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EPA Budget Cuts: Welcome Change or Cause for Concern?

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Special to the Legal

The Trump administration's proposed budget cut of approximately 25 percent of the Environmental Protection Agency's enforcement budget (\$129 million) is consistent with candidate Trump's platform targeting the EPA for failing to appropriately favor crucial business interests against what he perceives as environmentalists hell-bent on the dismantlement of the U.S. industrial base. Whether we are facing the cataclysmic disintegration of long-standing federal environmental programs, or logical budget cuts related to streamlining and modernizing an over-bulked EPA largely depends upon the vitriol of the media source reporting the news, but it is undeniable that cutting enforcement is a direct attack on the foundation of all environmental laws; the perception that a violator will be held accountable in some way.



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Enforcement of environmental law is a prime example of the complex dynamics among federal, state and citizen authority. Most environmental statutes are designed to be delegated to the states for implementation, provided the states enact legislation at least as stringent as the federal provisions. The EPA has determined that much of Pennsylvania's Air Pollution Control Act meets that standard, for example, and thus the Department of Environmental Protection (as well as

“It is unlikely that the reduction to the EPA's enforcement budget will collapse the enforcement process at all levels.”

Philadelphia's Air Management Services) have been delegated authority to issue key permits, and to take pertinent enforcement actions to deter noncompliance. Environmental statutes also generally have broad citizen suit provisions allowing groups or individuals to act as private attorneys general in prosecuting violations against purported violators. The citizens suits provision in environmental laws represent a congressional acknowledgment that government enforcement is subject to failure due to scarce resources, political pressure and other factors, which prevents full and adequate

enforcement of the laws. These provisions create a sort of dysfunction in the enforcement scheme, as they allow the federal government to overfile when it determines that a state has failed to take, or to adequately pursue, enforcement, while citizen environmental groups distrust the regulated industry as well as state and federal governments' vulnerability to political and economic pressure. Thus, there is a three-legged stool of environmental enforcement.

The EPA conducts about 22,000 inspections a year, leading to over 3,000 civil actions; states conduct about 146,000 inspections, and file around 9,000 civil actions. (Salzman and Thompson, "Environmental Law and Policy," Fourth Edition, 2014). States therefore have always played a highly dynamic role in the enforcement arena, even if that role has not traditionally been as robust as that played by the EPA. Yet there is a significant range in the capability of specific states to conduct effective enforcement activities. While many states have sophisticated and well-staffed environmental agencies, others less so. In theory at least the federal enforcement oversight role may have had the effect of smoothing-out such discrepancies, placing less emphasis on certain states and state programs, while more closely watching other states that may be less diligent; this oversight could conceivably be in keeping with the proposed budget restrictions.

Arguably the proposed budget cuts could cause EPA to self-reflect upon where best to use scarcer resources to bolster actions in states viewed as less diligent. Nevertheless, the interplay that currently exists among the federal and state governments, as well as citizens, will be altered, and it prompts the question of what would otherwise have become of the residents of Flint, Michigan, for example, if the federal government had not stepped in, since state officials were those who allowed the residents to be exposed to the contaminated water?

Yet eliminating 25 percent of the EPA's enforcement budget could simply mean a reallocation of the enforcement mechanism to the state level, as Administrator Scott Pruitt stated to Congress as the underlying reason for the cuts: states are closer to the problem at hand, and can therefore evaluate the need and scope of enforcement within a more informed context. What the statement overlooks is that EPA has trained and experienced staff charged with making decisions on a consistent basis, but with discretion. Removing those staff from the oversight process likewise removes discretion, experience and knowledge from the process. And, aside from their varying enforcement capabilities, one could also say that states are more subject to the political influence of powerful companies and opinion leaders within their borders, and could arguably be more easily

neutralized. On the other hand, a high-profile, environmental enforcement suit may prove very attractive to an aggressive state attorney general ready for a larger political stage. The administrator's statement aside, the future role of states in enforcing environmental laws does not lend itself to a straightforward prediction.

The temptation may also be to conclude that a cut in federal enforcement will fuel more citizen suits in addition to state actions, but the fact is that citizen suits rely on data reported by EPA and the states, not data generated by the private environmental groups. Most enforcement actions arise from information gathered through investigation and inspection, activities that environmental organizations and citizens cannot routinely undertake without special authorization. For example, one recent federal matter involved a situation where EPA and PADEP disagreed on the results of an inspection of an industrial facility by federal and state hazardous waste personnel. EPA overfiled the state with respect to whether a specific sump area constituted a "tank" for statutory purposes, when the state declined to enforce the issue. A citizens group is disadvantaged in such situations as it could never gain access to an industrial facility to make a similar inspection and would have had to rely on a Freedom of Information Act request to review the inspection report, and attempt to craft an enforcement case from that

document. Even so, this particular issue would likely not have been highlighted by a simple file review and only a visual site inspection would have revealed the violation. This is not an isolated occurrence; the laws contemplate this type of disagreement by allowing enforcement by more than one party.

Nevertheless, even despite the lack of data, the EPA budget cuts could lead to an overall increase in citizen suits. More organizations and ad hoc groups might be expected to rise up in the face of less EPA enforcement, and, as we've seen in recent years, there is no shortage of funding targeted to special interests. Defunding EPA could very well give rise to a new level of citizen engagement backed by politically or ideologically motivated organizations targeting specific industries, issues and even specific pollutants. Citizen suits are often tinged with a belief that the regulated entity/defendant is a bad actor and worthy of punishment, even if the regulatory infraction is a technical or de minimis one. This trend would not necessarily reflect the EPA's priorities or that of society in general, nor would it benefit the regulated community or possibly even the environment. In essence, these suits may be more targeted toward obstructing a project or development at odds with the organization's agenda than reflecting overall trends in environmental priorities reflected on the EPA's website (<https://www.epa.gov/>

enforcement/national-enforcement-initiatives). Industry may rightfully perceive that an increase in citizen suits would be a drag on their bottom line and a costly distraction without necessarily equating to an increase in the protection of the environment.

The EPA's immediate former enforcement chief, Cynthia Giles, identified the conundrum that the EPA will face. It is an observation derived from many years of experience within a bureaucracy, and in dealing with the allocation of budgeted resources. Giles point is that the cuts to enforcement will have some long-term impacts on the number of personnel involved in such activities, but the immediate impact could be paralysis. Her point is not that the EPA will be demoralized, but rather that the practical impact of the budget cuts fall on the softer costs of enforcement from so-called "extramural" accounts. The EPA's Office of Enforcement and Compliance Assurance allocates about 5 percent of its overall budget to hiring experts, travel, equipment and other litigation-related expenses. This would be the lowest-hanging fruit for immediate savings: terminating personnel would take significantly longer. As Giles stated, "EPA couldn't lay people off fast enough to avoid zeroing out the extramural budget. So there wouldn't be enough money for the remaining people to do anything." Without a vigorous enforcement program within the EPA, it is unlikely that counsel within

the EPA will have sufficient information to satisfy the rigorous internal protocols to refer a matter to the Department of Justice for civil or criminal enforcement. The cuts to the EPA's budget would therefore be reflected in the reduced number of civil actions filed by the DOJ on the EPA's behalf. If indeed the EPA becomes hamstrung in its ability to fund investigations, Giles' observations may prove prescient and industry may consider whether it is in a better place facing enforcement from potentially over-zealous state attorneys general looking to establish strong green credentials at the Trump administration's expense, and environmental organizations seeking to exploit a citizens suit for fundraising, doctrinal or publicity-generating purposes. It is unlikely that the reduction to the EPA's enforcement budget will collapse the enforcement process at all levels, and therefore speculative that regulated parties will enjoy any form of hiatus as a result of these budgetary moves.

—*Summer law interns Antwaine Golson and Jaime Zeng Zhu contributed to this article.* •