



President Trump gives pen to Dow Chemical CEO after signing executive order to eliminate regulations.

# Where Has All the EPA Enforcement Gone?

Lax and no enforcement actions pervasive

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**W**ithout enforcement of the regulations governing standards and use of toxic chemicals, the laws become unprotective and meaningless. Although the Environmental Protection Agency's (EPA) enforcement activities have varied from administration to administration and have been influenced by the "revolving door" phenomenon—with high-level employees rotating from positions in EPA to those in industry and back again—an unprecedented enforcement slowdown has been documented in the Trump administration.

When EPA was created in 1970, it was handed a wide range of responsibilities to protect human health and the environment under a range of congressional mandates. Its programs include the responsibility to implement and enforce requirements in the *Clean Air Act*, *Clean Water Act*, *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*, *Resource Conservation and Recovery Act*, *Toxic Substances Control Act*, and others, including partial responsibility for the *Endangered Species Act*. These laws provide EPA with a number of tools—ranging from public disclosure, registration or licensing, to fines and injunctive relief in civil judicial enforcement cases. Historically, the EPA's authority provides a set of sizable "enforcement sticks" with which to ensure compliance with environmental statutes. *The New York Times* recently investigated what many in the science, environment, public health, and advocacy worlds perceive as a sea change, with the advent of the Trump administration and EPA Administrator Scott Pruitt's approach to the agency's mission.

## HOW THE TRUMP ADMINISTRATION COMPARES

*The New York Times* analysis of the Trump administration's record on enforcement of environmental regulations, released in December, 2017, reviews a 266-day period during each of the Trump, Obama, and G.W. Bush administrations, in order to compare the records. The review looks at both judicial and administrative cases initiated by EPA in an effort to remedy violations of environmental regulations. Data from this analysis of enforcement substantiate a more permissive approach in the current administration toward polluters, as compared with that of the prior two administrations, says the *Times*, and enforcement actions have been fewer and smaller than those during those two previous administrations.

Injunctive relief actions have declined under the Trump administration, which has demanded approximately \$1.2 billion in such remedies—12% of what was sought under the Obama administration, and 48% of that under President Bush. EPA has stated that it remains committed to ensuring that companies obey environmental laws and regulations, adding that it focuses on "EPA and states work[ing] together to find violators and bring them back into compliance and to punish intentional polluters." *The Times* reports that Mr. Pruitt has said that the Trump administration's high-profile regulatory rollback "'does not mean a free pass for violators of environmental laws.' But as the Trump administration moves from one attention-grabbing headline to the next, it has taken a significant but less-noticed turn in the enforcement of federal pollution laws."

## THE TOP REGULATOR'S CLOSE RELATIONSHIP WITH THE REGULATED

Scott Pruitt's early 2017 confirmation as EPA Administrator set off alarm bells in the advocacy community. Prior to becoming Administrator, he was the Attorney General of Oklahoma and was infamous for suing EPA on behalf of industry interests under (thinly) veiled claims of the state's interests. As the Environmental Integrity Project notes, "The record shows that Pruitt has been a virtual lobbyist for the state's oil and gas companies, the agricultural industry, and other business groups. He also has a history of fighting federal action on environmental issues, cutting back on state enforcement, denying the reality of climate change, and trying to block clean water regulations. [He] built a national reputation, including as Chairman of the Republican Attorneys General Association, for suing EPA a dozen times in a politically charged campaign to try to scale back the power of the federal agency."

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New York Magazine's Daily Intelligencer reviewed Mr. Pruitt's schedule during his first four months in office and discovered through a records request by the nonprofit American Oversight that Mr. Pruitt spends most of his time meeting with industry lobbyists and executives, and only rarely meets with environmental, public health, or consumer groups. From April through early September of 2017 he had met with science or environmental groups five times, CNN reported.

When critics have spoken out about EPA's seeming uber-friendliness to business interests, the agency response has been that EPA had become, under prior administrations, "the poster child for regulatory overreach, and that Mr. Pruitt is now trying to "even the playing field" by meeting with those entities (read "industry") that had been "ignored" by the Obama administration. In its October 2017 article, "Scott Pruitt's Environmental Protection Agency Doesn't Give a Single Damn About the Environment," GQ magazine notes that, "The EPA is, at its core, an organization designed to check a free market that, absent regulation, would have no incentive to consider the environmental implications of its business decisions."

The *Times* article notes that "confidential internal EPA documents show that the enforcement slowdown coincides with

major policy changes ordered by Mr. Pruitt's team after pleas from oil and gas industry executives. . . . After this [*Times*] article was posted, EPA issued a statement criticizing the report, and saying that 'Administrator Scott Pruitt is committed to enforcement,' and that 'there is no reduction in EPA's commitment to ensure compliance with our nation's environmental laws.' Yet, according to confidential EPA documents, the agency plans to "stand down" on some pollution cases, and there is a national "handoff" of many enforcement duties to agencies in the states. Administrator Pruitt has called this "cooperative federalism;" critics call it an industry-friendly gesture to look the other way on polluters.

More than a dozen current and former EPA officials told the *Times* that the slowdown in enforcement is real on the ground and is coming from the top. Agency employees in the Chicago office—typically a very busy regional office because it oversees industry in Rust Belt states—told the paper that it has become hard even to start a new investigation. The *Times* reports that on May 31 of 2017 EPA employees nationally received an email memo from Susan Shinkman, the director of civil enforcement at EPA and one of Mr. Pruitt's top deputies. It directed agency investigators to get permission "before asking companies to track their emissions with instruments that determine the type and amount of pollutants being released at their plants."

The memo also told investigators that they need special authorization for such testing if the state objected to it, or if they did not already have evidence of a high likelihood of violation of pollution laws. "The scope was far-reaching, applying to possible violations of the *Clean Air Act*, the *Clean*

## Enforcement Options

EPA's enforcement options are judicial or administrative. Judicial cases involve the Department of Justice (DOJ) pursuing legal action against a polluter on behalf of EPA, and can result in significant fines and stop use orders—effecting changes to ensure no further violations will occur. Administrative cases do not involve DOJ but can be heard by an administrative law judge, resulting in fines and injunctive relief. One of EPA's most effective options is enforcement actions to force companies to reconfigure or retrofit how they operate in order to curb pollution and meet existing regulatory standards. Most enforcement actions initiated by EPA are for the assessment of civil penalties. Matters may be resolved through alternative dispute resolution, with the administrative law judge serving as a mediator. In fact, the threat of litigation is a powerful tool to elicit compliance with the law.

Water Act and federal laws regulating hazardous waste plants,” notes the *Times*. It functionally disarmed investigators of, arguably, their most important tool for snagging polluters. As the *Times* article reports, “Jeff Trevino, a lawyer in the Chicago office, who has worked for the agency for 27 years, said the new hurdles imposed by Mr. Pruitt had created ‘a Catch-22’ because, with new policies effectively discouraging requests for information, investigators will have a harder time getting the data needed to detect and confirm violations.” It is worth noting that investigators’ ability to order such tests has been a particular irritant for the fossil fuel industry.

In the past couple of years, the Denver and Chicago offices had issued a series of requests for information on petrochemical industry sites in the Midwest because of significant concerns about airborne particulate pollution, and adverse impacts of escaping air pollutants (such as benzene and methane) on health and climate. Late in the tenure of the Obama administration, companies ratcheted up their complaints about the testing, and Koch Carbon (a Koch Industries subsidiary) challenged EPA’s authority to require such testing. Conservative U.S. Senator James Inhofe (R-OK), chair of the Senate Environment and Public Works Committee, and other Republicans got behind the challenge to EPA, holding public hearings and calling out the testing as a sideways maneuver to cut greenhouse gas emissions.

Once Mr. Pruitt was made EPA Administrator, the complaints fell on more-receptive ears: “Ms. Shinkman, in an interview, said she was instructed to write the new policy memo after Mr. Pruitt received letters of complaint from oil industry executives in North Dakota and Colorado.” The North Dakota Petroleum Council, for example, sent a letter to Administrator Pruitt on March 31, calling the testing costly, burdensome, and a

potentially existential threat to petroleum companies’ ability to do business. The Administrator wrote back, saying that EPA would “develop best practices for judicious use of the requests,” and would “hand off” the bulk of enforcement functions regarding air pollution regulations to the state.

This response in North Dakota was seen by critics as part of an effort by the EPA to give states more say in how to treat polluters—a bellwether of the “new” EPA’s intent to limit—or abandon—some of its enforcement functions. This deference to “state authority” can be interpreted as a reduction in enforcement, given the antipathy some states, such as North Dakota, tend to have for pollution regulations, coupled with the Trump administration’s reduction in federal grants that help fund state and local enforcement of regulations.

### EPA EMPLOYEES ARE DEMORALIZED

The enforcement “slowdown” has been exacerbated by both an exodus of more than 700 EPA employees since the 2016 Presidential election—many of them through “buyouts” designed to reduce the agency’s workforce—and ongoing high-level vacancies, which are intentionally being left unfilled. A case in point: the EPA top enforcement officer, Assistant Administrator for the Office of Enforcement and Compliance Assurance Susan Bodine, was confirmed on Dec. 7—10.5 months into the current administration’s tenure.

This “new paradigm” at EPA has career employees, and especially those in regional offices who have deep knowledge of local and regional circumstances and issues, reportedly feeling demoralized and stymied. A former regional director of air and radiation in the Chicago regional EPA office, George Czerniak, said to the *Times*, “People at the agency are just being cautious, almost to the point of paralysis. They do not



want to do anything for fear of being told they have done something wrong—something the new administrator won't like.”

“‘Certain people who are polluting are doing it with impunity right now and I think it is horrible,’ said Nicole Cantello, an EPA lawyer in the Chicago office, who has worked at the agency for 26 years.” [Note: EPA employees quoted in the *Times* article spoke as union members, and not as employees; EPA did not authorize employees to speak.] A Bush administration lawyer who was assistant administrator for EPA's enforcement office, Granta Nakayama, said, “‘If you're not filing cases, the cop's not on the beat. . . . Or has the cop been taken off the beat?’” Cynthia Giles, former assistant administrator for the enforcement office during the Obama administration, said, “‘The Pruitt EPA is cratering on the enforcement work that matters most: holding the biggest polluters accountable.’”

The *Times* also reports, “Paul Calamita, who represents cities accused of violating the *Clean Water Act* when they release sewage and contaminated storm water into rivers and lakes, recommends that clients team up with state governments to push back against the EPA. . . . Under President Trump, Mr. Calamita said, the EPA and the Department of Justice have been willing to compromise, withdrawing a six-figure penalty in one instance after refusing to do so in two previous rounds of negotiations during the Obama administration. . . . ‘States with new Republican governors are following the Trump approach—providing compliance assistance at the outset to avoid enforcement where the discharger is cooperative,’ he said in a presentation to utility executives from around the United States. ‘A state that pushes back on EPA is likely to be successful.’”

### **EPA BEFRIENDS PESTICIDE MANUFACTURERS**

The rollback and slowdown of regulatory activity at EPA affects all regulated sectors, including pesticide use. Mr. Pruitt met privately with Dow Chemical's CEO, Andrew Liveris, several weeks before reversing EPA's tentative decision to ban chlorpyrifos. A copy of Mr. Pruitt's schedule reveals he met with Mr. Liveris on March 9 at a Houston hotel and “twenty days later Pruitt announced his decision to deny a petition to ban Dow's chlorpyrifos pesticide from being sprayed on food.” Of note is Dow Chemical's contribution of \$1 million dollars to President Trump's inauguration celebration.

EPA's own chlorpyrifos risk assessment, which incorporates recommendations from a 2016 Scientific Advisory Panel (SAP), finds that children exposed to high levels of chlorpyrifos have brain damage, attention problems, attention-deficit/hyperactivity disorder problems, and pervasive developmental disorders. The SAP agreed with EPA that there is an association between chlorpyrifos prenatal exposure and neurodevelopmental outcomes in children. After the 2016 review, EPA concluded that there is “sufficient evidence” that there are

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neurodevelopmental effects even at levels below the agency's level of concern, and that current approaches for evaluating chlorpyrifos' neurological impact is “not sufficiently health protective.”

In November, the administration filed a request with a federal judge, seeking a two-year delay of a looming deadline related to a determination of whether a family of commonly used pesticides is harmful to endangered species. Under a 2014 legal agreement, the National Marine Fisheries Service was required to issue findings on the pesticides—chlorpyrifos, diazinon, and malathion—by the end of 2017. Beyond Pesticides and other environmental and health advocacy groups have battled for years to get the federal government to evaluate more comprehensively the risks to humans and endangered species of organophosphate pesticides. Federal scientists had compiled a record of 10,000-plus pages demonstrating that the three organophosphates pose risks to nearly every endangered species studied. Prior to the 2016 election, regulators had expected to issue new limits on the use of the pesticides. “It's appallingly clear that the pesticide industry is now essentially running Trump's EPA,” said Lori Ann Burd, environmental health director at the Center for Biological Diversity. “Rather than following the science and the law, the agency is turning its back on endangered species across the country,” Ms. Bard said.

### **CONCLUSION**

The perennial Goliath faced by entities working to protect public health and the environment—corporate influence on federal and state decision makers—appears to have been strengthened with less pressure coming from compliance and enforcement actions. The likelihood of getting caught and being fined for a violation has historically contributed to a general industry resolve to comply with regulations. The weakened workforce engaged in enforcement means that the threat to public health and the environment grows.

*Debra Simes and Terry Shistar, PhD contributed to this article.*