

Irreplaceable: Why States Can't and Won't Make Up for Inadequate Federal Enforcement of Environmental Laws

JUNE 2017

In its proposed 2018 budget, the Trump Administration seeks a 31 percent reduction in funding for the U.S. Environmental Protection Agency (EPA), including a 24 percent drop in the agency's enforcement budget.¹ The enforcement cut purportedly reflects a desire to avoid "duplication of enforcement actions carried out by the States."² But the Administration's budget would also slash by 45 percent the EPA grants that states rely on to fund their own enforcement programs.³ Those cuts would make it virtually impossible for states to maintain existing levels of enforcement, much less for them to expand their programs to compensate for declining federal efforts. And even if they had unlimited resources, states would still be less likely than EPA to adequately police certain polluters, due to local political constraints. While there may be some exceptions, states in general have neither the means nor the will to substitute for robust EPA enforcement of federal environmental laws.

States Already Have More Enforcement Responsibility Than They Can Handle

Most federal environmental laws either allow or require EPA to delegate some enforcement authority to the states.⁴ As a result, states are already responsible for the bulk of enforcement activity.⁵ Indeed, the Environmental Council of the States (ECOS), a national association of state environmental regulators, has estimated that states bring about 90 percent of environmental enforcement actions each year.⁶

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Nevertheless, a 2011 report from EPA's Office of the Inspector General concluded that state enforcement efforts were both inadequate and inconsistent.⁷ That report reviewed enforcement data from 2003 to 2009 and evaluated state performance along three metrics:

- (1) the percent of facilities states inspected each year,
- (2) the percent of inspections that resulted in a state identifying significant noncompliance or a high-priority violation, and
- (3) the percent of violations that resulted in the state issuing a formal enforcement action with a penalty.⁸

Among other deficiencies, the report found that states “frequently do not meet national enforcement goals.”⁹ For example, only eight states had satisfied an EPA goal that all major air-pollution emitters be inspected every two years.¹⁰ Similarly, only two states had satisfied an EPA goal that all large-quantity generators of hazardous waste be inspected every five years.¹¹

The report also found a high degree of variation between states—and even within states—as to the vigor of enforcement efforts.¹² For example, for Clean Air Act enforcement, state performance (as assessed by an average of the three metrics mentioned above) varied by a range of almost 50 percentage points.¹³ In other words, “some states inspected facilities, identified violations, and/or assessed penalties for violations at a much higher rate than other states.”¹⁴

States Face Financial Barriers to Effective Enforcement, Which EPA Budget Cuts Would Worsen

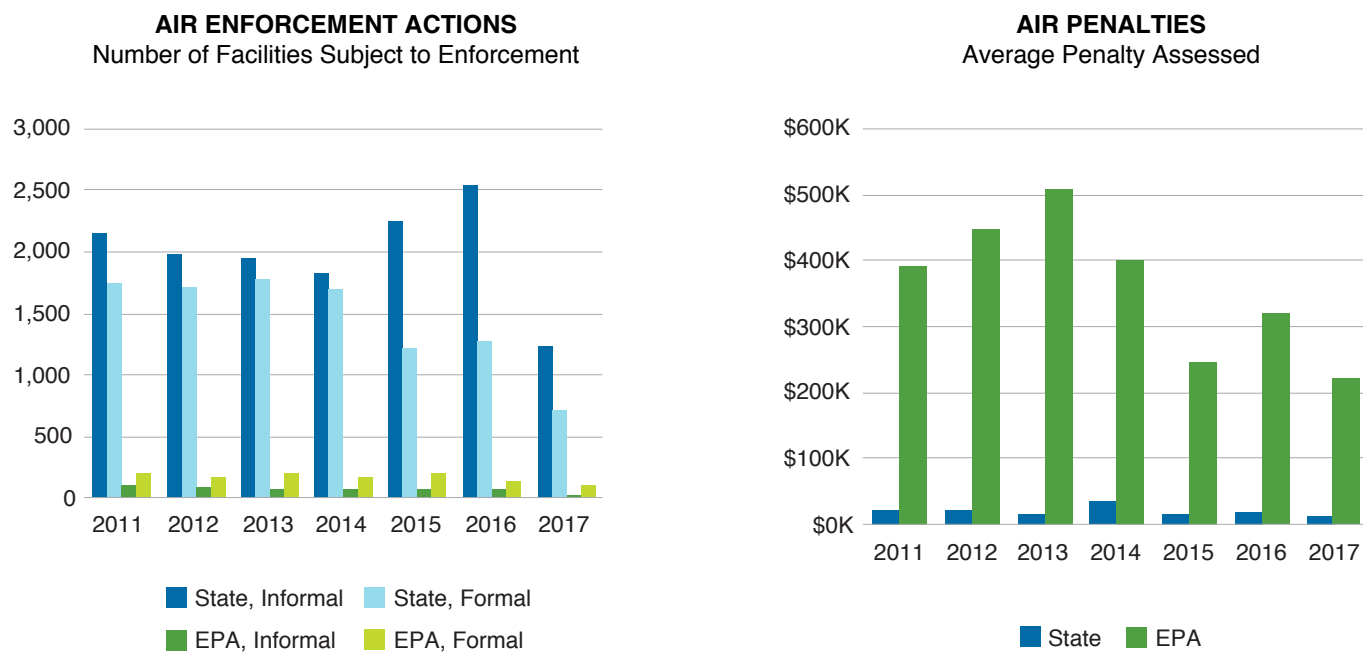
In response to criticism of their enforcement efforts, states often plead poverty. EPA grants account for a substantial share of state environmental agency budgets—27 percent on average, and close to 60 percent in some states¹⁵—and state regulators have long argued that they cannot satisfy their myriad responsibilities under laws like the Clean Air Act and Clean Water Act without increased federal aid.¹⁶

Despite states' protests, EPA grants have shrunk rather than expanded in recent decades. A 2007 study by the Government Accountability Office found that, between 1997 and 2006, EPA grants to states declined by 9 percent in inflation-adjusted terms, even as states' enforcement responsibilities increased.¹⁷ Since then, grant funding has fallen even further.¹⁸ Rather than compensating for reduced federal aid by allocating additional state funds to their environmental agencies, some state legislatures have compounded the damage by making cuts of their own. Pennsylvania, for example, has reduced state funding to its Department of Environmental Protection by 40 percent since 2007.¹⁹ As a result, the department has lost 25 percent of its staff.²⁰

Given the leanness of their current budgets, state regulators argue that the further cuts to EPA grants sought by the Trump Administration would necessarily result in substantially poorer environmental outcomes. The National Association of Clean Air Agencies, a coalition of state and local air pollution control agencies, warned that the proposed grant reductions “would likely have a devastating impact on [state and local agencies'] efforts to provide healthful air quality for the public.”²¹

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Even with adequate funding, states are unlikely to enforce federal environmental laws as vigorously as EPA would. Consider that, while states bring the vast majority of Clean Air Act enforcement actions each year, EPA tends to assess much larger financial penalties.²² The same pattern holds for Clean Water Act enforcement actions.²³



In part, the larger penalties assessed by EPA reflect a greater willingness to take on the most serious and complex enforcement cases. A state regulator may be reluctant to adequately penalize its jurisdiction's largest and most politically powerful industrial facilities.²⁴ Similarly, a state regulator may be unwilling to assess a penalty against a polluter whose emissions primarily harm residents of other—downwind or downstream—states.²⁵

Cuts to EPA's enforcement budget would likely lead to even laxer state penalties by putting state regulators in a weaker negotiating position. As a former head of EPA's Office of Enforcement and Compliance Assurance explained in a recent op-ed, under past administrations, "[c]ompanies have known that if they don't resolve their enforcement problems at the state level, they may have to face the EPA instead."²⁶ But in the absence of that federal backstop, companies will feel more emboldened "to push back against state enforcers," likely resulting in fewer and smaller settlements, and less deterrence of future violations.²⁷

Conclusion

Contrary to the Administration's rhetoric, its proposed 2018 budget would not cause a shift of enforcement activity from EPA to the states; it would simply cause a reduction in environmental enforcement. By cutting both EPA's enforcement budget and federal grants that fund state enforcement programs, the Administration's plan would exacerbate the resource and political constraints that state regulatory agencies already face in implementing core environmental laws like the Clean Air Act and Clean Water Act. Public health would inevitably suffer as a result.

Endnotes

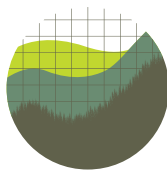
- ¹ OFFICE OF MGMT. & BUDGET, A NEW FOUNDATION FOR GREATNESS, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2018, at p. 42 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/budget.pdf>.
- ² OFFICE OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2018, at p. 86 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf>.
- ³ *Id.* at 84.
- ⁴ See ROBERT ESWORTHY, CONG. RESEARCH SERV., RL34384, FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? 10 (2014), <https://fas.org/sgp/crs/misc/RL34384.pdf>.
- ⁵ Mark Atlas, *Enforcement Principles & Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939, 941 (2007) ("Most states have been delegated the authority to implement most major federal environmental programs, so states do the overwhelming share of enforcing those laws.").
- ⁶ ENVTL. COUNCIL OF THE STATES, STATE AGENCY CONTRIBUTIONS TO ENFORCEMENT AND COMPLIANCE, 20-21 (Apr. 2001). *But see* ENVTL. INTEGRITY PROJECT, ASSESSING STATE ENFORCEMENT: TOO MANY CLAIMS, TOO LITTLE DATA (2003), http://www.environmentalintegrity.org/wp-content/uploads/2016/11/2003-04_Too_Many_Claims_Too_Little_Data1.pdf (criticizing the 90 percent statistic as misleading, because it does not differentiate between simple and complex enforcement actions).
- ⁷ U.S. EPA OFFICE OF THE INSPECTOR GENERAL, 12-P-0113, EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT 8 (2011), <https://www.epa.gov/sites/production/files/2015-10/documents/20111209-12-p-0113.pdf>.
- ⁸ *Id.* at 4.
- ⁹ *Id.* at 8.
- ¹⁰ *Id.* at 9.
- ¹¹ *Id.* at 10.
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ ENVTL. COUNCIL OF THE STATES, STATUS OF STATE ENVIRONMENTAL AGENCY BUDGETS (EAB), 2013-2015, at p. 16 (2017), https://www.ecos.org/wp-content/uploads/2017/03/Budget-Report-FINAL-3_15_17-Final-4.pdf (noting average share of budget from federal funding); *id.* at 12 fig.4b (showing states with highest budget shares from federal funding).
- ¹⁶ ESWORTHY, *supra* note 4, at 4.
- ¹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-883, EPA-STATE ENFORCEMENT PARTNERSHIP HAS IMPROVED, BUT EPA'S OVERSIGHT NEEDS FURTHER ENHANCEMENT 7 (2007), <http://www.gao.gov/assets/270/264845.pdf>.
- ¹⁸ ENVTL. COUNCIL OF THE STATES, STATUS OF STATE ENVIRONMENTAL AGENCY BUDGETS (EAB), 2013-2015, *supra* note 15, at 11.
- ¹⁹ Marie Cusick, *EPA cuts would leave states with more work, less money*, NPR, Apr. 7, 2017, <https://stateimpact.npr.org/pennsylvania/2017/04/07/epa-cuts-would-leave-states-with-more-work-less-money>.
- ²⁰ *Id.*
- ²¹ Testimony of the National Association of Clean Air Agencies, Provided to the House Appropriations Committee Subcommittee on Interior, Environment, and Related Agencies, Regarding the FY 2018 Budget for the U.S. Environmental Protection Agency (May 25, 2017), http://www.4cleanair.org/sites/default/files/Documents/NA-CAA_House_Testimony_FY18-05-25-17.pdf.
- ²² EPA, Enforcement and Compliance History Online, Analyze Trends: State Air Dashboard, <https://echo.epa.gov/trends/comparative-maps-dashboards/state-air-dashboard> (last visited on May 31, 2017). Chart data drawn from this resource.
- ²³ EPA, Enforcement and Compliance History Online, Analyze Trends: State Water Dashboard <https://echo.epa.gov/trends/comparative-maps-dashboards/state-water-dashboard> (last visited on May 31, 2017).
- ²⁴ See Eric Helland, *The Revealed Preferences of State EPAs: Stringency, Enforcement, and Substitution*, 35 J. ENVTL. ECON. & MGMT. 242, 243 (1998) ("The stringency of the Clean Water Act's enforcement by state agencies is not a function merely of budgets, but also of interest group politics."); Atlas, *supra* note 5, at 942 ("Some scholars have argued that the interests of state environmental enforcers have diverged

from those of EPA because they are more vulnerable to pressures from elected officials or interest groups, pleas of economic hardship from violators, enforcement budget constraints, and too-close relationships between regulators and regulated entities.”).

²⁵ Richard Revesz, *According to Scott Pruitt, states only have the right to pollute, not protect their environments*, L.A. TIMES, Mar. 20, 2017, <http://www.latimes.com/opinion/op-ed/la-oe-revesz-pruitt-epa-federalism-20170320-story.html> (“Left to their own devices, states cannot effectively control pollution that travels across state lines. Each state has an incentive to attract industry and overlook pollution that affects residents of other states.”).

²⁶ Cynthia Giles, *Why we can't just leave environmental protection to the states*, GRIST, Apr. 26, 2017, <http://grist.org/opinion/why-we-cant-just-leave-environmental-protection-to-the-states>.

²⁷ *Id.*



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