



Beyond 2020: Pollution

Reviving Pollution Enforcement

The strength of U.S. environmental laws is largely a function of the rigor by which they are enforced. However, under the Trump administration, anti-pollution enforcement efforts of all kinds – criminal, civil, and administrative – at the U.S. Environmental Protection Agency have [fallen to a generational low](#).

While the most dramatic drop took place under Trump, federal anti-pollution enforcement has been in a slow, [steady decline](#). That decline is reflected in recent EPA Strategic Plans that relegate enforcement to a [measure of last resort](#). This emphasis needs to change.

Politicians of all stripes claim to support stiff prosecution for polluters, yet only a [small fraction](#) (less than 5%) of EPA's more than \$9 billion annual budget goes to enforcement. Nor does the agency [spend all of the enforcement funds](#) it is allocated.

Increasing the percentage of the agency's budget dedicated to enforcement would help. However, without clear direction, much of those extra funds would make little effective difference. Additional funding must be coupled with implementing new practices or, in many cases, reviving old, traditional practices that have fallen into disuse to restore effective protections for our communities and the quality of our air, water, and lands. These steps include:

- 1. Provide Leadership and End Regulatory Capture.** For too long, EPA has been a "captive agency," where polluters and their lobbyists drive many of the Agency's most important policies and enforcement and compliance decisions. The new administration should appoint leaders at EPA with knowledge of environmental issues who have no ties to entities that EPA regulates. The Agency's new leadership should continually reiterate their support for a vigorous enforcement program that captures the unlawful economic benefits of

polluters, creates a playing field for all businesses, and protects public health and the environment.

- 2. Resume Inspections. Including Surprise Inspections.** In the past decade, the number of EPA inspections have fallen by half. In 2019, EPA took the further step of banning [most surprise inspections](#) without permission from the state. It also rarely conducts planned inspections in states with delegated programs. These inspections are important not only because they provide the fuel for formal enforcement actions but also because the visibility of inspections adds to the deterrent effect of dissuading potential violators from cutting corners.
- 3. Reinvigorate Criminal Enforcement.** The criminal enforcement program needs to be rebuilt and reorganized. The current number of EPA criminal investigators is well below the minimum of 200 agents required by the U.S. Pollution Prosecution Act of 1990. As a result, the number of [criminal cases](#) EPA referred to the Justice Department for prosecution is the lowest in nearly 30 years. In addition, the Office of Enforcement and Compliance Assurance should institute reporting mechanisms to ensure greater cooperation between criminal and civil enforcement offices.
- 4. Depoliticize Enforcement.** Decision-making about investigations and case referrals should be returned to the enforcement professionals.ⁱ For example, as part of EPA's new "Cooperative Federalism" initiative, EPA will rarely take enforcement actions if a state agency objects. Failure by EPA to intervene when a [state is impermissibly lax](#) opens the door for political favoritism and states engaging in regulatory races to the bottom to attract industry. Federal pollution laws are supposed to protect all Americans, regardless of the state in which they reside.
- 5. Strengthen Oversight of Delegated Programs.** Federally delegated state pollution programs constitute approximately two-thirds of all enforcement activity. Yet, EPA [exercises little oversight](#) and does not even require states to submit comparable reports of federally-financed inspections and other enforcement work. America deserves far more action for its current enforcement investment.
- 6. Restore Supplemental Environmental Projects.** The Trump administration severely limited the use of [Supplemental Environmental Projects \(SEPs\)](#) in case settlements. SEPs allow violators to undertake projects that provide tangible environmental or public health benefits to the affected community or environment, provide these projects are closely related to the violation being resolved and achieve pollution results that go beyond what is required under federal or state laws. SEPs should be revived to give prosecutors more tools and options.
- 7. Make Environmental Justice More Than a Slogan.** EPA [only plays lip service](#) to communities already overburdened with pollution, with few concrete actions

to bolster rhetorical commitments. EPA should be imposing tight permitting policies and strict discharge monitoring to ensure that disadvantaged communities enjoy some actual sense of empowerment against being further degraded.

- 8. Increase Prosecutions; Reduce Justice Department Rejections.** The Justice Department [rejects between](#) one-third and one-half of EPA prosecution referrals – a declination rate among the highest in the federal government. These criminal cases are the most serious violations EPA handles. The agency should redouble efforts to hike its prosecution rate and ensure that declined cases do not fall between the cracks.
- 9. Facilitate Citizen Enforcement.** EPA does little to assist citizens in monitoring discharge permits and often seeks to undermine citizen suits. EPA could dramatically increase its enforcement clout by reviving [disused whistleblower bounty statutes](#), assisting citizen permit oversight, and other steps that align EPA with affected communities and citizen activists. To assist in citizen monitoring, EPA needs to improve and publicize tools and such as the Toxic Release Inventory Act (TRI) and Enforcement and Compliance History Online (ECHO).
- 10. Professionalize the Entire Enforcement Program.** EPA typically does not analyze enforcement patterns, examine trends, or assess impacts. Nor does it use risk-based assessments to target resources. Instead, EPA annual enforcement reports are collections of anecdotal results that provide no basis for comparison over time or meaningful metrics of results. While EPA often associates the term “compliance” with that of enforcement, as a practical matter, the agency rarely prioritizes enforcement to secure measurable compliance results. EPA needs to recognize that public health is inextricably related to pollution exposure that flows from a lack of enforcement.

Prosecuting polluters is a core governmental responsibility. EPA and the Justice Department are indispensably responsible for this core function. In the next administration, even-handed enforcement must be a paramount strategy for minimizing environmental harm and public health threats visited on us all.

¹ Directives that should be immediately suspended include: Best Practices for Compliance and Enforcement-Related Information Requests, November 21, 2018; Transition from National Enforcement Initiatives to National Compliance Initiatives, August 21, 2018; The Appropriate Use of Compliance Tools in Civil Enforcement Settlements, April 3, 2018; DOJ memorandum Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, January 25, 2018; and, Enhancing Effective Partnerships Between EPA and the States in Civil Enforcement and Compliance Assurance Work, July 11, 2019.