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# Environmental Protection in the Trump Era

Spring 2018



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Environmental Protection in the Trump Era.

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# Cutting Enforcement of Environmental Law

Federal agencies and Department of Justice attorneys have considerable discretion in deciding whether, when, and how to enforce regulatory requirements, and enforcement priorities often change with a new administration. The **Trump Administration's stated support for deregulation** and its plans to dramatically cut EPA's enforcement budget **suggest cutbacks in federal environmental enforcement**, and federal oversight of state enforcement, in the coming years.

## Process.

Federal environmental laws establish a broad array of enforcement tools to help ensure compliance, including:

- agency notices of violation;
- agency orders requiring cleanup, compliance, or assessing civil penalties; and
- judicial proceedings for civil penalties, cost recovery, injunctions, or criminal sanctions.

The agency charged with administering a specific statute determines whether to initiate an enforcement action. If the case involves judicial proceedings (civil or criminal), the Department of Justice (DOJ) represents the agency in court and settlement negotiations. **Most civil environmental enforcement cases are resolved by settlement** between the parties.

*Federal-State Relationship in Enforcement.* In some areas, notably requirements governing activities on federal lands and prosecution of federal crimes, federal agencies have exclusive or near-exclusive enforcement authority. Under many federal pollution control laws, states with delegated and approved programs have the primary role in implementation and enforcement, but the federal government oversees state programs and has concurrent enforcement authority. **EPA and states enter into and periodically review Memoranda of Agreement governing implementation** of these delegated or approved programs, including enforcement practices. EPA's "Revised Policy Framework for State/EPA Enforcement Agreements" describes the **circumstances that would give rise to federal enforcement**: when state enforcement is untimely or inappropriate; a state requests federal enforcement; a national legal precedent is involved; or there is a violation of a federal order or consent decree.

## Areas to Watch

*Federal Agencies.* The Administration has established new enforcement priorities that refocus resources among regulated activities and industries. For example, EPA priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste. In addition to revising enforcement priorities, there are myriad ways DOJ, EPA, and other agencies might curtail federal enforcement. Deregulatory pressures in enforcement can take different forms, including:

- the initiation of fewer investigations and enforcement actions;
- slower schedules for bringing enforcement actions;
- decreased penalty demands or more relaxed compliance schedules in consent agreements; and
- decreased federal oversight of state permitting and enforcement efforts.

*Agency Discretion.* Agencies and DOJ exercise prosecutorial discretion in **deciding which enforcement cases to pursue with their limited resources** and how to conduct those cases. Relatively few provisions in the major environmental laws have been found to impose a mandatory and enforceable duty to undertake an enforcement action. Agencies also establish written policies that guide their enforcement decisions in specific types of cases. In lawsuits challenging agency enforcement decisions or policies, courts generally apply a presumption in favor of agency discretion, and look to the particular statute to determine whether Congress has constrained that discretion.

Federal agencies also may establish broad priority areas for focusing enforcement resources. EPA, for example, selects “National Enforcement Initiatives” every three years.



### Discussion.

In short, **federal agencies have considerable discretion as to whether and how to pursue enforcement of federal laws.** The Trump Administration is likely to exercise this discretion by **revising the enforcement priorities** within each agency, pursuing a **more limited environmental enforcement role** across federal programs, and **reducing its oversight of states’ efforts to enforce** those programs where states have primacy.

The impacts of weaker federal enforcement would generally be greatest in states with less active enforcement programs and on issues where federal agencies have exclusive or near-exclusive authority to enforce federal requirements (e.g., Department of the Interior regulation of offshore oil and gas development or illegal wildlife trade). Criminal prosecutions could be affected significantly by a smaller federal presence, given the prominent federal role in that area.



### Opportunities for Public Engagement.

Some **federal laws allow the public to review and comment on the proposed resolution of an enforcement matter**—e.g., the Clean Water Act requires public notice and an opportunity to comment on civil penalty orders, while RCRA (the federal solid waste law) requires notice and comment and an opportunity for a public meeting on proposed settlements.

More generally, DOJ has issued by rule its formal policy of providing the public an opportunity to comment on a proposed consent decree before judgment is entered by the court. The **public may also have an opportunity for input on an agency’s proposed enforcement priorities.** For example, EPA took public comment and solicited feedback from stakeholders prior to finalizing its 2017-2019 National Enforcement Initiatives.

*Congress.* Congress might also seek to weaken enforcement generally by continuing to cut federal agency budgets and staff ([see Chapter 10](#)), or by enacting substantive legislation—e.g., to curtail existing enforcement authorities or limit the role of citizens in enforcement. For example, H.R. 732 (the “Stop Settlement Slush Funds Act”), passed by the House in October, would limit the use in settlement agreements of SEPs and other payments by defendants that do not “directly remed[y] actual harm” caused by the defendant. Another House bill, H.R. 985 (“Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act”), would add new barriers to class action suits in federal court and to federal multi-district litigation.

**Most major federal environmental laws authorize citizens to bring suit to enforce the laws themselves where the government has failed to take action.** In addition, under the Administrative Procedure Act, citizens are generally authorized to bring suit against the federal government to challenge agency actions that are procedurally or substantively unlawful. Citizen enforcement can be expected to increase in the event of a decrease in government enforcement. Where federal or state government action has been initiated, citizens or environmental groups also may be able to intervene as a party and play a direct role in pursuing the violations, including involvement in settlement negotiations.

**Action Areas to Watch.** *Federal Agencies.* Agencies can change their approach to enforcement directly through written or informal policies.

In December 2017, with the Senate’s confirmation of Susan Bodine, EPA filled its top enforcement position. The agency’s draft Strategic Plan for FY 2018-2022, issued in October, states: “EPA’s enforcement priorities remain focused on cleaning up hazardous waste sites and addressing the most significant violations consistent with EPA’s statutory authorities.” EPA will likely revisit the National Enforcement Initiatives to refocus resources among regulated activities and industries.

**Current priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste.**

The Department of Justice issued a policy in June that **raised concerns about the continuing use of supplemental environmental projects (SEPs), a mechanism where polluters pay** some settlement funds to a third party to carry out environmental remediation or conservation work. The June 5, 2017, [Memorandum](#) from the Attorney General prohibits, in civil and criminal cases litigated under the direction of the Attorney General, settlement payments to nongovernmental third parties unless expressly authorized by statute or unless the payment “directly remedies the harm that is sought to be redressed.” On January 9, 2018, DOJ provided guidance on implementing the new policy. The Acting Assistant Attorney General issued a [Memorandum](#) establishing that the policy does not prohibit the use of SEPs if the project is consistent with EPA’s SEP policy, and offering examples of allowable third-party payments in environmental cases.

Shortly after issuing the June 5 Memorandum, DOJ changed the terms of a court-entered consent decree in a Clean Air Act case that the Obama Administration brought against Harley-Davidson Motor Co. The [substitute decree](#) filed by DOJ is identical to the [original settlement](#) terms except that it *removes* a requirement for the company to carry out a \$3 million penalty mitigation project to reduce air emissions from woodstoves. On January 31, 2018, several states filed an amicus brief asking the court to reject the proposed consent decree and reinstate the mitigation project.

DOJ also recently addressed the use of agency guidance documents in future affirmative civil enforcement (ACE) cases. In a January 25, 2018, [Memorandum](#), DOJ’s Associate Attorney General stated that DOJ litigators “may not use noncompliance with guidance documents as a basis of proving violations of applicable law in ACE cases,” and noted that a party’s failure “to comply with agency guidance . . . does not mean that the party violated [the] underlying legal requirements....” It remains to be seen whether the brief Memorandum signals a shift in enforcement practice for EPA and other agencies.

Another way that agencies might change their approach to enforcement is to change the legal interpretation of what constitutes a prosecutable violation. In December 2017, the Department of the Interior in [Solicitor's Opinion M-37050](#) changed a long-standing interpretation of the Migratory Bird Treaty Act to determine that a person cannot be prosecuted for violating this law unless the person (including an oil company, mining company, or timber company) engaged in the “intentional” killing of migratory birds. This redefinition of an element of the criminal offense is a significant change from prior practice.

In addition to developing new policies and priorities, **there are myriad ways DOJ, EPA, and other agencies might curtail federal enforcement.** Deregulatory pressures in enforcement can take different forms, including:

- the initiation of fewer investigations and actions;
- slower schedules for bringing enforcement actions;
- decreased penalty demands or more relaxed compliance schedules in consent agreements; and
- decreased federal oversight of state permitting and enforcement efforts.

The Administration might also advance a less aggressive approach to enforcement through reduction in agency staff or through reorganization of enforcement responsibilities within the agency. Federal agencies might reduce their funding and technical assistance to the states, making it more difficult for states to fill enforcement gaps. The Administration might also change course on federal agencies’ efforts to integrate environmental justice considerations into enforcement and other regulatory actions ([see Chapter 13](#)).

*Congress.* **Congress might seek to weaken enforcement generally by continuing to cut federal agency budgets and staff** ([see Chapter 10](#)), or **by enacting substantive legislation—e.g., to curtail existing enforcement authorities or limit the role of citizens in enforcement.** For example, H.R. 732 (the “Stop Settlement Slush Funds Act”), which was passed in the House in October and is pending in the Senate, would limit the use in settlement agreements of SEPs and other payments by defendants that do not “directly remed[y] actual harm” caused by the defendant.

Following are other bills introduced in 2017 that would affect the ability of citizens and public interest groups to directly enforce environmental laws or to ensure that federal agencies are fulfilling their legal obligations:

- H.R. 3131 (Endangered Species Litigation Reasonableness Act), introduced in the House of Representatives on June 29, 2017, would amend the Endangered Species Act to impose new limitations on attorney fees in cases brought under the Endangered Species Act (ESA). It does so by subjecting fees under the ESA to the Equal Access to Justice Act, which imposes several limits on fees paid by the United States government.
- H.R. 985 (“Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act”) would add new barriers to class action suits in federal court and to federal multi-district litigation—two different procedural pathways for grouping the claims of individual plaintiffs. The changes to the class action process include raising the bar for class certification and delaying or capping fees for class counsel. The bill was passed by the House on March 9, 2017, and is pending before the Senate.

- H.R. 720 and S. 237 (The “Lawsuit Abuse Reduction Act”) would modify the Federal Rules of Civil Procedure by making sanctions for “frivolous” lawsuits mandatory rather than a tool that can be used at the discretion of the district court judge. Under this bill, sanctions must include reimbursement of all reasonable expenses due to the violation necessitating the sanctions; the sanctions may also address case-specific consequences and the levying of additional penalties for deterrence purposes. The bill would also make it impossible for a party to avoid sanctions by withdrawing the objectionable claim or other action within 21 days, as can be done under the present rules. The bill was passed by the House on March 10, 2017, and is pending before the Senate.
- H.R. 2936 (The “Resilient Federal Forests Act of 2017”) would prohibit the award of legal fees to plaintiffs challenging forest management activities, defined as any “project or activity carried out . . . on National Forest System lands or public lands consistent with the forest plan covering the lands.” The measure also would set time limitations for preliminary injunctive relief and provide the U.S. Departments of Agriculture (National Forest System) and Interior (public lands) discretion to subject challenged forest management activities to binding arbitration. The bill was passed by the House on November 11 and is pending before the Senate.