



MEMORANDUM

February 22, 2019

To: Subcommittee on Oversight and Investigations Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “EPA Enforcement: Taking the Environmental Cop off the Beat”

On **Tuesday, February 26, 2019, at 10:30 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Oversight and Investigations will hold a hearing entitled, “EPA Enforcement: Taking the Environmental Cop off the Beat.” The hearing will examine the effectiveness and consistency of the U.S. Environmental Protection Agency (EPA) in implementing and enforcing federal environmental regulations and laws, as well as the resulting impacts of the Agency’s efforts and actions on human health and the environment.

I. EPA ENFORCEMENT OVERVIEW

EPA is responsible for ensuring that regulated entities comply with our nation’s environmental laws, and for enforcing those laws when they are broken.¹ EPA’s Office of Enforcement and Compliance Assurance (OECA) conducts this work in partnership with EPA’s program offices and ten regional offices, as well as state and tribal governments and other federal agencies, such as the U.S. Department of Justice (DOJ).

EPA conducts enforcement using a variety of mechanisms. EPA may assess compliance by conducting inspections of individual facilities.² These inspections can include sampling, emissions testing, and other measures to assess environmental conditions at a facility.³ Where a significant violation is found, EPA will work with the entity to address the violation. EPA may communicate the finding of a violation using either informal notification or formal administrative action, such as a Notice of Violation or an Administrative Order.⁴ Enforcement

¹ Environmental Protection Agency, About the Office of Enforcement and Compliance Assurance (OECA) (<https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca>).

² Congressional Research Service, *Federal Pollution Control Laws: How Are They Enforced?* (Oct. 7, 2014) (RL343384).

³ *Id.*

⁴ *Id.*

may result in revocation of permits, assessment of financial penalties, or requiring the regulated entity to take specific action to comply with the environmental standards.⁵

EPA can work with DOJ to file civil actions in federal district court against persons or entities who allegedly have not complied with statutory or regulatory requirements, or in some cases, with the terms of an Administrative Order.⁶ Authorities for redressing these violations and to seek penalties and assessments in these cases are defined by law.⁷ Penalties often take the form of judicially mandated actions and equipment to control pollution (also known as injunctive relief) or mutually-agreed upon supplemental environmental projects. These cases often take several years to complete, and are usually resolved through a negotiated settlement, such as a consent decree.⁸ EPA may also initiate criminal enforcement actions against individuals or entities who may have knowingly or negligently violated federal pollution control laws. Both civil and criminal judicial cases are brought in federal court by DOJ on behalf of EPA.⁹

Many federal environmental laws authorize a substantial enforcement role for states, provided the states have the capacity to administer and enforce these laws while meeting national standards.¹⁰ Even where states have received authorization to administer a program, EPA maintains independent enforcement authority and can play a critical role in ensuring states implement consistent programs that fulfill federal requirements.¹¹

II. EPA ENFORCEMENT INDICATORS

Although there is no single indicator for overall enforcement levels, according to EPA data, enforcement and compliance results have recently declined across a broad variety of key measures.¹² EPA cases resulted in \$3.95 billion in injunctive relief in fiscal year 2018, nearly two-thirds of what it collected in 2009, the next lowest year since 2008 adjusted for inflation.¹³

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. Environmental Protection Agency, Office of Inspector General, *EPA Must Improve Oversight of State Enforcement* (Dec. 9, 2011) (Report No. 12-P-0113).

¹² Environmental Protection Agency, Fiscal Year 2018 EPA Enforcement and Compliance Annual Results (<https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>).

¹³ *Id.*

Administrative and civil judicial penalties in fiscal year 2018 declined to \$69.47 million,¹⁴ which marks the lowest level since OECA was established in 1994.¹⁵

Other key indicators suggest a potential decline in future enforcement efforts. For instance, EPA data indicates that the Agency conducted 10,612 inspections in 2018, which is the lowest number in the last decade and less than half of the inspections conducted in the peak year of 2010.¹⁶ EPA also initiated roughly 1,800 civil enforcement cases in fiscal year 2018, which marks the lowest level since 2008.¹⁷

III. NEW ENFORCEMENT POLICY DIRECTIVES ADD REVIEW

In 2017 and 2018, EPA provided guidance and instituted procedures requiring political appointees to review enforcement activities. For example, on January 22, 2018, EPA issued an interim guidance memorandum that requires review by the OECA Assistant Administrator in certain instances where EPA and a state do not agree on a particular enforcement matter.¹⁸ On March 23, 2018, EPA issued a memorandum that instituted interim procedures requiring early notice to EPA political appointees of civil judicial referrals to DOJ.¹⁹ On April 30, 2018, EPA issued a memorandum with interim procedures for providing early notice of civil judicial referrals under the Comprehensive Environment Response, Compensation, and Liability Act (CERCLA).²⁰ Some critics have suggested these measures create additional hurdles to

¹⁴ *Id.*

¹⁵ Civil Penalties for Polluters Dropped Dramatically in Trump's First Two Years, Analysis Shows, *Washington Post* (Jan. 24, 2019).

¹⁶ Environmental Protection Agency, Fiscal Year 2018 EPA Enforcement and Compliance Annual Results (<https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>).

¹⁷ *Id.*

¹⁸ U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance to Regional Administrators on Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (Jan. 22, 2018).

¹⁹ U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine Office of Enforcement and Compliance Assurance Assistant Administrator to EPA Regional Counsels, Regional Enforcement Directors, Regional Enforcement Coordinators, and Office of Civil Enforcement Division Directors Director, Deputy Director, and Division Directors on Interim Procedures for Providing Early Notice of Civil Judicial Referrals (Mar. 23, 2018).

²⁰ U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine, Office of Enforcement and Compliance Assurance Assistant Administrator to EPA Regional Counsels and Regional Superfund Directors on Interim Procedures for Providing Early Notice of CERCLA Civil Judicial Referrals (Apr. 30, 2018).

environmental enforcement and contribute to a perception of a lack of support for enforcement by EPA political leadership.²¹

IV. ENFORCEMENT STAFF REDUCTIONS AND PROPOSED BUDGET CUTS

According to EPA, OECA has faced a net loss of 131 full-time equivalent employees, or roughly 17.8 percent of its staff, since January 2017.²² As noted by the *Washington Post*, several experts said that staff reductions in enforcement can have a significant impact on EPA's ability to enforce environmental laws because a significant majority of OECA's budget is dedicated to personnel costs.²³ Furthermore, the loss of staff can also cause a loss of institutional knowledge when employees with specialized experience leave the Agency. In addition, the Trump Administration proposed significant cuts to EPA's fiscal year 2019 budget of more than \$2.5 billion,²⁴ including significant year-over-year cuts to enforcement and compliance activities.²⁵ Although Congress rejected these proposed budget reductions, some have voiced concern that such sizable proposed cuts exhibit a lack of executive branch support for enforcement and other environmental protection activities.²⁶

V. WITNESSES

The following witnesses have been invited to testify:

Panel I

The Honorable Susan Bodine

Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

²¹ *Trump Appointee at EPA to Scrutinize which Pollution Cases May Go To Court*, Washington Post (Jun. 15, 2018). See also Joel Mintz, *It's Official: Trump's Policies Deter EPA Staff from Enforcing the Law*, The Hill (Feb. 16, 2019).

²² Briefing by Patrick Traylor, Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, to House Committee on Energy and Commerce Staff (Feb. 8, 2019).

²³ *With a Shrinking EPA, Trump Delivers on His Promise to Cut Government*, Washington Post (Sept. 8, 2018).

²⁴ *Trump budget seeks 23 Percent Cut at EPA, Eliminating Dozens of Programs*, Washington Post (Feb. 12, 2018).

²⁵ Environmental Protection Agency, FY 2019 EPA Budget In Brief (Feb. 2018). For example, EPA's FY 2019 budget justification proposed \$56 million in cuts to compliance and enforcement activities under EPA's Environmental Program and Management account, nearly 20 percent from 2018 levels.

²⁶ Joel Mintz, *It's Official: Trump's Policies Deter EPA Staff from Enforcing the Law*, The Hill (Feb. 16, 2019).

Panel II

Bruce Buckheit, JD, MS

Analyst and Consultant

Former Director

Air Enforcement Division, Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

Bakeyah Nelson, PhD

Executive Director

Air Alliance Houston

Eric Schaeffer, JD

Executive Director

Environmental Integrity Project

Chris Sellers, PhD, MD

Professor of History

Director, Center for the Study of Inequality and Social Justice

Stony Brook University

Jay Shimshak, PhD

Associate Professor of Public Policy and Economics

Frank Batten School of Leadership and Public Policy

University of Virginia

The Honorable Ronald J. Tenpas, JD

Partner

Vinson & Elkins LLP

Former Assistant Attorney General

Environment and Natural Resources Division

U.S. Department of Justice