

Trump's Proposed EPA Budget Cuts Underscore the Role of Next Generation Enforcement

Proposal for dramatic reductions in EPA staff and budget could lead to uneven environmental enforcement as states, tribes and environmental groups fill the vacuum.

Introduction

On March 16, Donald Trump's administration proposed a 2018 Budget Blueprint that slashes funding at a number of federal agencies, including the Department of State, Department of Housing and Urban Development and Department of Education. But no funding cuts are quite as dramatic as the administration's proposed 31% budget reduction for the U.S. Environmental Protection Agency (EPA). Trump's Budget Blueprint is more of an aspirational statement regarding this administration's political priorities and targets than an actual federal budget, and the final budget will be subject to lengthy and intense negotiations in Congress. But with Republicans in control of the White House, House of Representatives, and Senate, EPA's budget and staffing still appear headed for major reductions. While EPA has already undergone significant budget cuts and staff reductions over the past decade, additional cuts will likely accelerate EPA's reliance on Next Generation Enforcement tools, including self-reporting of violations, electronic monitoring and data-sharing, and the delegation of oversight and enforcement efforts to state, tribal and citizens groups.

Implications

As funding and staffing for EPA is further reduced in the next few years, EPA will increasingly rely on states, tribes and the public to bring environmental enforcement cases under state and local laws, and the citizen suit provisions in the major federal environmental statutes.¹ In the absence of EPA involvement in more enforcement cases, companies with industrial or manufacturing facilities throughout the country face the daunting prospect of addressing common environmental problems with a number of different parties with vastly different environmental and political agendas.

While most of the regulated community is unlikely to view the proposed budget cuts at EPA with alarm, the long-term decline of funding and staffing at EPA might have unintended consequences that increase regulatory uncertainty, heighten the risk of litigation, and result in the adoption of a potentially risky patchwork of compliance practices at different facilities in different parts of the country. Despite the overall reduction in the total number of EPA enforcement actions that seems likely to occur in the next few years, the career staff at EPA and the U.S. Department of Justice (DOJ) are also likely to continue to pursue major environmental enforcement actions — as they have in recent years in cases including the Deepwater Horizon incident — that result in significant exposure for enforcement targets. In this new era of environmental enforcement, the regulated community will increasingly need experienced national environmental counsel familiar with EPA's new enforcement tools, capable of developing strategies to

avoid or mitigate environmental liabilities, and with the experience and resources to defend and manage environmental enforcement litigation initiated by EPA, state attorney generals, tribes and well-funded citizens groups across the country.

Budget and Staff Reductions

The Trump administration's 2018 Budget Blueprint, which has not been approved by Congress, proposes a reduction in EPA funding by 31% from 2017 levels and would eliminate 3,200 positions at the Agency.² Among the programs and offices the Trump administration has specifically targeted for funding reductions or elimination are the Hazardous Substance Superfund Account, climate change initiatives, the Office of Research and Development (ORD), Categorical Grants, and restoration efforts in the Great Lakes and Chesapeake Bay.³ The Office of Enforcement and Compliance Assurance (OECA) would see its budget under the Trump plan reduced nearly 25% to US\$419 million.⁴ According to the 2018 Budget Blueprint, this enforcement funding reduction would "avoid[] duplication by concentrating EPA's enforcement of environmental protections violations on programs that are not delegated to States, while providing oversight to maintain consistency and assistance across State, local and tribal programs."⁵ As such, the 2018 Budget Blueprint also proposes a reduction of the scope of matters subject to investigation or enforcement by OECA.

The Trump administration's proposed budget reductions would accelerate a significant decline in EPA's enforcement efforts that began under the Obama administration. EPA's budget peaked in fiscal year 2010 at approximately US\$10.3 billion, but has steadily declined since, dropping to US\$7.9 billion in fiscal year 2013 before rebounding slightly to US\$8.1 billion in fiscal year 2016.⁶ Likewise, staffing at EPA has steadily decreased from approximately 17,300 employees in fiscal year 2010 to approximately 15,400 employees in fiscal year 2016.⁷

These significant reductions in budget and staffing have had a telling impact on EPA's enforcement efforts. Over the past five years, the number of inspections EPA has conducted at facilities has dropped precipitously from nearly 20,000 per year in fiscal year 2012 to approximately 13,500 in fiscal year 2016.⁸ The total number of civil enforcement cases filed by the DOJ on behalf of EPA has declined from more than 3,000 in fiscal year 2012 to approximately 2,400 in fiscal year 2016.⁹ The number of environmental criminal investigations EPA opened has also steadily declined from more than 300 per year in fiscal year 2012 to less than 200 per year in fiscal year 2016.¹⁰ But, notably, EPA calculates that the value of its enforcement efforts in fiscal year 2016 was US\$13.72 billion, a dramatic increase from fiscal year 2015, and an increase of more than 30% from fiscal year 2012.¹¹

Next Generation Compliance

Following significant budget cuts and a drop in judicial and administrative enforcement cases during the Obama administration,¹² EPA proposed Next Generation Compliance in October 2014 as a means of using technology, self-reporting, electronic monitoring and increased transparency to fill in the enforcement gap. EPA's Next Generation Compliance includes five interconnected elements including: (1) more effective regulations and permits; (2) advanced monitoring tools; (3) electronic reporting; (4) expanded transparency; and (5) innovative enforcement strategies. EPA's ultimate goal with Next Generation Compliance was to increase Agency flexibility and responsiveness and ultimately do more with less.¹³

Next Generation Compliance will assist the EPA, states, and tribes to better address large regulated universes with approaches that go beyond traditional single facility inspections and enforcement. All of these approaches combined help us to better protect public health and the environment, assure a level playing field for businesses that play by the rules, engage

communities, and reduce regulatory burdens. Budget uncertainties and constrained resources only reinforce the imperative to move forward with Next Generation Compliance.¹⁴

In the enforcement context, EPA specifically planned to use improved technology and monitoring to identify serious violations faster, improve self-reporting of violations and share more data with the public.¹⁵ By making self-reporting and environmental data available to the public through its Next Generation Compliance initiative, EPA explicitly sought to improve the ability of “the public, impacted community members, neighboring facilities, and other agencies to play a role in assessing compliance.”¹⁶ EPA signaled that states, tribes and impacted communities should take a more active role in environmental enforcement.

Conclusion

The decline of federal environmental enforcement efforts in favor of state, tribal and local efforts raises the specter of uneven regulation and compliance in the United States. States and communities with active and well-funded environmental agencies and groups may zealously (or overzealously) fill the vacuum created by the absence of federal enforcement. Other states and communities that lack the funding or political organization or will to enforce environmental laws may face uneven and inadequate environmental enforcement.¹⁷

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Endnotes

¹ See, e.g., the citizen suit provisions of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; the Clean Air Act, 42 U.S.C. § 7604; and the Clean Water Act, 33 U.S.C. § 1365.

² America First, A Budget Blueprint to Make America Great Again, Office of Management and Budget, at 41 (March 16, 2017).

³ *Id.* at 41-42.

⁴ *Id.*

⁵ *Id.* at 42.

⁶ EPA's Budget and Spending, available at <https://www.epa.gov/planandbudget/budget> (last accessed on March 24, 2017).

⁷ *Id.*

⁸ FY 2016 Enforcement and Compliance Annual Results, Federal Inspections and Evaluations, p. 11, available at <https://www.epa.gov/sites/production/files/2016-12/documents/fy16-enforcement-annual-results-data-graphs.pdf> (last accessed March 24, 2017).

⁹ *Id.* at 12.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 3.

¹² EPA Next Generation Compliance: Strategic Plan 2014-2017 (October 2014).

¹³ *Id.* at 7 (“Next Generation Compliance provides opportunities to be more strategic, so our [EPA’s] enforcement dollar goes further and more people are better protected from harmful pollution.”).

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 7. (“If we have information on compliance through electronic reporting, we are more able to experiment with approaches that will improve compliance at facilities beyond just those that receive enforcement attention. Transparency strategies, such as innovative ways to inform the public of serious violations, can also improve compliance when thoughtfully applied to the right problems.”).

¹⁶ *Id.* at 5.

¹⁷ David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563, 628 (2016) (“EPA will need to be alert to a range of issues that include over-deterrence, inconsistent treatment of similarly-situated regulated parties, the use of theories and evidence in ways that might have unintended consequences for EPA’s policy objectives, and citizens’ exercise of their ‘private attorney general’ authority to pursue their own private rather than public interests.”).