smelter site and then orders the responsible party (the company that bought the smelter) to reimburse the agency for its cleanup costs.

Informal Enforcement Action: EPA sends a power plant a notice of violation of the Clean Air Act and gives the plant 30 days to come into compliance before issuing a fine (an APO) or a formal order to comply with the law (an ACO).

Compliance Cost: The EPA and DOJ file a case in court against a municipality that is in violation of the Clean Water Act for discharge of excess sewage due to a faulty wastewater treatment plant. The parties negotiate a consent decree that requires the municipality to come into the compliance with the law, which entails spending $500 million to repair its treatment plant.

Supplemental Environmental Project (SEP): In addition to requiring compliance in the above case, the parties negotiate a reduced civil penalty in return for the city spending $5 million to connect failing septic systems to the city sewer system, a project (SEP) that will yield health and environmental benefits for the community.

Criminal Case: The EPA and DOJ file a criminal case in court against a chemical manufacturer that, in violation of the Clean Water Act, did not take reasonable steps to ensure that toxic chemicals it manufactured would not leak into the nearby river. The chemicals did leak, endangering the water supply of the city downstream and bringing the local economy to a halt. The company was fined $1 million in criminal penalties and its president was sentenced to two months in prison.

Figure 3: Examples of enforcement actions and enforcement outcomes. To read about actual civil and criminal cases, see "Cases and Settlements," https://www.epa.gov/enforcement/cases-and-settlements.

ED_002434_00000092-00029

Enforcement actions have been declining for the past decade and, for some types of actions, even longer. But in the past year, the declines in enforcement have happened at an accelerating pace. As Figure 4 shows, the percentage declines in CDCs, APOs, ACOs, and AOCs were all larger from FY 2017 to FY 2018 than they were on average for FY 2008 to FY 2017. With the exception of CDCs, the percentage declines from FY 2017 to FY 2018 were also outside of the range of previous decreases going back to FY 2008. For APOs—the most common type of enforcement action taken by the EPA—both the rapidity and extent of the decline between fiscal years 2008 to 2017 were especially abrupt.

Accelerating Decline in EPA Enforcement Actions			
Enforcement Action	**Average Annual Percent Change, FY 2008 to FY 2017**	**Range of Annual Percent Change, FY 2008 to FY 2017**	**Percent Change, FY 2017 to FY 2018**
Judicial Consent Decrees or Court Orders	-7	-31 to +11	-22
Administrative Penalty Orders	-6	-15 to -1	-55
Administrative Compliance Orders	-8	-33 to +17	-42
Administrative Orders for Cost Compliance	+1	-50 to +92	-54

Figure 4: Average annual percentage change and ranges of change from FY 2008 to FY 2017, compared to percentage decrease from FY 2017 to FY 2018. As these data show, the declines in civil enforcement actions were generally outside of the average and the range of previous years. Note: The average annual percentage decrease was calculated started with the change from FY 2008 to FY 2009, through the change from FY 2016 to FY 2017. Source: ICIS FE&C Data Set, downloaded from Enforcement and Compliance History Online, Data Downloads, Environmental Protection Agency, accessed October 10, 2018, https://echo.epa.gov/tools/data-downloads.

Another way to measure enforcement is through the penalties levied against violators of environmental laws, when the gorilla's arm reaches into polluters' pocketbooks. Out of the total 112 judicial cases for FY 2018, the federal government imposed about $28 million in penalties, by far the lowest of the last decade. Even a

ED_002434_00000092-00030

doubling of FY 2018 penalties would not raise their total above the second-lowest yearly amount recorded since 2006. The same is true of federal penalties levied in administrative cases, which nose-dived to about $19 million, or 45 percent of the previous year. State and local penalties levied along with judicial federal penalties are likewise very low by standards of the last twelve years, as are the costs of SEPs. The preceding numbers are in nominal dollars; adjusted for inflation, the drops are still more startling. The collapse of FY 2018 penalties is even more stark when you remove the huge penalties from big settlements initiated and pursued during the Obama administration, with BP (over the Deepwater Horizon oil spill) and Volkswagen (over the diesel emissions scandal). These settlements resulted in civil judicial penalties of $1.45 billion for Volkswagen in 2017, and $5.5 billion and $1 billion for BP in 2016 and 2013, respectively. Figure 5 compares FY 2018 to the preceding ten years in inflation-adjusted dollars, with these huge settlements removed.

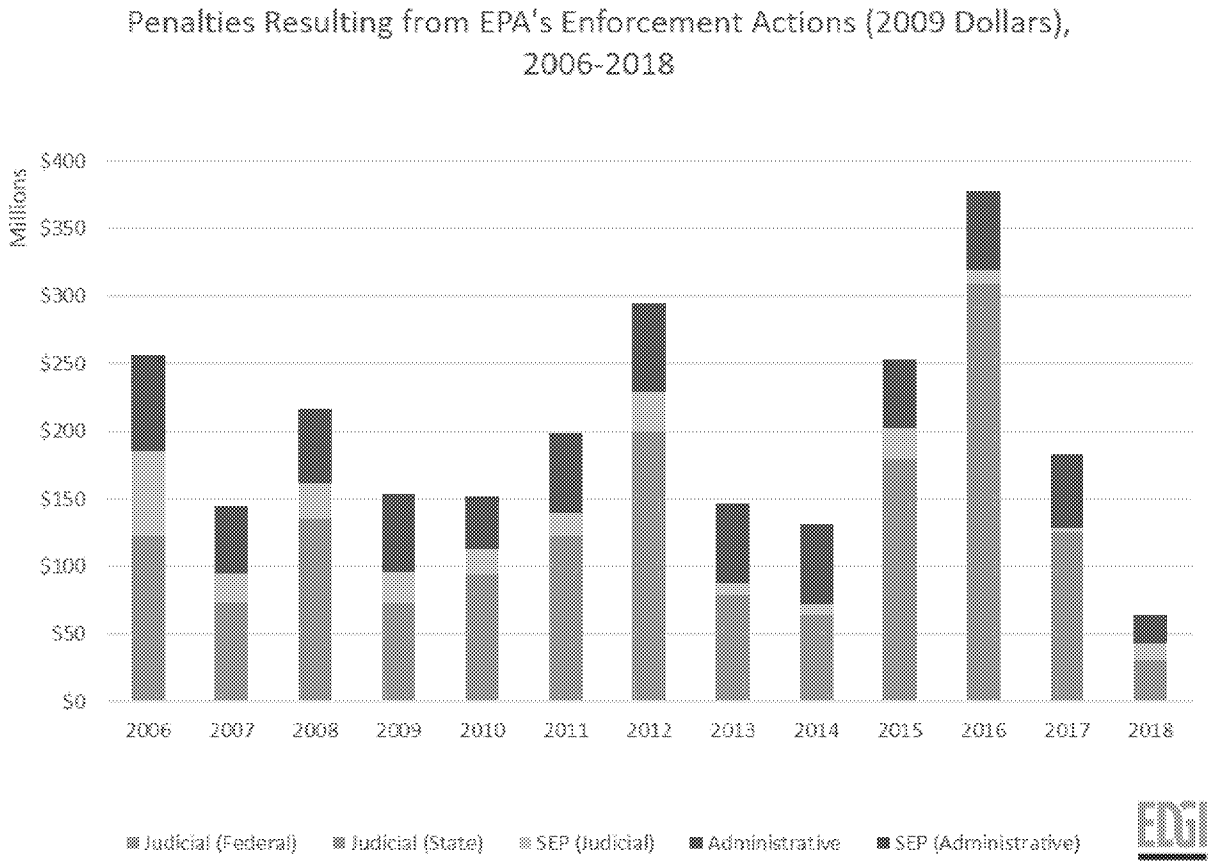


Figure 5: Penalties and costs of SEPs resulting from the EPA's civil enforcement actions. The huge settlements from BP and Volkswagen in fiscal years 2013, 2016, and 2017 have been removed. Even with those removals, the chart reveals a sharp drop in penalties in FY 2018.

ED_002434_00000092-00031

Note: Adjusted for inflation (2009 dollars). Source: ICIS FE&C Data Set, downloaded from Enforcement and Compliance History Online, Data Downloads, Environmental Protection Agency, accessed October 10, 2018, https://echo.epa.gov/tools/data-downloads. GDP deflators from Table 10.1 "Gross Domestic Product and Deflators Used in Historical Tables: 1940–2023," Historical Tables, Office of Management and Budget, accessed October 23, 2018, https://www.whitehouse.gov/omb/historical-tables/.

The cost incurred by polluters and other violators to comply with EPA legal actions and directives offers another measure of the agency's assertiveness. When regulated entities clean up their act, it costs them money. Compliance costs reflect the degree to which the EPA is forcing industries to spend what they otherwise would not, to invest in reducing their pollution and other negative impacts on environmental and human health. By that measure, Trump's EPA has been doing much less to change how polluting entities operate. Compliance costs were lower in FY 2018 than they have been in the last twelve years (Figure 6).

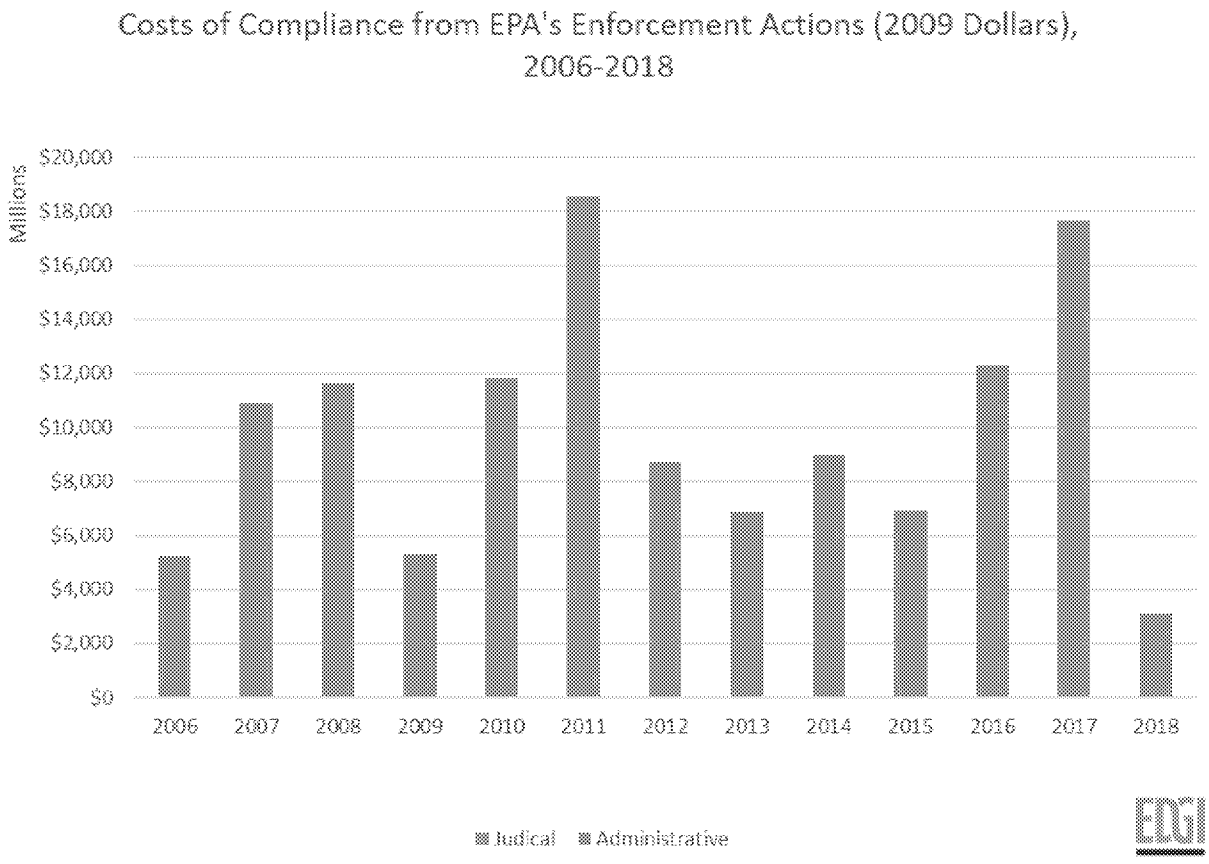


Figure 6: Costs of compliance resulting from EPA's civil enforcement actions. The chart reveals a sharp drop in compliance costs in FY 2018, suggesting that polluters are being forced to change their practices less often or in less fundamental ways. Note: Adjusted for

ED_002434_00000092-00032

inflation (2009 dollars). Source: ICIS FE&C Data Set, downloaded from Enforcement and Compliance History Online, Data Downloads, Environmental Protection Agency, accessed October 10, 2018, https://echo.epa.gov/tools/data-downloads. GDP deflators from Table 10.1 "Gross Domestic Product and Deflators Used in Historical Tables: 1940-2023," Historical Tables, Office of Management and Budget, accessed October 23, 2018, https://www.whitehouse.gov/omb/historical-tables/.

The number of criminal cases brought by the Trump-era EPA have also steeply declined. While criminal penalties are not available yet for FY 2018, data from the ECHO Enforcement Case Search engine shows that only fifty-four criminal cases have been settled in the past fiscal year, compared to eight-seven in FY 2017, eighty-one in FY 2016, and over one hundred every year going back to FY 2010. Those years span the time when the EPA took on some of the biggest and most involved cases in its history. Yet, even as it contended with the cases against BP and Volkswagen, the Obama-era EPA settled more criminal cases each year than it appears the Trump EPA will report for FY 2018.[51]

[51] The ECHO database only includes criminal settlements going back to 2008. In FY 2008 and 2009, the EPA settled fewer criminal cases (seventy and ninety-eight, respectively), but still not as few as FY 2018. EPA, Enforcement Case Search, available at https://echo.epa.gov/facilities/enforcement-case-search, accessed October 12, 2018.

ED_002434_00000092-00033

WHY THE DROP?

The EPA has offered several public explanations for these declines since Trump has taken office. Their public justifications offer a selective reading of the Trump administration's actual record. The OECA, the agency's enforcement arm, meanwhile, has initiated more realistic internal research and discussions about the agency's wilting enforcement numbers. These internal discussions consider explanatory factors that the agency's official spokespeople have never broached, likely because they implicate the agency's own leadership. The interviews we conducted in the last year with EPA staff members and recent retirees shed still more telling and persuasive light on just what has happened with EPA enforcement over the past two years, and why.

The EPA Administration's Public Explanations of Decline

Current EPA leadership has sought to explain, justify, contextualize, and, in some cases, deny declines in enforcement numbers.

After the release of FY 2017 enforcement figures, EPA spokespeople, including OECA assistant administrator Susan Bodine, claimed the EPA had simply changed its priorities, that some lower numbers were the result of a new emphasis on criminal cases that were especially egregious, complex, highly significant, or high-impact. As evidence, she and other agency officials pointed to a rise in criminal fines and incarceration as well as substantial civil penalties. But the numbers Bodine was defending from FY 2017 actually included three months of the Obama administration. Moreover, as we have seen, the huge civil penalties netted in FY 2017, like that from the Volkswagen settlement that became the second-largest in agency history, were the final fruit of enforcement actions begun, and in some cases nearly completed, during Obama's presidency. Likewise, $2.8 billion of the $2.94 billion in criminal fines in FY 2017 came from Volkswagen.[52]

[52] Brady Dennis, "EPA Brings in Billions in Enforcement Fines—but Most Stem from Obama Era," *Washington Post*, February 8, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/02/08/epa-brings-in-billions-in-enforcement-fines-but-most-stem-from-obama-era; and Khimm, "EPA Enforcement Actions."

ED_002434_00000092-00034

When Trump's EPA administration has acknowledged declining enforcement numbers, it has sought to explain them away. First, Administrator Bodine has argued that media reports on declines in enforcement do not acknowledge the longer-term historical decline in enforcement numbers.[53] But while enforcement numbers have indeed been declining for years, that is not a justification for continued decline, and it is not an explanation for the accelerated decline that is now occurring (Figure 5).

In the press and in guidance memos, the EPA has also insisted that the declines reflect its shift to informal enforcement actions, which agency leadership claims will bring about compliance more quickly than more formal initiatives. Yet the agency's own numbers do not show that the agency has ramped up informal enforcement as an alternative to formal enforcement actions—on the contrary.[54] The number of informal enforcement actions taken in FY 2018 is the lowest it has been in over twelve years. Informal actions, now touted as the Trump EPA's priority, were actually many times more common in the Obama administration than they are now. The current administration has ratcheted down *both* informal and formal enforcement actions to their lowest in over a decade (Figure 7).

[53] Dennis, "EPA Brings in Billions."
[54] Miranda Green, "EPA Pushes Informal Policy to Deal with Polluters Outside Courts," *The Hill*, March 29, 2018, https://thehill.com/policy/energy-environment/380811-epa-pushes-informal-policy-to-deal-with-polluters-outside-of.

ED_002434_00000092-00035

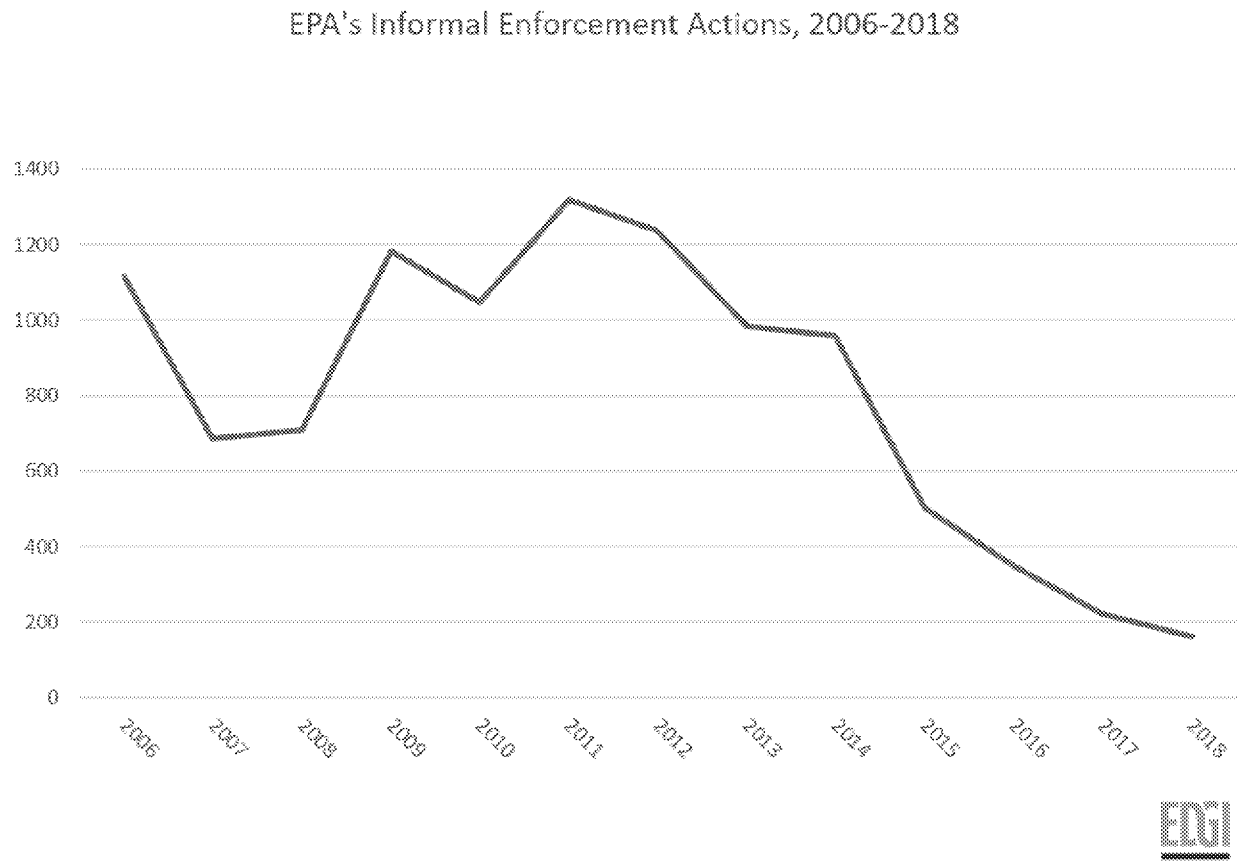


Figure 7: Informal enforcement actions taken by the EPA against regulated entities. Despite a purported emphasis on informal enforcement actions by the current EPA leadership, informal enforcement actions have declined. Source: ICIS FE&C Data Set, downloaded from Enforcement and Compliance History Online, Data Downloads, Environmental Protection Agency, accessed October 10, 2018, https://echo.epa.gov/tools/data-downloads.

In addition, the EPA claims that it is stepping back to allow states to take the lead in enforcement. But for one thing, states have always the lead in environmental enforcement, by undertaking the majority of enforcement actions. And the success of state-level enforcement has remained obdurately patchy and uneven. As the General Accounting Office concluded in 2011, "state enforcement programs frequently do not meet national goals and states do not always take necessary enforcement action." Enforcement programs in many states frequently underperform: "noncompliance is high and the level of enforcement in low."[55]

[55] General Accounting Office, "EPA Must Improve Oversight of State Enforcement," Report No. 12-P-0113, December 9, 2011, https://www.epa.gov/sites/production/files/2015-10/documents/20111209-12-p-0113.pdf.

ED_002434_00000092-00036

Moreover, there is little evidence that states are stepping into the breach to make up for declining enforcement at the EPA. State and local enforcement actions related to the Clean Air Act stationary sources program and the Clean Water Act Discharge Permit System program have declined during the Trump administration. (State and local governments are only required to report formal enforcement actions related to these programs to the EPA's ICIS database). There were 4,161 civil cases related to these programs entered by state and local agencies in FY 2017 and 4,672 in FY 2018. These numbers were down 18 percent and 8 percent, respectively, compared to the average for FY 2006 to FY 2016 (5,074). The total penalties (including SEP payments) levied in these cases were also lower for FY 2017 and FY 2018 than in previous years. Adjusted for inflation (in 2009 dollars), average penalties for FY 2006 to FY 2016 were about $91 million. But the penalties in FY 2018 were only $59 million and only $38 million in FY 2017. Moreover, even though there was an uptick in state and local fines from FY 2017 to FY 2018, this increase was completely wiped out by the decrease in federal fines, which were $120 million lower in FY 2018 than in FY 2017, and $314 million lower than in FY 2016 (both in 2009 dollars, including all civil penalties and SEP payments). In short, polluters have been fined less in state and local cases in the past two years under Trump, compared to the average of previous years, and state and local fines are nowhere close to offsetting declines in federal fines.[56]

The EPA Administration's Internal View of Decline

Internal documents from OECA's leadership show an administration that is apprehensive about declining enforcement numbers and much less confident about the agency's own public explanations of the declines. The documents also reveal an acknowledgment that many other contributors unmentioned in the agency's public pronouncements may be driving the decline. These contributors include the increased influence of industry, the increased intervention from headquarters, the lack of resources, and the chilling effect on staff of the policies, tone, and rhetoric of EPA leadership.

On June 18, 2018, Lawrence Starfield, the principal deputy assistant administrator for OECA, wrote an email to regional enforcement directors asking for help. Starfield

[56] ICIS FE&C Data Set, downloaded from Enforcement and Compliance History Online, Data Downloads, Environmental Protection Agency, accessed October 10, 2018, https://echo.epa.gov/tools/data-downloads.

ED_002434_00000092-00037

and others had been comparing midyear enforcement numbers for FY 2018 to FY 2017. "As you can see from the attached charts," Starfield wrote, "there are significant decreases in enforcement and compliance activity across almost all programs and in almost every region." Nationwide, there had been a decrease of 24 percent for civil case initiations and 23 percent for civil conclusions. Starfield noted that Bodine would be reaching out to regional administrators to discuss the declines. He also asked the regional enforcement directors for explanations for the decrease in any program that showed a 10 percent decline from the previous year.[57]

The data and charts Starfield attached to his email painted a more detailed, and in some cases more bleak, picture. Every enforcement program showed a decline from FY 2017 to 2018 except the Safe Drinking Water Act Public Water System (SDWA PWS) program. Major enforcement programs showed declines in civil cases started ("case initiations") and in civil cases concluded ("case conclusions"). OECA leadership explicitly note declines in hazardous waste, clean water, and clean air programs (Figure 8).[58]

[57] Lawrence Starfield email to Enforcement Directors, Regional Program DDs (Regions 3,4,5, and 7), and OCE Division Directors, "Deliberative—For Internal EPA Use Only," June 19, 2018 [document in EDGI's possession].
[58] The report also noted that the increase in SDWA PWS case initiations may have been the result of a bump in SDWA PWS inspections in FY 2016 and FY 2017. OECA, "FY17 to FY18 Mid-Year Analysis for Regional Evaluation," June 16, 2018 [document in EDGI's possession].

ED_002434_00000092-00038

Declines in Cases for EPA's Major Civil Enforcement Programs, Midyear FY 2017 to Midyear FY 2018				
Enforcement Program	**Initiations (Case Decrease)**	**Initiations (Percentage Decrease)**	**Conclusions (Case Decrease)**	**Conclusion (Percentage Decrease)**
Resource Conservation Recovery Act – Hazardous Waste	-9	-17	-13	23
Clean Water Act – National Pollution Discharge Elimination System	-64	-36	-71	-38
Clean Air Act – Stationary Source	-36	-52	-24	-38

Figure 8: In the middle of FY 2018, most of the EPA's major civil enforcement programs showed declines in enforcement cases started and cases concluded. Source: OECA, "FY17 to FY18 Mid-Year Analysis for Regional Evaluation," June 16, 2018.

As the OECA leadership pointed out, some EPA regions saw much greater declines than others. Case initiations showed the heaviest drops in Regions 3, 4, and 8 (Figure 9). Case conclusions saw the heaviest drops in Regions 1, 3, and 4 (Figure 10).[59]

[59] OECA, "FY17 to FY18 Mid-Year Analysis."

ED_002434_00000092-00039

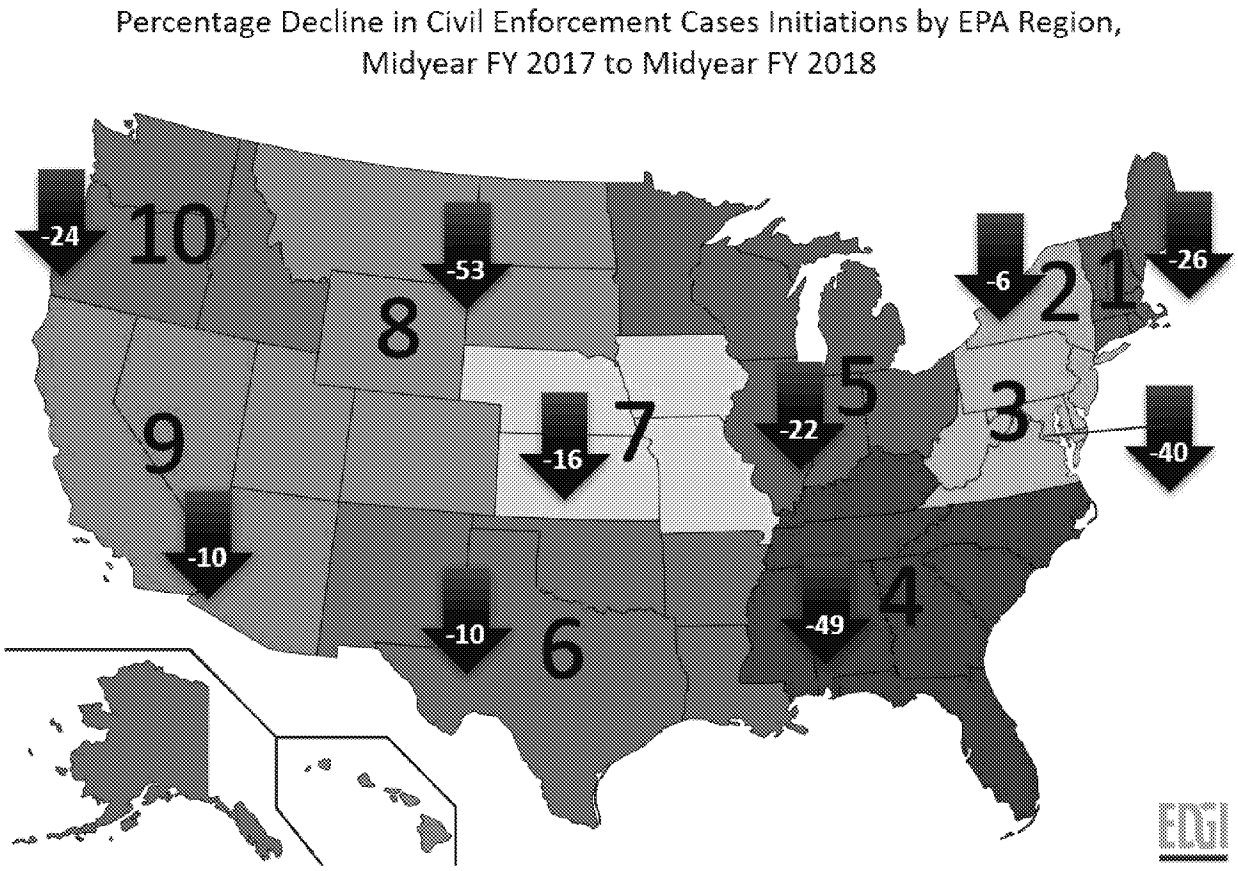


Figure 9: In the middle of FY 2018, all of the EPA regions showed declines in civil enforcement cases initiated. Regions 8, 4, and 3 had especially large declines. Source: OECA, "FY17 to FY18 Mid-Year Analysis for Regional Evaluation," June 16, 2018 [document in EDGI's possession].

Percentage Decline in Civil Enforcement Cases Conclusions by EPA Region, Midyear FY 2017 to Midyear FY 2018

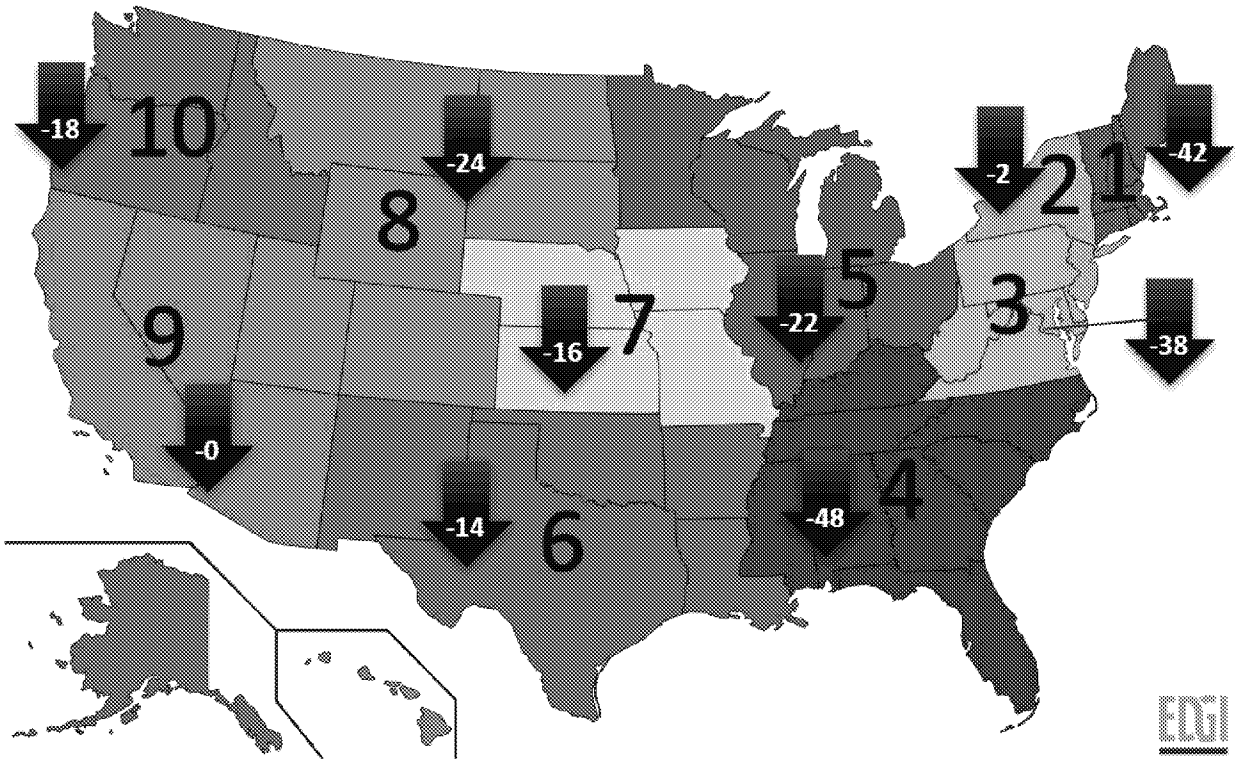


Figure 10: In the middle of FY 2018, all of the EPA regions showed declines in civil enforcement cases concluded. Regions 1, 3, and 4 had especially large declines. Source: OECA, "FY17 to FY18 Mid-Year Analysis for Regional Evaluation," June 16, 2018 [document in EDGI's possession].

In addition to enforcement actions, inspections—the starting point for enforcement—were way down at the midpoint of the fiscal year. Total inspections were down 33 percent from FY 2017. FY 2018 had the lowest number of inspections at midyear than any other fiscal year going back to FY 2008. The next lowest was FY 2017. All the regions had lower inspection numbers at the midyear of FY 2018 than FY 2017. Regions 1 and 6 saw particularly drastic declines, down 78 percent and 49 percent, respectively.[60]

In a separate EPA internal document from June 14, 2018, titled "Possible Reasons for Decline in Inspection/Enforcement and Ideas for Reversing," OECA leadership considered various reasons for the abrupt decreases in enforcement action. Overall,

[60] OECA, "FY17 to FY18 Mid-Year Analysis."

ED_002434_00000092-00041

the document presents seven possible explanations (numbered below) that might be contributing to the dropping enforcement tallies.[61]

One reason, according to OECA's document, was "state deferral" (#1). On the one hand, the document notes that regions were "appropriately deferring more to states" on enforcement and inspections in programs where the EPA had authorized states to enforce environmental laws. This deference, the document states, followed from White House guidance and a January 22, 2018, memo from Bodine.[62] But some regional enforcers also "incorrectly interpreted" this guidance to mean they "should do no inspections and enforcement in authorized states." This, the document suggests, was perhaps due to "inconsistent messaging" by some regional administrators. However, even a correct interpretation of the guidance required EPA regions to discuss any potential inspections and enforcement actions with a state beforehand. That, the document notes, "takes effort, and slows the work."[63]

The administration's deference to states has also changed how states and regulated entities approach enforcement, according to OECA. States have asked for more deference, and defendants in EPA cases have asked that states take over cases. OECA's document observed that EPA staff "may be less motivated to go the extra mile if they know that their hard work in developing a case could be turned over to the state, and perceive the state may not resolve the violations as effectively as EPA would have." The document indicates that this change in staff attitudes may be "only anecdotal" but that it "becomes more powerful as its spreads among regional enforcement managers."[64]

Related to greater hesitancy of staff is another rationale forwarded by OECA: Industry's view that the administration "would reduce enforcement or become friendlier . . . led some companies to believe that they have more leverage to push back on EPA settlement demands" (#2). This perception is, according to the document, "amplified by [the] willingness of some senior political leaders to meet

---

[61] OECA, "Possible Reasons for Decline in Inspection/Enforcement and Ideas for Reversing," June 14, 2018 [document in EDGI's possession].
[62] Memo from Susan Bodine to Regional Administrators, "Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States," January 22, 2018, https://www.epa.gov/sites/production/files/2018-01/documents/guidance-enhancingregionalstatecommunicationoncompliance.pdf.
[63] OECA, "Possible Reasons for Decline."
[64] OECA, "Possible Reasons for Decline."

ED_002434_00000092-00042

directly with defendants." As a result of this pushback, "some settlements are taking longer to conclude."[65]

Another potential contributor is the "chilling effect," in the words of OECA, of "various actions/perception of shifts in enforcement direction" (#3). Especially in the first six months of the new administration, there had been a "consistent message" from the administration "to slow enforcement," OECA's own officials now internally acknowledge. Initially, the landing team wanted to "pause all enforcement, which then evolved to reviewing all cases, and [then the] Green Red Blue charts." (These charts were a new system instituted by Trump's EPA leadership in which regional enforcers sent proposed enforcement actions to regional administrators, who then forwarded them to headquarters, where proposed actions were ranked according to which ones would get the most scrutiny. Staff said this process let them know their work was being scrutinized and slowed work down.[66]) While "very few cases were intentionally stopped," the document continues, the compilation and review of cases took resources and "made staff and managers in the regions very cautious on moving forward with inspections and enforcement." In addition, "senior Agency leadership" had posed questions about enforcement activity while passing along complaints from regulated entities about enforcement. The leadership thereby gave staff the impression they thought that the "EPA was at fault," more so than the businesses that complained. Finally, in the spring of 2017, headquarters sent a memo requiring that it review all requests from regions for information from regulated companies, often a prelude to inspections or further enforcement actions.[67] Regional staff, the OECA authors believed, perceived this new oversight as "indicating [there] should be less of these [requests for information from regulated entities]."[68]

Another, dampening influence on enforcement suggested by OECA was that headquarters began "asking more detailed questions about the nature of specific enforcement cases earlier in the process than historically has been done" (#4). This, too, may have sent an "unintentional signal that certain types of cases are not appropriate."

---

[65] OECA, "Possible Reasons for Decline."
[66] Confidential interview with EPA employee.
[67] Susan Shinkman, Director Office of Civil Enforcement, to Regional Counsel, Enforcement Directors, Enforcement Coordinators and OCE Division Directors, "Interim Procedures for Issuing Information Requests Pursuant to Clean Air Act Section 114, Clean Water Act Section 208, and RCRA Section 3007," May 31, 2017, https://www.documentcloud.org/documents/4324892-EPA-Clean-Air-Act-and-Its-Power-to-Request.html#document/p60/a392202.
[68] OECA, "Possible Reasons for Decline."

ED_002434_00000092-00043

Yet another factor OECA considered was a lack of "resources" (#5). EPA budgets from Congress had been declining over the past eight years, and for more than half of FY 2017, the agency operated under a continuing resolution, with a very real prospect of deep budget cuts. Hence, agency officials curbing expenditures on travel and contracts may have been impeded from developing cases. Loss of expertise due to "extremely limited new hiring" and the exodus of staff through buyouts and attrition also might have curtailed new enforcement efforts.[69]

Two final reasons rounded out OECA's analysis of the decline in enforcement numbers. First, it observed that headquarters had not shown much interest in enforcement "measures and regional performance" over the past few years (#6). And, second, it noted that "anticipated changes in program direction," apparently meaning rules and guidance on regulations such as "WOTUS [Waters of the United States] [and] air policy changes . . . may result in less enforcement now" (#7).

These internal documents show how OECA leadership has acknowledged, internally, several important points that it has not been willing to publicly concede:

1. The declines in enforcement are severe.

2. Enforcement declines may be resulting from influences for which EPA's current leadership is wholly or partly responsible: lack of resources; increased industry influence and pushback; intervention from leadership that is slowing work; uncertainty about regulatory changes; and a general perception among staff that enforcement, or certain types of enforcement, are not appropriate, not welcome by the leadership, or are unlikely to be successful under the new administration's approach.

3. The stakes of declines already under way in EPA enforcement are high. The decline in enforcement cases will lead, according to the document, to a decline in outcomes, including "penalty dollars, injunctive relief and *environmental benefits*" [emphasis added].[70] Put bluntly, the dramatic decline of EPA enforcement is a threat to public health.

---

[69] These are the Voluntary Early Retirement Authority (VERA) and the Voluntary Separation Incentive Payment (VISP).
[70] OECA, "FY17 to FY18 Mid-Year Analysis."

ED_002434_00000092-00044

EPA Staff Explanations of Decline

"Enforcement, in general, is frankly under siege within the current administration."[71]

In-depth interviews conducted by EDGI researchers between October 2017 and September 2018 provide an insider's perspective on why enforcement numbers have declined so rapidly, and to such historic lows, in the past fiscal year. Interviewees point to a number of interconnected and mutually reinforcing reasons, including the antiregulatory philosophy of the Trump administration, the industry ties of key leaders, the threat of steep budget cuts along with loss of staff and expertise, increased industry power and influence, a deference to states called "cooperative federalism," uncertainty about which aspects of federal environmental law management will support staff in enforcing, and increased pushback from industry.

Shrinking Enforcement Budgets and Staff

"EPA is losing its expertise."[72]

EPA employees point to budgetary uncertainty and staff loss as factors that help explain the downturn in enforcement under the Trump administration. There is no question that the threats to the budget are real. Since taking office, the Trump administration has pushed for deep cuts to the EPA's budget with the blessing of the agency's top administrator. These cuts have targeted, among other programs, the agency's key compliance and enforcement functions. Trump's FY 2018 budget called for about 20 percent in cuts to compliance monitoring and civil enforcement, and 28 percent in cuts to criminal enforcement. As part of these proposed budget cuts, the administration has also proposed major cuts to staff in all these divisions (for proposed, enacted, and actual budget and staff for these divisions for the past few fiscal years, see Figures B and C, Appendix).

The White House FY 2018 budget also proposed $20 million in cuts to a DOJ fund used for litigation against hazardous waste polluters under the Superfund

[71] Confidential interview with EPA employee.
[72] Confidential interview with EPA employee.

ED_002434_00000092-00045

program—putatively one of Pruitt's top priorities. And it proposed significant cuts to grants that help assist states in their environmental enforcement programs.[73]

Even the Republican-dominated Congress, which has generally been sympathetic to Trump's focus on environmental deregulation, has balked at the deep cuts to the EPA's budget. Along with congressional gridlock on passing a budget, which resulted in continuing resolutions, the result has been that the EPA's FY 2018 enforcement and compliance budget has basically stayed the same as in previous years. Unfortunately, that level of funding was already severely low, hobbling enforcement and compliance in the Obama administration. That hobbling has continued and has been exacerbated as a result of the agency's policy to get staff to leave or retire early, as mentioned previously.

In OECA, since Trump came into office, seventy-three staff members have left, while only four replacement staff have been hired, resulting in a staffing reduction of 15.7 percent between January 2017 and August 2018. Inspectors and staff working on enforcement in the EPA's ten regional offices, who do the majority of the on-the-ground work to determine compliance with environmental laws at the local level, have also left the agency. Region 5 lost five enforcement support employees and three investigators, and Region 7 also lost several enforcement employees. In addition, numerous senior scientists and policy experts who do the complex work of interpreting rules and advising on compliance and enforcement have also retired or resigned.[74]

One unit for which numbers have become available through April 2018 is the EPA's Criminal Investigation Department (CID). Investigators for CID scrutinize the most egregious offenders of environmental laws. But the division has long been understaffed, failing to maintain the 200 investigators required by law under the Pollution Prosecution Act of 1990. But the CID's capacity has eroded even more

---

[73] Laura Peterson, "Enforcement of Environmental Laws Drops Under Trump Administration," *Project on Government Oversight*, February 20, 2018, https://www.pogo.org/analysis/2018/02/enforcement-of-environmental-laws-drops-under-trump-administration.

[74] Andrew Rosenberg, "EPA Can't Stop Polluters When The Trump Administration Cuts Enforcement Staff," *Union of Concerned Scientists*, September 13, 2018, https://blog.ucsusa.org/andrew-rosenberg/the-epa-cant-stop-polluters-when-the-trump-administration-cuts-enforcement-staff. For percentage decline, see Brady Dennis, "With a Shrinking EPA, Trump Delivers on His Promise to Cut Government," *Washington Post*, September 8, 2018, https://www.washingtonpost.com/national/health-science/with-a-shrinking-epa-trump-delivers-on-his-promise-to-cut-government/2018/09/08/6b058f9e-b143-11e8-a20b-5f4f84429666_story.html?utm_term=.1e0a6e9fe348.

ED_002434_00000092-00046

under Trump, falling from 157 investigators in September 2016 to 140 in April 2018, pushing a long-term decline to the lowest levels since at least 1997 (Figure 11).[75] In addition, for much of FY 2017 and a few weeks of FY 2018, Pruitt siphoned off up to 10 percent of the criminal investigators for his own personal security detail.[76]

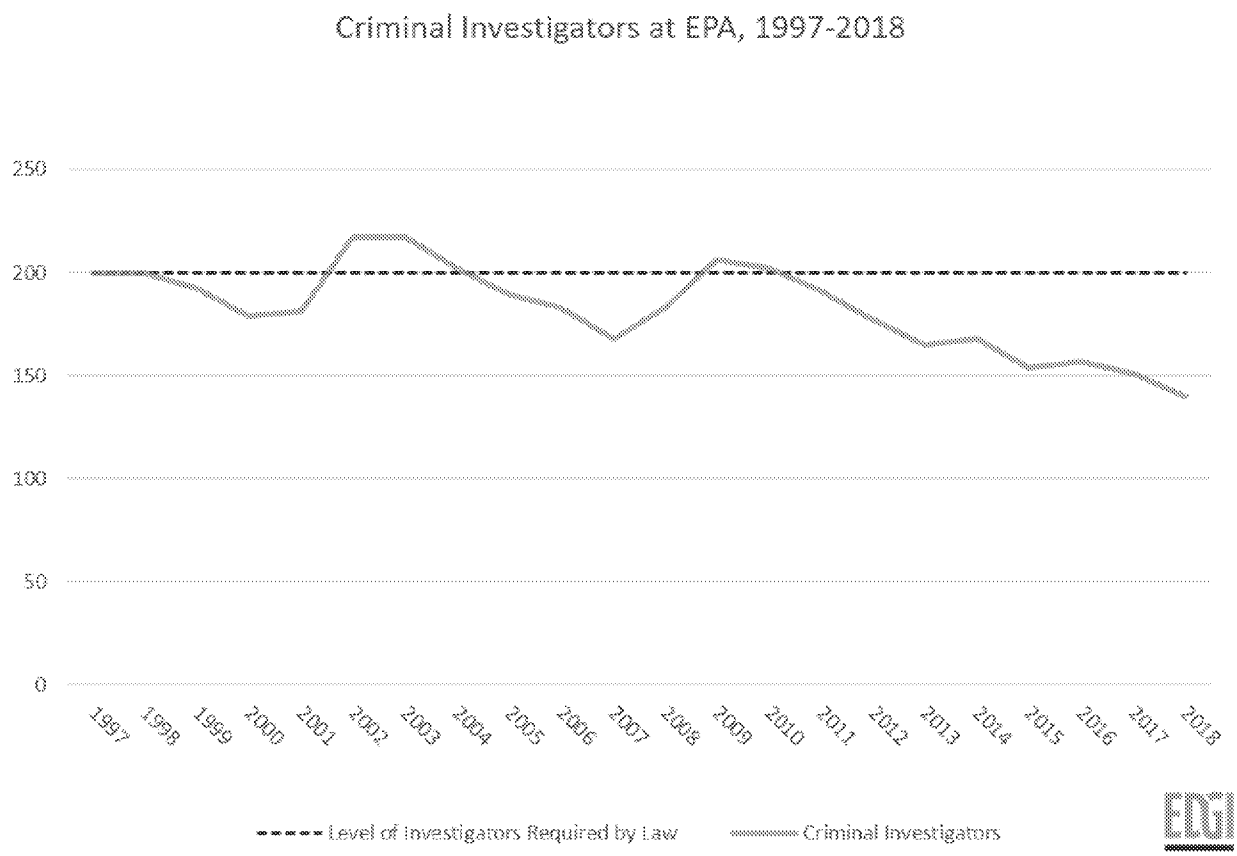


Figure 11: Criminal investigators at the EPA compared to the number of investigators required by law. The EPA's staff of criminal investigators has fallen to its lowest in 2018 since at least 1997, dropping to nearly two-thirds of the 200 investigators required by law. Note:

[75] Dino Grandoni, "EPA Loses a Tenth of Its Criminal Investigators since Trump's Election," *Washington Post*, June 21, 2018, https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/06/21/the-energy-202-epa-loses-a-tenth-of-its-criminal-investigators-since-trump-s-election/5b2aa8ea30fb046c468e6f1a/.

[76] "EPA Pulls 'Most' Investigators from Pruitt's Security, Hires Dedicated Staff," *InsideEPA*, October 19, 2017, https://insideepa.com/daily-news/epa-pulls-most-investigators-pruitts-security-hires-dedicated-staff; and Amanda Reilly, "Agency Defends Enforcement as Cops Return from Pruitt Detail," *E&E News*, October 20, 2017, https://www.eenews.net/greenwire/stories/1060064229?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1060064229.

ED_002434_00000092-00047

The 2017 numbers are those reported as of September 12, 2017, and the 2018 numbers are those reported as of April 2018. Source: For 1997–2012 data: Robert Esworthy, "Federal Pollution Control Laws: How Are They Enforced?" Congressional Research Service report, October 7, 2014, https://fas.org/sgp/crs/misc/RL34384.pdf. For 2013–2016 data: Public Employees for Environmental Responsibility, "Agent Count—8/8/17," accessed October 15, 2018, https://www.peer.org/assets/docs/8_24_17_CID_special_agent_numbers.pdf. For 2017 data: Renee Schoof, "EPA Adds Agents to Guard Pruitt, While Fewer Fighting Crimes," Bloomberg BNA, September 12, 2017, https://www.bna.com/epa-adds-agents-n57982087754/. For 2018 data: Public Employees for Environmental Responsibility, "EPA Agents Fighting Eco-Crime Drop as Security Detail Grows," PEER, June 21, 2018, https://www.peer.org/news/press-releases/epa-agents-fighting-eco-crime-drop-as-security-detail-grows.html.

The White House's latest budget proposal for FY 2019 again proposes deep cuts to the EPA's budget and staff. The White House proposes to nix about $14.7 million and 110 full-time employees from compliance and monitoring, compared to FY 2017, justifying the cuts by stating that states "conduct the vast majority of inspections" and because the agency plans to "increase reliance on technology rather than on-site inspections." Civil enforcement is also on the chopping block, for $30.4 million in cuts and a 223-person reduction (FTEs), again because states are the "primary implementers of our nation's environmental laws." Finally, the White House proposes that the criminal enforcement program lose $4.2 million in funds and 59 full-time employees because the agency plans to "focus on the most egregious cases," coordinate with civil enforcement more, and sideline cases that "have limited deterrence value."[77]

The impact of staff losses, as described by our interviewees, helps explain why enforcement has been so poor and why we have much to be concerned about in the face of these proposed cuts to budget and staff at the EPA.

Interviewees told us that staff taking buyouts or otherwise leaving is having a significant effect on enforcement work across many different programs including the Clean Air Act, especially the control of hazardous air pollutants, Superfund, RCRA, and matters having to do with environmental justice, among others.

[77] EPA, "Fiscal Year 2019: Justification of Appropriation Estimates for the Committee on Appropriations," February 2018, https://www.epa.gov/sites/production/files/2018-02/documents/fy-2019-congressional-justification-all-tabs.pdf.

ED_002434_00000092-00048

Loss of staff affects work because there are simply fewer people to do the day-to-day work. This means that work either slows down or stops, which can lead to downturns in enforcement. A staff member shared an illustrative example from the Superfund program, which is supposedly one of the priority areas of the agency: "When a technical support staff retires and we can't replace them, that's where the clog is because, you know, you—each one of these sites is—generally has groundwater contamination. If you don't have a hydrogeologist that can get you a response within a couple of weeks, you're sitting there waiting."[78]

Loss of staff means loss of institutional knowledge. Every time a staff member who had responsibility for an aspect of a particular regulatory program leaves, the EPA's knowledge of how to inspect, interpret, enforce, and defend enforcement actions is diminished. Diminishing know-how is a very acute concern for EPA staff, who are seeing employees with many decades of specialized knowledge leave the agency.

Learning the internal workings of regulatory programs and their implementation can take years or decades. As one person said, "the institutional knowledge [is] just really leaving the agency. . . . People who have been there for thirty years and everything that they know and they have experienced and are ready to—they're just going. They're just leaving, you know? They're just going out the door with very little effective management of the knowledge stocks of the agency."[79]

In addition, states and industry both rely on EPA technical staff and scientists to answer questions about implementation of environmental regulations. With so many staff leaving, our interviewees report that the agency is losing this type of consultative expertise in various regulatory programs. According to one interviewee:

"EPA gets hundreds of questions a year from state and local agencies and similarly we get frequent questions from industry on how to implement federal regulations. However, due to the extensive loss of staff, particularly senior staff, there's no one there to answer these questions on how to correctly and effectively implement these rules. A state inspector will go out and say, 'We went and looked at this particular facility and this is what we found. EPA, what do you think? Is that what you meant when you wrote this rule? Does it sound like the rule should apply or that there is a violation?' EPA has lost that level of institutional knowledge at both the regional level and at the headquarters level."[80]

---

[78] Confidential interview with EPA employee.
[79] Confidential interview with EPA employee.
[80] Confidential interview with EPA employee.

ED_002434_00000092-00049

Further, for any one environmental issue there may only be a small number of people with expertise in rule interpretation or enforcement. One example is the asbestos rule. As one staff member said, "We had one guy that coordinated the national asbestos program out of EPA headquarters, asbestos being one of the most toxic hazardous air pollutants. And he was it. He was the expert on our asbestos rule and he walked out the door and he had been running it for twenty years. The agency has no backup depth for staff and virtually no knowledge transfer effort to capture the experience and institutional knowledge regarding effective implementation of these complex rules protecting our environment."[81] Without other experienced staff to train a new person coming on board, enforcement is likely to suffer.

Another example cited was the loss of scientists and engineers in the Office of Air Quality Planning & Standards. With the people who wrote the rules implementing the Clean Air Act retiring or leaving, and with those few hired to replace them new and inexperienced, the quality and impact of future work in this office are imperiled.

However, it is not merely the loss of expertise and resources that is undermining enforcement at the EPA. A broad array of changes in perspectives, policies, and practices within the EPA as well as among those it regulates have conspired to weaken EPA enforcement programs and to shackle its ability to protect human and environmental health.

Industry Influence, Political Obstruction, and a Chilling Effect on Staff

In interviews, EPA staff told us that they are unequivocally getting the message from management to step back from enforcing environmental laws and to "go easy" on regulated industries. As one staff member said, "What you have now is there are explicit directions not to do certain types of inspections and numbers overall are dropping."[82]

OECA's leadership has initiated policies that break with past practices by removing much of the independence of EPA regional offices to initiate or follow through with enforcement actions. In May 2017 OECA instituted a policy that took away regional

[81] Confidential interview with EPA employee.
[82] Confidential interview with EPA employee.

ED_002434_00000092-00050

enforcement officers' authority to request tests and information regarding clean air, water, and hazardous waste. In March and April of 2018, Bodine sent memos requiring local investigators get approval from headquarters first before referring any cases to the DOJ. In the past these had been sent to DOJ and OECA leadership simultaneously.[83]

Bureaucratic obstacles like these have slowed down enforcement work. Moreover, combined with rhetoric from the White House and EPA leadership deeply critical of the EPA, the industry friendliness of the agency's political leadership and other changes in enforcement policies do indeed have a chilling effect on staff. As one interviewee described:

"The assumption is, okay, well we're supposed to be deferential, we're supposed to be, you know, kind of less confrontational or whatever, probably on the assumption that, okay, well I don't know that these people are politically connected or not but let's assume that they are and that if we're too tough on them or we give them, you know, too rigid an answer on something that they're gonna, you know, go over our head and then we'll be in worse shape than we were before, so we—can we work with them on something or not? At the end of the day—well you just don't know whether or not somebody's gonna have your back or not or whether they're gonna stab you in the back."[84]

Staff assert that they see very little interest from the agency's political leadership in enforcing regulations across the board, particularly with respect to the coal and electric utility industries, oil and gas companies, and the petrochemical industry. For example, one staff member told us that Region 8 employees have been instructed to stop inspecting natural gas drilling sites on state or private lands along the Front Range in Colorado, where thousands of natural gas extraction wells dot the landscape. Inspections of stationary sources under the Clean Air Act were indeed

---

[83] Eric Lipton and Danielle Ivory, "Under Trump, EPA Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers," *New York Times*, December 10, 2017, https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html; and Dino Grandoni, "Trump Appointee at EPA to Scrutinize Which Pollution Cases May Go to Court," *Washington Post*, June 15, 2018, https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/06/15/the-energy-202-trump-appointee-at-epa-to-scrutinize-which-pollution-cases-may-go-to-court/5b22ee7e1b326b3967989aee/.

[84] Confidential interview with EPA employee.

ED_002434_00000092-00051

down in Region 8 by about 57 percent at the midpoint of FY 2018 compared to the midpoint of FY 2017.[85]

There, and wherever else EPA inspectors are backing off, the environmental consequences will likely be significant. Emissions of volatile organic compounds from natural gas extraction wells can contribute to violations of federal ozone standards, leaving communities at greater risk from respiratory problems. Methane emissions from leaking wells also exacerbate climate change. The Obama administration was taking steps to address these problems by requiring industry to plug leaks, which could also reduce its loss of product. While much of the oil and gas industry, a key constituency of the Trump administration, had gotten ready to comply, it now opposes these regulations and supports the EPA's current effort to unravel them.[86]

The administration has also explored other ways of favoring its allies in the energy industry through changes in enforcement practice. As the *New York Times* reported in January 2018, these industries had been lobbying Pruitt for enforcement slowdowns.[87] In April, *E&E News* reported that the EPA would be giving more flexibility to oil and gas companies in choosing to self-audit.[88] And on August 21, 2018, OECA administrator Susan Bodine sent a memo to regional administrators that, among other things, ended the EPA's focus on the energy sector, which had been part of the agency's National Enforcement Initiatives for several years.[89]

But even with the budgetary uncertainty and staff declines, and with increased industry influence at EPA, how have political appointees managed to so quickly

---

[85] The 57% decline is for "partial compliance evaluation" inspections of stationary sources in the Clean Air Act. The other category of stationary source inspection, "full compliance evaluations," could not decline -- because they were already at zero at the midpoint of FY 2017. [OECA], "Possible Reasons for Decline in Inspection/Enforcement and Ideas for Reversing," June 14, 2018.
[86] Coral Davenport, "Trump Administration Wants to Make It Easier to Release Methane into Air," *New York Times*, September 10, 2018, https://www.nytimes.com/2018/06/21/climate/methane-leaks.html. For Trump's constituency, see Mike Soraghan, "Trump Team Phasing Out Oil Field Enforcement Initiative," *E&E News*, August 21, 2018, https://www.eenews.net/stories/1060095163.
[87] Lipton and Ivory, "Under Trump."
[88] Miranda Green, "EPA to Unveil Policy Aimed at Avoiding Legal Action over Oil and Gas Polluters: Source," *The Hill*, April 20, 2018, https://thehill.com/policy/energy-environment/384078-epa-to-unveil-new-policy-aimed-at-avoiding-legal-action-over-oil.
[89] Memo from Bodine to Regional Administrators, "Transition from National Enforcement Initiatives to National Compliance Initiatives," August 21, 2018, https://www.epa.gov/sites/production/files/2018-08/documents/transitionfromneitonci082118.pdf; and Soraghan, "Trump Team."

ED_002434_00000092-00052

transform the EPA's orientation toward enforcement, restraining its potential reach and clout and curbing its inclinations to protect public health?

Cooperative Federalism—or, Leave States Alone

"I think it's this philosophy that the states, if they have an authorized program, the EPA should just leave them alone, and they just do what they do."[90]

EPA staff point to a major policy change in the relationship of the EPA's enforcement to state governments, what members of the Trump administration have called "cooperative federalism." The term "cooperative federalism" has long meant federal, state, and local governments working together rather than in separate spheres. It originated in the 1930s as a largely positive way of describing an increased role for the federal government in matters that had formerly been left mostly to the states. The system of environmental laws that emerged in the 1970s, which gave the federal government a much stronger role in antipollution control, has long been considered an example of cooperative federalism because of the strong roles it accords both to the federal government and to the states, in whose hands much of our environmental law enforcement has since lain.[91]

Given that states have had a continuously strong role in environmental programs since the 1970s, the current administration's use of the term does not indicate a return to the general idea of cooperative federalism in environmental programs—since that has never gone away. Instead, the Trump administration has redefined the term to introduce a brand-new policy of extreme deference to states on matters of regulation and enforcement. Pruitt contrasted the "cooperative federalism" approach to "coercive federalism," but neither he nor others in the administration have described their philosophy in any detail.[92] The spirit of the approach, however, appears to have much in common with the push for

---

[90] Confidential interview with EPA employee.
[91] Robert Glicksman, "From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy," *Wake Forest Law Review* 41, no. 719 (2006).
[92] Zack Colman, "Why the EPA Nominee Wants to be a Political Wrecking Ball," *Christian Science Monitor*, January 28, 2017, https://www.csmonitor.com/Environment/Inhabit/2017/0118/Why-the-EPA-nominee-wants-to-be-a-political-wrecking-ball; John Siciliano, "EPA's Pruitt to Governors: 'The Days of Coercive Federalism are Over," *Washington Examiner*, https://www.washingtonexaminer.com/epas-pruitt-to-governors-the-days-of-coercive-federalism-are-over.

ED_002434_00000092-00053

"devolution" during the 1980s by conservative think tanks like the Heritage Foundation. Devolution was a call to return most of the EPA programs to the states. Although Ronald Reagan tried to adopt the Heritage Foundation's blueprint for the EPA, devolution was widely rejected by Congress, the public, and even the states. The "cooperative federalism" of the current administration amounts to a backdoor approach to devolution, pursued via policy directives beneath the level of formal rule makings and under-the-radar screens of the media and Congress. Not coincidentally, it served as the pivotal concept in the Heritage Foundation's proposal for the EPA in its *Blueprint for Reform: A Comprehensive Policy Agenda for a New Administration in 2017*. That document laid out a vision for American environmental policy that sidelined the role of the federal government in most areas of environmental policy and practice, essentially strangling the EPA's "gorilla" function. That Heritage proposal has served as a touchstone for the Trump administration's plans.[93]

Scott Pruitt made "cooperative federalism" a cornerstone of his approach to the EPA since his Senate confirmation hearings, and acting administrator Wheeler has since taken up the torch.[94] Moreover, the idea has become instantiated in EPA policy via multiple pronouncements, including the September 27, 2017, OECA National Program Manager Guidance; a January 22, 2018, memo from Susan Bodine on "Enhancing Regional-State Planning and Compliance"; and the EPA's February 8, 2018, *Strategic Plan for FY 2018–2022*, which made "cooperative federalism" one of the agency's three strategic goals.[95]

---

[93] Brad Plumer, "The Heritage Foundation Has a Plan for Gutting EPA and the Energy Department. It's Eerily Plausible," Vox, March 1, 2017, https://www.vox.com/energy-and-environment/2017/3/1/14777536/heritage-budget-trump-epa-cuts; Heritage Foundation, "President Trump Cites Heritage Research on Paris Climate Change Agreement," May 15, 2017, https://www.heritage.org/impact/president-trump-cites-heritage-research-paris-climate-change-agreement; and Jonathan Mahler, "How One Conservative Think Tank Is Stocking Trump's Government," *New York Times*, June 220, 2018, https://www.nytimes.com/2018/06/20/magazine/trump-government-heritage-foundation-think-tank.html.

[94] "Environmental Protection Agency Designate E. Scott Pruitt, Senate Confirmation Hearing Opening Statement," January 18, 2017, https://www.epw.senate.gov/public/_cache/files/0e505de4-aa91-4dcc-ba23-dc9ddab01c0b/scott-pruitt-opening-statement-final-.pdf; and Brady Dennis and Juliet Eilperin, "Incoming EPA Chief: 'This Is the Right Job for Me,'" *Washington Post*, July 6, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/07/06/incoming-epa-chief-this-is-the-right-job-for-me.

[95] OECA, National Program Manager (NPM) Guidance, Fiscal Years 2018–2019, September 29, 2017, https://www.epa.gov/sites/production/files/2017-10/documents/fy18-19-oeca-npm-guidance.pdf; EPA, "FY 2018–2022 EPA Strategic Plan" February 12, 2018, https://www.epa.gov/sites/production/files/20https://www.epw.senate.gov/public/_cache/files/0e505

ED_002434_00000092-00054

"Cooperative federalism," sounds innocuous or even like a laudable approach to working with states, but in practice, EPA staff assert that, to Trump's EPA, "cooperative federalism" actually means "leave them [the states] alone."[96] For most states, that means taking the top environmental cop off of the beat, resulting in a substantial weakening of the U.S. environmental regulatory environment. This has been accomplished quickly and quietly through policy directives, avoiding the need for Congress to make legislative changes to weaken environmental laws, which would likely be unpopular with the majority of the public.

The Bodine memo on "regional-state planning" strongly emphasizes deference of the EPA to the states, carving out a circumscribed set of situations "that could warrant EPA involvement in individual inspections and enforcement following close communication and involvement of upper management of both agencies [EPA and the state]." And, in a departure from past practices, the memo requires that when "senior leadership in the Region and the State do not agree . . . the matter should be elevated to the OECA Assistant Administrator for a decision." As OECA's assistant administrator, Bodine, who has close relationships to industry groups, has thereby been entrusted with the decision-making power. This seriously undermines the power of regional EPA enforcers to serve as checks on state environmental enforcement since states can strip regions of their prerogatives by disputing their enforcement decisions.[97]

Why is it problematic for EPA to take a hands-off approach at the state level? One reason is that states vary in their political will to turn "gorilla," to take enforcement actions against industries within their borders. While some states pursue enforcement vigorously, many do not. According to one EPA staffer, "a lot of it gets into the willingness of the political people in the state to confront their own businesses. How willing are they to do that and fine them?"[98] Previously, in a state unwilling to inspect and enforce, the EPA would have stepped in, but our interviewees tell us that now there is considerable reluctance: "If a state government decides enforcement isn't important, in the past EPA might step up its efforts in that state, now we're really not allowed to unless there is some justification."[99]

---

de4-aa91-4dcc-ba23-dc9ddab01c0b/scott-pruitt-opening-statement-final-.pdf18-08/documents/fy-2018-2022-epa-strategic-plan-print.pdf; and Bodine to Regional Administrators, "Enhancing Regional-State Planning."

[96] Confidential interview with EPA employee.

[97] Bodine to Regional Administrators, "Enhancing Regional-State Planning."

[98] Confidential interview with EPA employee.

[99] Confidential interview with EPA employee.

ED_002434_00000092-00055

Furthermore, the EPA already works closely with states to enforce environmental laws; it is required to do so. But if a state is "authorized" by the EPA to enforce federal environmental law, the EPA's role has been largely one of oversight, stepping in if technical assistance is needed or asked for. Most states have EPA authorization for key programs such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act.[100] This means that, prior to the Trump administration, states were already doing the majority of inspection and enforcement.

In these authorized states, the critical, required role of the EPA is to check whether state environmental agencies are doing enough to meet federal standards, and it must address the largest and most technically difficult sites, like petrochemical facilities, power plants, and natural gas production sites. The EPA provides assistance to states in the form of highly trained inspectors, technical expertise, and specialized equipment for monitoring or measuring emissions. It also furnishes a national perspective on companies or sectors that operate in multiple states and works to solve interstate pollution issues.

For complex or egregious cases, the EPA can bring in the U.S. Department of Justice if needed and can pursue criminal cases against polluters if warranted. (DOJ's Environmental and Natural Resources Division received its own memo on "cooperative federalism"—i.e., the lack of need for federal involvement—on March 12, 2018).[101] A staff member explains how the EPA and states shared the work in the past: "And EPA . . . [would say] . . . we're worried about these five, so we're going to go and do really thorough inspections at these five. We'll probably find three problems there and take cases. Whereas the state's doing like 100, more of a shallow dive, and they might find 10 or 15 things there and they may end up penalizing them with a slap on the wrist. But they're not like the gigantic cases the EPA takes."[102]

---

[100] EPA, "State Review Framework for Compliance and Enforcement Performance," December 30, 2016, https://www.epa.gov/compliance/state-review-framework-compliance-and-enforcement-performance.

[101] Memo from Jeffrey Wood, Acting Assistant Attorney General, to ENRD Section Chiefs and Deputy Section Chiefs, "Enforcement Principles and Priorities," March 12, 2018, https://www.peer.org/assets/docs/epa/3_29_18_USDOJ_AAG_Memo.pdf .

[102] Confidential interview with EPA employee.

ED_002434_00000092-00056

Many state environmental agencies, although they have grown and developed since the 1970s, remain poorly resourced in part because they are so vulnerable to political whims and funding cuts.[103] Interviewees underscored the fact that inspectors in many states do not earn high salaries and can thus easily be hired away by industry. The turnover creates a need for constant training of new staff and complicates the agency's ability to build up staff expertise and experience. Competent inspections of complex facilities often require specialized training, advanced degrees such as engineering, and a thorough understanding of the industrial process being observed. They may also require expensive and technically sophisticated equipment, which state environmental programs may not possess.

One example is the use of infrared cameras for detecting methane leaks from gas drilling and processing. Although methane is short-lived in the atmosphere, it is an extremely potent greenhouse gas. Infrared cameras can "see" leaks that are not detectable to the naked eye. However, the cameras are expensive, and not all state environmental programs have access to them. If the EPA is not inspecting gas sites with infrared cameras, state inspectors cannot offer comparable checks on compliance unless their own programs are sufficiently resourced with cameras and unless they are authorized and encouraged to act. One staff member described: "We've used it heavily in doing the oil and gas inspections that we were doing in Region 8 and other places, here in the mid-Atlantic, you know, with the Marcellus Shale . . . we've had some real successes with that. If we're not out in the field, [if] we're not using that stuff, there's gonna be no real driver for people to be vigilant about that on the corporate side."[104]

There are also large differences across states in the percent of inspections that discover violations. The variations happen across specific enforcement programs as well. A staff member explains:

"Some states are pretty diligent in finding stuff, they might find a 20 or 30 percent hit rate. Other states will find 1 percent. Their agencies don't want to know about problems or the inspectors aren't very competent. Or they're not paying them enough and the industry hires them and then you have only junior people doing stuff. So there's a lot of factors that go into finding a violation for air and RCRA that make it pretty rare. And those rates are going to be somewhere around 1 to 4

---

[103] Robert R. Kuehn, "The Limits of devolving Enforcement of Federal Environmental Laws," *Tulane Law Review* 70, no. 2373 (1996); and Inger Weibust, *Green Leviathan: The Case for a Federal Role in Environmental Policy* (New York: Routledge, 2016).
[104] Confidential interview with EPA employee.

ED_002434_00000092-00057

percent of the universe. Whereas in the Water Act, it's more like a quarter of those."[105]

Turning inspections and enforcement over to states may also reduce the penalties imposed on industry for noncompliance. Typically, the EPA is more likely to act the part of the gorilla; it tends to levy higher fines on violations of pollution laws than do the states—and is in many instances more likely to impose those fines. State regulators constrained by statute or politics are more likely to turn sheepish, to give a company a slap on the wrist in the form of a small fine. Corporate violators can make the calculation that paying a small fine is cheaper than upgrading equipment or taking other steps to comply with the law.

The directives for implementing "cooperative federalism" show that in practice EPA political appointees and elected officials in state government will have more input on the EPA's inspection and regulatory actions, likely leading to delays or political interference. The January 22, 2018, memo from Bodine instructed the EPA's ten regional offices, where most inspection and enforcement occurs, on how to work more closely with state elected officials. She stressed the importance of "keeping the state's political leadership informed . . . [of] . . . high profile inspections and enforcement actions that are planned" and avoiding "surprises."[106]

Further, Bodine advised that there would need to be more discussion with state elected officials and internally to justify any inspection visits to industrial facilities. Bodine advised that "EPA regions and States" will "provide explanations of why specific facilities are proposed for inspection." This should lead to conversations between the EPA and the states about the "value and need for the inspections, priorities, and capacity."[107]

This policy makes it easier for state governments that are inclined to protect polluting industries within their borders. Further, making staff justify to agency higher-ups what in the past were considered routine inspections may well be suppressing the numbers of inspections, which are themselves the prelude to most further enforcement actions. An atmosphere where inspections are relatively rare also sends the message to industry that compliance is optional and that, if they do violate the law, the chances are they won't get caught.

---

[105] Confidential interview with EPA employee.
[106] Memo from Susan Bodine to Regional Administrators.
[107] Memo from Susan Bodine to Regional Administrators.

ED_002434_00000092-00058

And even though the EPA says it is turning more work over to the states, the EPA is not providing them with more resources to meet this stepped-up role. In fact, Trump's 2019 budget will slash by nearly $575 million funding to states and tribes for inspection, enforcement, and related activities.[108]

EPA staff say there is little to no evidence that most states are increasing their role in inspections and enforcement. One employee even went so far as to say, "I know that there's a lot of states that are doing almost no enforcement."[109] It is not clear how EPA leadership intends to evaluate the effectiveness of "cooperative federalism," and it is unclear at what point the EPA would step in if the state is not doing a good job of enforcing environmental laws. Staff worry that political leadership will engage in a whitewashing of the dramatic decline in enforcement under Trump. They foresee that there may well be a "concerted effort to message how the states are picking this stuff up when we don't really have evidence that they are."[110]

Regulatory Rollbacks, Delays and Industry Pushback

Another factor that staff identify as contributing to dramatic declines in enforcement is the administration's public statements and actions regarding rolling back or rescinding parts of federal environmental laws. With the status of key rules such as the Clean Power Plan, the Mercury and Air Toxics Rule, the Coal Ash Rule, and the Municipal Solid Waste Landfill New Source Performance Standards up in the air, there is a huge disincentive for industry to make incremental progress toward complying with these rules. While these proposed rule changes still have to go through formal rulemaking processes and will be challenged in the courts, reconsideration itself raises questions about just what federal policies will be in the near future. The uncertainty makes industry less inclined to invest money to comply with rules still on the books but now under challenge. EPA staff is also left wondering what they should be enforcing and, moreover, what management will support them in enforcing. For now, industry can bide its time and not make major investments in certain types of pollution control.

Other strategies being deployed by political appointees to go easier on the regulated community include delays in the implementation of recently approved rules and

[108] EPA, "FY 2019 Budget in Brief."
[109] Confidential interview with EPA employee.
[110] Confidential interview with EPA employee.

ED_002434_00000092-00059

extensions of deadlines for compliance. An example is methane collection at landfills, another Obama-era policy that Trump's EPA appears to not be moving forward on.[111] While delaying implementation does not lead to declines in enforcement, it is another quick, nonlegislative, under-the-radar way to remake environmental policy. As one staff member said "I think they can do an awful lot through just nonimplementation or—and since there is no congressional oversight—nobody's gonna call a hearing, saying why aren't you implementing this rule?"[112]

Finally, the messages coming from the Trump administration and his EPA are leading to a sense of empowerment among regulated industries. Staff members described getting pushback from regulated industries on issues and cases that in the past would likely not have been problematic.

This view has spread not just to big industry but to smaller regulated entities such as landlords, who are required to inform (disclose to) potential renters or buyers about the possibility of lead-based paint in homes they rent. Lead is the number one environmental health threat to children, and in most U.S. communities, lead-based paint is the main source of lead exposure for children. Disclosures to renters or buyers of homes that have lead-based paint in them is a critical public health measure. Yet, as one of our interviewees who worked in lead-based paint inspections and enforcement told us, after the election of Trump, landlords stopped responding to calls about compliance. Before Trump, landlords would agree to set up meetings or, at most, delay them. But, our interviewee said, after Trump, "[Landlords] would say, 'No,' and hang up, or they'd start screaming at me."[113] Moreover, unlike previous administrations, leadership was not willing to back the inspector up in forcing these meetings to happen.

The administration's antiregulation rhetoric has been heard very clearly by industry, and they are pushing back on things they likely would have agreed to comply with under a different administration. Under Trump, they realize that such pushback has a good chance of succeeding.

---

[111] EPA, "Municipal Solid Waste Landfills: New Source Performance Standards (NSPS), Emission Guidelines (EG) and Compliance Times," October 18, 2017, https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-new-source-performance-standards; and William C. Shillaci, "EPA Sued by State AGs over Delayed Landfill Rules," *EHS Daily Advisor*, June 12, 2018, https://ehsdailyadvisor.blr.com/2018/06/epa-sued-state-ags-delayed-landfill-rules/.
[112] Confidential interview with EPA employee.
[113] Confidential interview with EPA employee.

ED_002434_00000092-00060

CAN STATES TAKE OVER THE "GORILLA" ROLE?

If states are left to pick up the slack, can they rise to the challenge? And how well are states already equipped to do so? The answers vary from state to state. The stark differences in environmental law enforcement under the cooperative federalism model of environmental governance are apparent in state environmental law enforcement records. Some states still hew to the more stringent rules of former EPA administrations, while other states are not enforcing environmental rules as effectively under the sheepish oversight of the Trump administration. Depending on which state you live in, you may be breathing less clean air and drinking dirtier water.

On the air pollution front, while some states have remained relatively steady in their compliance and enforcement activities, others have curtailed their programs. Some of the twenty-seven states that sued the federal government over the legality of the Clean Power Plan have stopped enforcing the Clean Air Act as effectively under the Trump administration. Oklahoma, Scott Pruitt's home state and a major location for oil and gas drilling, is a prime example of looming failures of cooperative federalism that are being compounded by antienvironmental federal leadership.

Oklahoma's 2017 Department of Environmental Quality (DEQ) annual report reveals that the state's air pollution enforcement has dropped significantly since the Trump administration took over. The DEQ's Division of Compliance and Enforcement cut its formal air enforcement actions almost in half from 2016 to 2017, with only fourteen formal actions in 2017 compared to twenty-three in 2016.[114] Examination of prior years' data shows that fourteen formal actions is far below average for Oklahoma's DEQ. The state filed approximately twice as many air enforcement actions each year between 2013 and 2015.[115] Oklahoma also collected far fewer fines under its air

---

[114] Oklahoma Department of Environmental Quality (DEQ), Annual Report 2017, pp. 30, 39 http://www.deq.state.ok.us/mainlinks/reports/2017AnnualReport/2017%20DEQ%20Annual%20Report.pdf.

[115] Oklahoma DEQ, Annual Report 2013, p. 31, http://www.deq.state.ok.us/mainlinks/reports/2013AnnualReport/AnnualReport2013.pdf; Oklahoma DEQ, Annual Report 2014, p. 37, http://www.deq.state.ok.us/mainlinks/reports/2014AnnualReport/FINALAP14.pdf; and Oklahoma DEQ, Annual Report 2015, Agency Statistics Section, http://www.deq.state.ok.us/mainlinks/reports/2015AnnualReport/AnnualReport2015.html.

ED_002434_00000092-00061

enforcement program in 2017 ($58,032), an amount that is less than half of prior years' fines.[116] For comparison, between 2013 and 2016, the lowest amount collected was $134,688 in 2016, and the highest was $524,909 in 2013.[117] The 2017 fines are abnormally low, showing a steep decline of tens of thousands to hundreds of thousands of dollars compared to previous years. Fewer fines in the environmental enforcement context indicates that fewer violations were addressed and that enforcement was less stringent.

Most alarmingly, Oklahoma's DEQ is only curbing a fraction of the air pollution it once did. Between 2013 and 2016, reductions in air emissions ranged from 4,000 tons in 2013 to 896 tons in 2016.[118] In sharp contrast, in 2017 the agency's enforcement actions reduced air emissions by only 116 tons.[119] It seems that Oklahoma, whose governor prohibited the state from implementing the Clean Power Plan in 2015 by executive order, is so eager to please local industrial enterprises that it has nearly done away with any air emission reduction efforts.

Oklahoma's DEQ is also being starved of funding. The DEQ's budget decreased by $3.1 million between 2014 and 2017,[120] and Oklahoma's legislature reduced the state's portion of the Environmental Agency's funding by 11.3 percent.[121] It is unlikely that enforcement will pick up unless the agency is properly funded.

Like Oklahoma's DEQ, Kentucky's Department of Environmental Protection (DEP) has also cut its environmental enforcement efforts nearly in half. In 2017 the agency reported the fewest environmental enforcement actions since at least 2010.[122] Kentucky DEP's Division of Enforcement gets its cases through referrals from the State's regional offices, the department's Central Office Programs, and internally from the Compliance and Operation Branch. In 2017 only 266 new cases were referred to the division, a 48 percent decrease from the prior year. Compared to

---

[116] Oklahoma Department of Environmental Quality, Annual Report 2017, p. 30.
[117] Oklahoma DEQ, Annual Report 2016, p. 39, http://www.deq.state.ok.us/mainlinks/reports/2016AnnualReport/AnnualReportFY2016.pdf; Oklahoma DEQ, Annual Report 2013, p. 31.
[118] Oklahoma DEQ, Annual Report 2013, p. 32; Oklahoma DEQ, Annual Report 2016, p. 39; Oklahoma DEQ, Annual Report 2015, Statistics Section; and Oklahoma DEQ, Annual Report 2014, p. 37.
[119] Oklahoma DEQ, Annual Report 2017, p. 31.
[120] Oklahoma DEQ, Annual Report 2017, p. 18.
[121] Joe Wertz, State Budget Agreement Brings Sharp Cuts to Agencies Overseeing Oklahoma's Environment, *State Impact Oklahoma*, May 26, 2016, https://stateimpact.npr.org/oklahoma/2016/05/26/state-budget-agreement-brings-sharp-funding-cuts-to-agencies-overseeing-oklahomas-environment/.
[122] Kentucky Division of Enforcement, Annual Report State Fiscal Year 2018, p. 8, http://dep-enforcement.ky.gov/Documents/Annual%20Report%20FY2018.pdf.

ED_002434_00000092-00062

past years, 266 is an extremely low number of case referrals. In the second-lowest tally of case referrals from recent years, in 2014, the state still counted 349 referrals, almost 100 more than 2017.[123]

Other state environmental agencies' 2017 data also demonstrates significant drops in enforcement under the Trump EPA's sheepish oversight. West Virginia's Division of Air Quality & Enforcement did far fewer full compliance inspections of air pollution sources in 2017, conducting only 563 inspections and 121 partial evaluations of air pollution sources.[124] In 2016 the division conducted 871 inspections and 307 partial evaluations of air pollution sources.[125] The state also issued fewer notices of violations in 2017 (37) than in 2016 (53).[126]

In addition to states' enforcement efforts, some states' more informal advisory programs also appear to be shrinking. Indiana's annual reports indicate that the state's compliance advisory panel, charged with ensuring that industries comply with Section 507 of the federal Clean Air Act,[127] is doing far less outreach now than it did in past years. The panel aspires to complete at least 250 site visits a year. In 2014 and 2015 the panel exceeded the 250 site visits goal but failed to do so in 2016 and 2017, with the agency reporting "significant turnover" on the panel's outreach staff.[128]

The gradual decline of programs like Indiana's Clean Air Act outreach, along with the decreased environmental enforcement in many states, reveals a pattern of insufficient enforcement. Increasingly deficient state programs are evidence that, when abandoned by the federal government, states will not carry out more robust enforcement even though champions of cooperative federalism claim otherwise. As the Trump administration steps back from enforcing the nation's environmental laws, instead of stepping up, some states are following suit and also stepping back.

---

[123] Kentucky Division of Enforcement, Annual Report, 2018, p. 8.
[124] West Virginia Department of Environmental Protection (DEP), Fiscal Year 2016–2017 Annual Report, p. 1, https://dep.wv.gov/pio/Documents/2016-17%20Annual%20Report.pdf.
[125] West Virginia DEP, Fiscal Year 2015–2016 Annual Report, p. 1, https://dep.wv.gov/pio/Documents/Annual%20reports/2015-16%20DEP%20Annual%20Report%20Jan%2019%202017.pdf.
[126] West Virginia DEP, Fiscal Year 2016–2017 Annual Report, p. 1; and West Virginia DEP, Fiscal Year 2015–2016 Annual Report, p. 1.
[127] Indiana Code § 13-13-7.1.
[128] Indiana Department of Environmental Management (DEM), Annual Report 2014, p. 23, https://www.in.gov/idem/files/idem_2014_annual_report.pdf; Indiana DEM, Annual Report 2015, p. 21, https://www.in.gov/idem/files/idem_2015_annual_report.pdf; Indiana DEM, Annual Report 2016, p. 19, https://www.in.gov/idem/files/idem_2016_annual_report.pdf; and Indiana DEM, Annual Report 2017, p. 19, https://www.in.gov/idem/files/idem_2017_annual_report.pdf.

ED_002434_00000092-00063

The EPA's new cooperative federalism hamstrings the agency's supervision of state programs, and the odds are that states will increasingly be left to their own devices.

When state environmental regulators are left on their own, the environmental and health protections of their citizenry can corrode, since there is no guarantee that environmental rules will be properly enforced. For instance, in Kansas, the state environmental agency failed to report or remediate pollution in a Haysville, Kansas, drinking water well. Even though the Kansas Department of Health and Environment knew about dry-cleaning chemical contamination in drinking water above the federal limit, the state did not act or warn citizens using the well.[129]

When the EPA steps back from its oversight role in the states, industry knows. That awareness serves to weaken the state's hand in negotiations with polluters around compliance. The state can no longer brandish over violators' heads the prospect of the EPA "gorilla" stepping in and potentially imposing greater pollution-control requirements or larger fines if the industry refuses to comply with state regulators. Not having that leverage further weakens the ability of states to enforce environmental regulations.

Finally, states cannot adequately carry out federal environmental programs when they are underfunded. Budget shortfalls shrink the heft and musculature of a regulatory agency, making lax enforcement well-nigh inevitable. That the Trump administration remains so adamant about cutting federal funding for state programs raises serious questions about whether it really does want state regulators to step up where it is backing off. The so-called State and Tribal Assistance Grants would be cut by 16 percent under the president's FY 2019 budget proposal.[130] On average, state environmental programs get 27 percent of their funding from the federal government, and some states receive much more.[131] For example, Oklahoma's DEQ gets 38 percent of its funds through federal grants.[132]

---

[129] Fernando Salazar, "Kansas Drank Contaminated Water for Years. The State Didn't Tell Them," *Wichita Eagle*, August 26, 2018, https://www.kansas.com/news/politics-government/article216625720.html.

[130] EPA, "FY2019 Budget in Brief."

[131] Environmental Council of the States, "Testimony of the Officers of the Environmental Council of the States before the Senate Committee on Appropriations Subcommittee on Interior, Environment, and Related Agencies Addressing the FY19 Budget for the U.S. Environmental Protection Agency," April 27, 2018, https://www.ecos.org/wp-content/uploads/2018/05/ECOS-FY19-Senate-Appropriations-Testimony.pdf.

[132] Oklahoma DEQ Annual Report 2017, p. 26.

ED_002434_00000092-00064

Funds earmarked for state environmental programs currently make up about 45 percent of EPA's budget.

In practice, what the sum total of the Trump administration's actions seem likely to accomplish is that already underfunded state environmental agencies will struggle even more to inspect and enforce environmental laws. We may well be headed toward an ever-more patchwork system of environmental regulation, where drastic differences in environmental health and safety can be found simply by walking across arbitrary state lines.

ED_002434_00000092-00065

CONCLUSION

"The decisions we make today are critical in ensuring a safe and sustainable world for everyone, both now and in the future. . . . The next few years are probably the most important in our history."

> — Debra Roberts, co-chair of IPCC Working Group II and an author of the IPCC Special Report Global Warming of 1.5°C

The dramatic declines in EPA enforcement since Trump came into office point to a dangerous direction for environmental protection in the United States—with global impacts. This is not just a blip; this administration is no longer just finding its footing. The consistent data on enforcement declines across program areas and regions bespeaks deep philosophical and practical changes at the agency, carried out by industry-aligned political appointees. They appear determined to remake environmental protection by substituting a sheep for a gorilla in the federal government's "closet," freeing industrial polluters to have their way with environments we all share. This shift has long-term implications for the health of all Americans, from infants in utero to the elderly in every state in the nation. Even if the agency reversed course tomorrow, it would take years to restore the federal government's role and impact on environmental enforcement. As one EPA staff member said, "I think the end-of-year numbers are going to be probably pretty bad and they're gonna get worse in 2019 unless there is a significant philosophical change about how we're doing things and kind of a recommitment to vigorous enforcement."[133]

The recent dramatic declines in federal enforcement bring to mind the early Reagan administration, a time when the agency suffered large budget and staffing cuts and was beset by scandal. Back then some environmentalists thought that, as damaging as this onslaught on the EPA was, it would prove more easily reversible than other bigger failings of the Reagan years that they deemed worse. Our nation also lost time, what turned out to be nearly a decade's delay in grappling with a host of large and complex global issues that still threaten us today: "global warming linked to

[133] Confidential interview with EPA employee.

ED_002434_00000092-00066

pollution, acid rain, toxic waste, air pollution and the contamination of underground water supplies."[134]

Now, in year two of the Trump administration, it is déjà vu all over again. The Reagan experience clearly showed how long-lasting even just two years of frontal assault on our nation's premier environmental regulator could prove. What is different today, for one, is that while the Reagan attack on the EPA let up after two years, the current offensive shows few signs of slowing.

Another fundamental difference today is that humanity now has a deadline from the scientific community for addressing climate change. According to the Intergovernmental Panel on Climate Change (IPCC), we have a little over a decade to substantially reduce CO_2 emissions to 45 percent of what they were in 2010. By 2050, CO_2 emissions need to effectively be kept at zero to limit average warming to 1.5°C in order to stave off the most severe effects of climate change such as ecosystem loss, sea-level rise, and even more frequent catastrophic weather events.[135] The IPCC report is a red alert to governments and people around that the global community has no more time to lose. We can't afford the roadblocks thrown up by the Trump administration against any EPA action to curb greenhouse gases, delaying progress this year, the next, and the next.

And it isn't just climate change that makes the EPA's ongoing retreat so worrisome. The Trump administration's attack on the EPA's current regulations and enforcement capacities is inviting many other far-reaching and detrimental consequences. Children will continue to be exposed to dangerous neurotoxins like mercury; fewer curbs on air pollution will exacerbate asthma and other respiratory problems and cause premature deaths; increased exposures to toxic chemicals in the air we breathe will likely provoke more cancers; and health-protecting cleanups of toxic waste sites across the country will slow, among other impacts. The costs of diminished EPA protection will be borne by all of us, even as industry pays less to curb their pollution.

Rolling back regulations and rewriting the rules to favor industry are the obvious ways that the administration is trying to remake environmental policy. Less recognized, however, is how much Trump's political appointees have been able to

---

[134] Philip Shabecoff, "Reagan and Environment: To Many, a Stalemate," *New York Times*, January 2, 1989, https://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html.
[135] Intergovernmental Panel on Climate Change, *Special Report Global Warming of 1.5°C, Summary for Policymakers*, October 6, 2018, http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

ED_002434_00000092-00067

fundamentally change the landscape of environmental regulation by signaling friendliness to industry and launching a wide range of under-the-radar shifts in agency policy and procedures. EPA leadership has thereby accomplished a profound change in the agency's on-the-ground work, as evidenced by the enforcement data.

Publicly, the EPA has claimed that the decreases in enforcement actions reflect a shift to informal enforcement strategies by the agency and stepped-up state-level regulatory efforts. But there is little evidence that either are happening. Further, the downturn in the EPA's enforcement appears to have even alarmed high-level EPA staff. Acknowledging that that drastic reductions in enforcement actions are indeed happening and look bad, agency officials have come up with analyses that go beyond any public pronouncements and are much more in line with how both EPA enforcement staff and critics of the agency have explained enforcement declines. Namely, they finger industry influence, deference to states, deregulation, political obstruction, and the chilling effect of the sum of the leadership's actions on its own staff.

They are right to be concerned. Most Americans do care about environmental protection. And many will indeed be shocked to learn that undue industry influence is allowing environmental conditions that threaten their and their children's health, like air and water pollution and lead in drinking water.[136]

Even if OECA's leadership were to make genuine changes to recharge enforcement, the situation is likely to get worse before it gets better because of all of the other changes set in motion within the agency, from staff reductions and procedural changes to the change in expectations among staff. The disruptive process of reorganizing regional offices now in the works will, according to one of our interviewees, "probably further suppress numbers of inspections and actions."[137] Tellingly, the EPA's Inspector General (IG) recently notified Susan Bodine that the IG's office will begin studying enforcement trends and differences in enforcement across regions and environmental programs.[138]

---

[136] Monica Anderson, "For Earth Day, Here's How Americans View Environmental Issues," Pew Research Center, April 20, 2017, http://www.pewresearch.org/fact-tank/2017/04/20/for-earth-day-heres-how-americans-view-environmental-issues/.

[137] Confidential interview with EPA employee. OECA internal documents also noted that the "establishment of a pilot measure for 'state assists' in FY2018 could lead to further reductions in traditional EPA enforcement." OECA, "Possible Reasons for Decline."

[138] Memo from Kathlene Butler, Director, Water Directorate, Office of Audit and Evaluation to Susan Bodine, "Analysis of EPA Enforcement Results from Fiscal Years 2006 Through 2018 Project No. OA&E-FY19-0030," November 5, 2018,

ED_002434_00000092-00068

In the near term, enforcement will probably continue to decline. That is because inspections, which are how the enforcement process begins, are also way down in FY 2018. Comprehensive inspection numbers are not available through the EPA's ECHO website (only through OECA's yet-to-be released FY 2018 annual report), but numbers for Clean Air Act stationary sources are. They show total EPA and state inspections of Clean Air Act–covered stationary sources tumbling to 30,927 in FY 2018, a 14 percent decline from the previous year. The FY2018 figure is also a whopping 35 percent less than the average number of Clean Air Act stationary source inspections carried out between FY 2006 and FY 2017 (47,380).[139]

Fewer inspections mean fewer additional enforcement actions "in the pipeline," to be undertaken over the ensuing months and years. As one staff member explains, the drop in inspections ensures that "there's definitely not going to be a lot coming out of the pipelines next year. . . . Among career staff, there's a recognition that 2018 is going to look bad and 2019 is likely to look worse."[140]

With the severe drop in enforcement in FY 2018 auguring even worse numbers in FY 2019, our interviewees suggest the leadership may try to reconfigure or spin the numbers. "Sometimes, if the metrics don't look good, then you change the metrics," one said.[141] Another described OECA's leadership as grasping after whatever else they could count to bolster the tallies. "They're kind of going through the couch cushions, trying to find loose change," even as staff continue to insist on keeping the numbers "as accurate as possible."[142]

Actions speak louder than words, and the nosedive in enforcement at the EPA over the last two years says volumes about the Trump administration's actual designs for this cornerstone of our nation's environmental regulation. So do its budgetary priorities. The dramatic cuts to federal and state funding that it has requested for FY 2019, if passed, will further hamstring both EPA and the states, delivering yet another one-two punch to environmental enforcement.

---

https://www.epa.gov/sites/production/files/2018-11/documents/_epaoig_notificationmemo_11-5-18_enforcementresults.pdf; Sean Reilly, "IG to audit long-term enforcement trends," *E&E News,* November 6, 2018, https://www.eenews.net/eenewspm/stories/1060105329/feed.

[139] ICIS-Air Data Set, downloaded from Enforcement and Compliance History Online, Data Downloads, Environmental Protection Agency, https://echo.epa.gov/tools/data-downloads. Accessed October 22, 2018.

[140] Confidential interview with EPA employee.

[141] Confidential interview with EPA employee.

[142] Confidential interview with EPA employee.

ED_002434_00000092-00069

Evidence has also accumulated of what the Trump administration's cooperative federalism actually means: weakened as well as ever-more uneven and unequal environmental protection across our nation. Already, industry-friendly states have taken the EPA's new hesitancy to oversee or supplement their environmental agencies as an opportunity to step back themselves. Reduced federal assistance and funding will likely exacerbate this trend. States with stronger environmental programs and more environmentally oriented publics will still do their best to uphold current environmental laws. However, the Trump administration is also pushing back against states that want to do more to protect their environments. In practice, their notion of letting the states take the lead seems only to apply if state agencies are being as friendly to industry as the federal EPA has become.[143] As polluters gain greater liberties, environmental inequities will worsen, and, more than ever, your zip code will determine whether you have clean water and air—or not.

The U.S. EPA is on an irresponsible and reckless path, with our country's environment and health at stake. Balanced, transparent, and democratic processes have lost sway over much of EPA's decision making, with polluting industries gaining ever-more decisive power. Greater attention to these issues by national media and hearings called by a Democratic House of Representative can help illuminate all that has gone wrong. But the only lasting antidote to this is widespread and sustained citizen engagement in elections, in local and state governments, and in the federal government—an aroused civil society across the board. With the IPCC's looming deadline in mind and with the health of our population and planet at stake, we have not a moment to lose.

---

[143] Jeremy Dillon, "Republicans Push-Back against States Seen as Too Pro-Regulation," *Roll Call*, September 24, 2018, https://www.rollcall.com/news/policy/republicans-push-back-against-states-seen-as-too-pro-regulation.

ED_002434_00000092-00070

APPENDIX

Summary of EPA Regulatory Rollbacks			
Regulation	**Regulation Summary**	**Mechanism for Rollback**	**Current Status**
Clean Air Act			
Cross-State Air Pollution Rule and Section 126 Petitions	Regulate air pollution sources that cross state lines with the goal of reducing smog from upwind sources	Extending Deadlines of and rejecting 126 petitions	Under litigation
Montreal Protocol Hydrofluorocarbons Kigali Agreement	Phase out HFCs as a substitute for CFCs due to HFCs impact on climate change	Proposed new rules Delayed ratifying treaty	Under reconsideration
"Once In Always In" Guidance for Major Sources	Transitions industries classified as major sources of Hazardous Air Pollution (HAP) to minor sources, with less oversight, if they agree to limit their emissions	Weakened pollution control technology requirements through memorandum	Under litigation
Ozone National Ambient Air Quality Standards	Sets stricter ozone standards	Delayed implementation	Under litigation
Mercury and Air Toxics Standards	Limits emissions of mercury and other toxins from power plant emissions	Withdrawing from lawsuit	Under reconsideration
Regional Haze Rule Regional Haze: State Implementation Plans	Regional haze rules are designed to create pollution control plans at the state level to protect air quality and visibility at National Parks	Rule under Review Transferring more authority to states	Under litigation Under reconsideration
Chemical Disaster Rule (Risk Management Plan / Accidental Release Prevention Requirements)	Modified chemical facility risk management rules in an attempt to prevent accidents	Delayed rule	Under litigation Under reconsideration
EPA VOC and Methane Standards for Oil and Gas Facilities	Rules targeting the emissions of methane and VOCs for fracked and re-fracked well operations	Proposed withdrawal of technical guidance Amendment to rule Proposed revision	Under litigation Under reconsideration
Power Plant Startup, Shutdown, and Malfunction Rule	Regulates pollutants during the startup, shutdown, and malfunction of power plants	Rule under review	Under litigation Under reconsideration
Clean Water Act			
Power Plant Effluent Limits	Regulates the discharge of toxic pollutants discharges into surface water	Delayed compliance	Under litigation
Resource Conservation and Recovery Act			
Coal Ash Rule	Authorized EPA to regulate coal ash disposal	Amendments to existing rules	Under litigation
Other			
Chesapeake Bay and Nonpoint Source Programs / TMDLs	Provides funding for clean up and pollution controls in the Chesapeake Bay Watershed	Defunding program	Budget allotment under consideration
Clean Power Plan / Carbon Pollution Emission Guidelines	Clean Power Plan committed to 32% decrease in emissions from power sector from 2005 levels by 2030 with flexibility given to states in how to achieve this goal	Executive Order Proposed repeal Proposed replacement rule	Under litigation Under Reconsideration
Municipal Solid Waste Landfill New Source Performance Standards and Emissions Guidelines	Requires emission reductions from municipal landfills for methane releases	Reconsidering aspects of rules	Under litigation
Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Power Plants	Regulates carbon pollution from new or refurbished power plants	Executive Order Reviewing the rule	Under litigation (suspended) Under reconsideration

ED_002434_00000092-00071

Figure A: Mechanisms Used to Roll Back Environmental Regulations. This figure summarizes the major rules that have been modified since 2017 and the mechanism (litigation, rule review, rule reconsideration, and budget allotment) that have been used by the Pruitt and Wheeler administrations to roll back environmental regulations. Source: Environmental Law at Harvard, "Regulatory Rollback Tracker" http://environment.law.harvard.edu/policy-initiative/regulatory-rollback-tracker/.

EPA's Compliance and Enforcement Budgets (Millions of Dollars - Rounded)			
Compliance Monitoring			
FY	**Proposed Presidential**	**Congressionally Enacted or Continuing Resolution**	**Actual**
2019 (Trump)	86		
2018 (Trump)	86	101	
2017 (Obama)	111	101	98
2016 (Obama)	122	102	104
2015 (Obama)	119	102	103
Civil Enforcement			
FY	**Proposed Presidential**	**Congressionally Enacted or Continuing Resolution**	**Actual**
2019 (Trump)	141		
2018 (Trump)	141	171	
2017 (Obama)	183	171	172
2016 (Obama)	186	171	174
2015 (Obama)	181	171	170
Criminal Enforcement			
FY	**Proposed Presidential**	**Congressionally Enacted or Continuing Resolution**	**Actual**
2019 (Trump)	41		
2018 (Trump)	40	45	
2017 (Obama)	53	46	48
2016 (Obama)	52	46	48
2015 (Obama)	81	47	48

Figure B: Proposed, enacted, and actual budgets for EPA's Compliance Monitoring, Civil Enforcement and Criminal Enforcement programs. While the enacted (or continuing resolution) budgets for these programs did not decline in FY 2018 compared to the previous

ED_002434_00000092-00072

years, the White House pushed for deep cuts in that fiscal year and continues to push for deep cuts in FY 2019. Source: EPA's Budget in Brief and Justification of Appropriation Estimates for the Committee on Appropriations, for fiscal years 2015 to 2019, accessed October 15, 2018, https://www.epa.gov/planandbudget/archive.

EPA's Compliance and Enforcement Staff (Full Time Equivalents)			
Compliance Monitoring			
FY	**Proposed Presidential**	**Congressionally Enacted or Continuing Resolution**	**Actual**
2019 (Trump)	429		
2018 (Trump)	432	539	
2017 (Obama)	540	540	506
2016 (Obama)	540	540	510
2015 (Obama)	535	537	509
Civil Enforcement			
FY	**Proposed Presidential**	**Congressionally Enacted or Continuing Resolution**	**Actual**
2019 (Trump)	857		
2018 (Trump)	858	1080	
2017 (Obama)	1081	1080	1061
2016 (Obama)	1082	1080	1064
2015 (Obama)	1085	1083	1046
Criminal Enforcement			
FY	**Proposed Presidential**	**Congressionally Enacted or Continuing Resolution**	**Actual**
2019 (Trump)	210		
2018 (Trump)	194	269	
2017 (Obama)	268	269	238
2016 (Obama)	267	269	248
2015 (Obama)	269	269	252

Figure C: Proposed, enacted, and actual staffing levels for EPA's Compliance Monitoring, Civil Enforcement and Criminal Enforcement programs. While the enacted (or continuing resolution) staffing levels for these programs did not decline in FY 2018 compared to the previous years, the White House pushed for deep cuts to staffing in that fiscal year and continues to push for deep cuts in FY 2019. Source: EPA's Budget in Brief and Justification of

ED_002434_00000092-00073

Appropriation Estimates for the Committee on Appropriations, for fiscal years 2015 to 2019, accessed October 15, 2018, https://www.epa.gov/planandbudget/archive.

ED_002434_00000092-00074