



The State Energy &  
Environmental Impact Center  
NYU School of Law

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## A Pass to Pollute:

### Environmental (Non)Enforcement Under the Trump Administration

Under the Trump administration, enforcement of environmental regulations has dropped to historic lows. During fiscal year (FY) 2019, the Environmental Protection Agency (EPA) reduced its inspections of regulated facilities by almost half the average annual rate performed by the previous administration.<sup>1</sup> As a corollary, EPA's civil and criminal enforcement case load fell to its lowest level in a quarter century.<sup>2</sup> These and similar declines across other federal agencies are the direct consequence of deliberate administration efforts to restrict and curtail federal agencies' compliance monitoring and enforcement activity through rulemakings, legal opinions, policy memos and funding reductions.

In addition to systematically undercutting environmental enforcement, the administration has been eliminating or scaling back key environmental protections, nullifying even the possibility of enforcing them. The EPA and the Bureau of Land Management (BLM), for example, have moved to eliminate their respective regulations on methane emissions from the oil and gas industry,<sup>3</sup> opening the door for this potent greenhouse gas to spew essentially unchecked from thousands of wells. And because the administration has dramatically narrowed the definition of the "waters of the United States" that fall under the Clean Water Act,<sup>4</sup> more than half of the nation's wetlands and millions of miles of streams have lost federal protection entirely.<sup>5</sup>

Regulatory agencies also have taken steps to hamstring the rulemaking process itself. The EPA, for example, is proposing to eliminate consideration of important health and environmental benefits when conducting cost-benefit reviews under the Clean Air Act. The agency intends to pursue similar changes to cost-benefit analysis of regulations under other statutes — all as an obvious ploy to falsely claim that the costs of new rules outweigh their benefits.<sup>6</sup> The EPA has also proposed arbitrary restrictions on the use of science in its rulemaking processes, using the widely accepted need to protect personal medical information as an excuse to discount certain peer-reviewed scientific research.

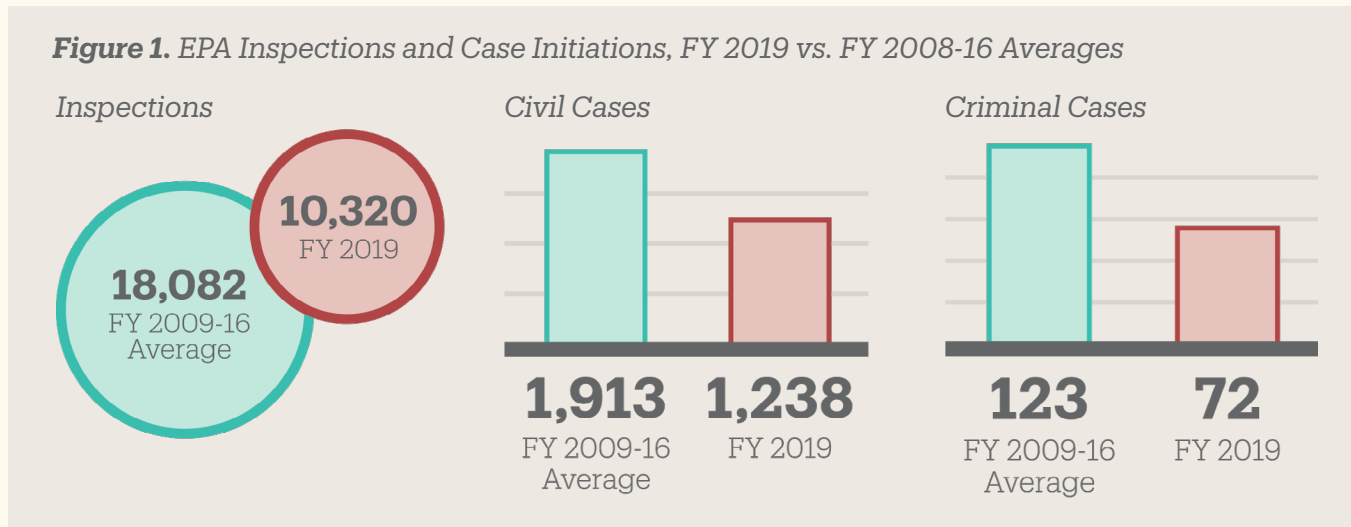
Finally, the administration has pushed its own enforcement responsibilities onto states, many of which have small environmental and resource management agencies that lack the capacity and expertise to fulfill such responsibilities on their own. The administration has done so while proposing year after year to slash the federal funding that those state agencies rely on.

June, 2020

# Environmental Protection Agency

According to the EPA’s own annual report on enforcement results, the agency conducted only 10,320 inspections and evaluations during FY 2019<sup>7</sup> — 43% below the annual average under the Obama administration.<sup>8</sup> The EPA’s Enforcement and Compliance History Online database reveals similar lows in criminal and civil enforcement case initiations. The EPA initiated just 1,238 civil and 72 criminal enforcement cases during FY 2019 — 35% and 41% below the Obama-era annual average, respectively.<sup>9</sup>

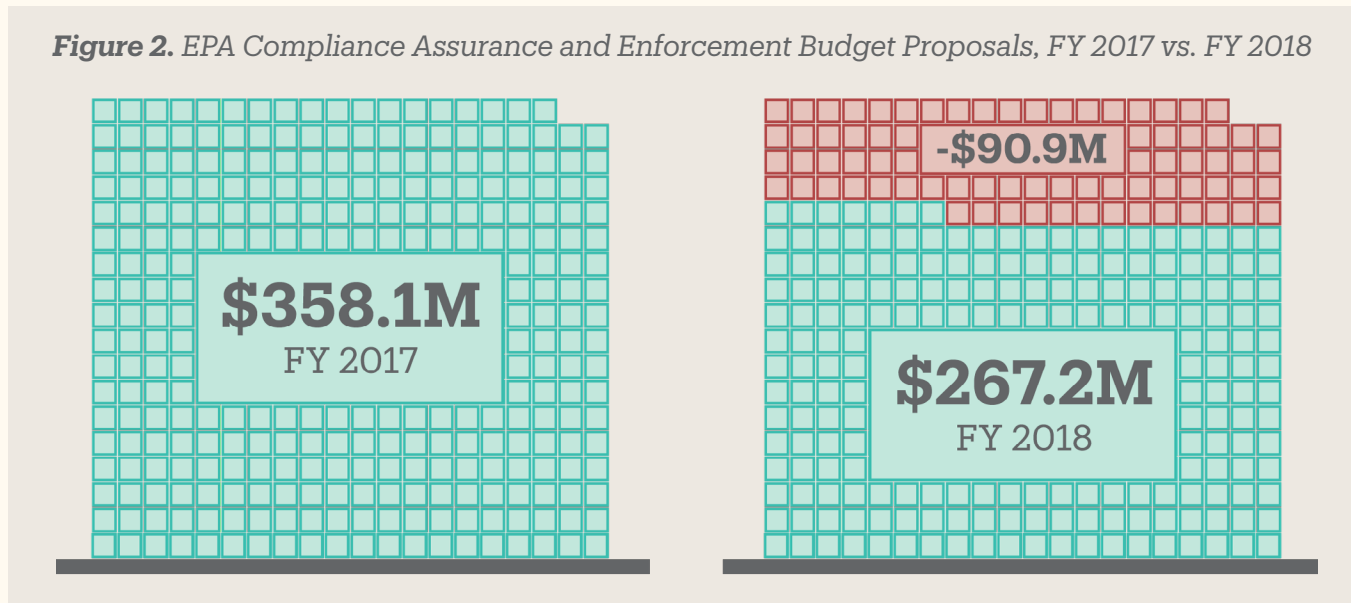
**Figure 1.** EPA Inspections and Case Initiations, FY 2019 vs. FY 2008-16 Averages



## Budget Priorities

The Trump administration’s budget proposals reflect its deprioritization of the EPA’s compliance monitoring and enforcement activities. For FY 2017, the Obama administration proposed a budget of \$358.1 million<sup>10</sup> for such activities; the following year, the Trump administration proposed just \$267.2 million<sup>11</sup> — a reduction of more than 25%. The budget figures proposed by the Trump administration for FY 2019 and FY 2020 were slightly higher, but still failed to reach even the \$300 million mark.<sup>12</sup>

**Figure 2.** EPA Compliance Assurance and Enforcement Budget Proposals, FY 2017 vs. FY 2018



## **‘No Surprises’ Policy**

In July 2019, the EPA’s assistant administrator for enforcement and compliance assurance sent a memo<sup>13</sup> to the agency’s regional administrators on cooperation between the EPA and states on civil enforcement and compliance assurance activities. Among other guidance, the memo outlined a new “no surprises” policy directing EPA staff to provide their state counterparts with advance notice of planned inspections of regulated facilities. The policy does not require the EPA to provide facilities themselves with advance notice of inspections, but concerns have been raised that state regulators may be inclined to do so.<sup>14</sup> The memo also directed EPA staff to “defer to a state as the primary implementer of inspections and enforcement” and to consult with states on “whether or when facilities are to be provided notice of inspections.”

## **Restricting Future Enforcement**

As the EPA weakens its enforcement of existing regulations, the agency is simultaneously working to impose arbitrary and unjustified restrictions on the rulemaking process itself, effectively constraining its own regulatory authority. If successful, these initiatives will further undermine the EPA’s effectiveness as the primary enforcer of federal environmental protections by limiting the agency’s ability to promulgate enforceable regulations to begin with.

### ***Skewing Cost-Benefit Analysis***

In April 2020, the EPA reversed its determination that its Mercury and Air Toxics Standards (MATS) are “appropriate and necessary” under the Clean Air Act. The reversal rests on the agency’s decision to conduct a new cost-benefit analysis of the MATS rule that illogically excluded from consideration tens of billions of dollars in environmental and public health co-benefits associated with massive reductions in fine particulate matter and other air pollutants that result from the control of mercury, the primary target of the rule. The EPA has thus set a dangerous precedent that could dramatically weaken the agency’s regulatory authority by prohibiting the agency from considering some of the co-benefits associated with a possible rule when conducting a cost-benefit analysis of the proposal.<sup>15</sup> This skewed approach — which the EPA is now moving to codify for all Clean Air Act regulations<sup>16</sup> — puts a heavy hand on the scale in favor of removing important regulatory protections.

### ***Discounting Scientific Research***

The EPA’s so-called “secret science” rulemaking, initiated in April 2018 and revived in March 2020, aims to restrict the consideration of scientific research by requiring the agency to discount studies that rely on personal health information that cannot be made public. This effort directly conflicts with the EPA’s obligation to use the “best available science” in its rulemaking processes, and impedes the agency’s mission to protect public health by blocking the use of scientifically sound studies in the development of regulations that provide critical environmental safeguards.

# Interior Department

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Policies implemented at the Interior Department during the Trump administration have set in motion a dramatic decline in oversight and enforcement activities across the lands, waters and natural resources under the department’s purview. In many cases, these declines have been revealed only through dogged reporting based on Freedom of Information Act (FOIA) requests, because most Interior Department agencies — including the Bureau of Land Management, the U.S. Fish and Wildlife Service (USFWS) and the Office of Surface Mining Reclamation and Enforcement (OSMRE) — do not maintain readily accessible databases of their compliance monitoring and enforcement activities.

## Weakening Protections for Migratory Birds

The U.S. Fish and Wildlife Service, whose mission is to “conserve, protect, and enhance fish, wildlife, plants and their habitats,” has taken several steps to end penalties under the Migratory Bird Treaty Act (MBTA) for the incidental (i.e., unintentional but not unexpected) taking and killing of more than 1,000 species of migratory birds. The effort began with a December 2017 solicitor’s opinion<sup>17</sup> that erroneously concluded that the MBTA’s protections “apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.” Four months later, the Service released a guidance document<sup>18</sup> that indicated it would no longer “withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA,” depriving the Service of leverage it previously used to work with the regulated community to reduce migratory bird injuries and deaths. In February 2020, the service initiated a rulemaking to codify the 2017 solicitor’s opinion.<sup>19</sup> In late 2019, the *New York Times* published an in-depth investigation into the devastating impacts of the Service’s change in policy, excerpted here:

*Across the country birds have been killed and nests destroyed by oil spills, construction crews and chemical contamination, all with no response from the federal government, according to emails, memos and other documents viewed by The New York Times.*<sup>20</sup>

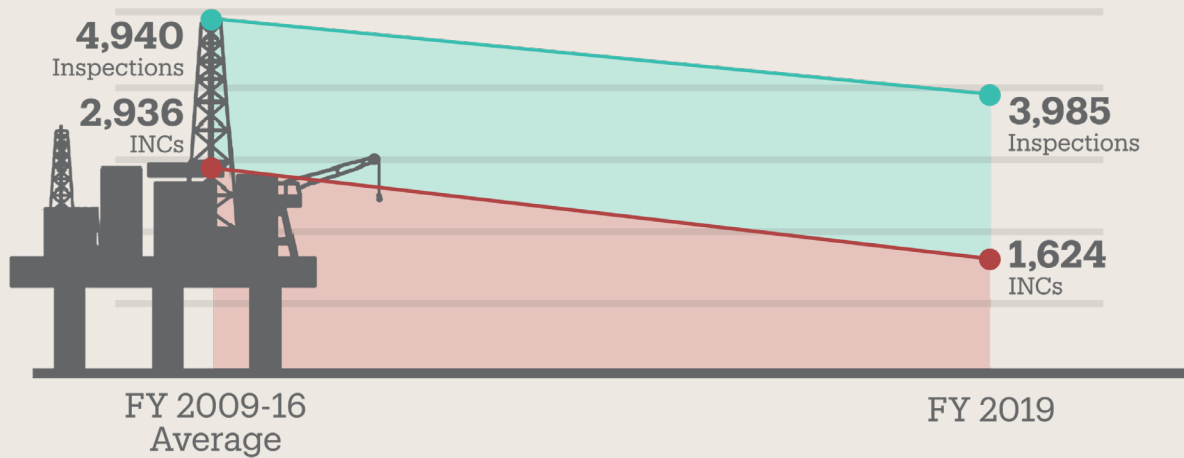
## Waiving Offshore Drilling Safety Requirements

Under the Trump administration, the Bureau of Safety and Environmental Enforcement (BSEE) — an agency established by the Obama administration to regulate offshore drilling — has sidestepped its enforcement responsibilities put in place after the BP *Deepwater Horizon* disaster in 2010. During FY 2019, BSEE conducted 20% fewer inspections of offshore facilities and issued 45% fewer non-compliance citations against offshore oil and gas operators relative to its Obama-era annual averages.<sup>21</sup> BSEE has also weakened safeguards through rulemakings: it finalized rollbacks of regulations aimed at preventing accidents and averting catastrophic spills in September 2018<sup>22</sup> and May 2019.<sup>23</sup>

## Undermining Oversight of Coal Mines

In May 2020, the Office of Surface Mining Reclamation and Enforcement proposed ending its longstanding practice of issuing “10-day notices” to state regulators when it receives complaints from the public regarding suspected environmental violations at coal mines.<sup>24</sup> Doing so would eliminate a key tool for neighboring property owners and other stakeholders to force state regulators to investigate potential violations.<sup>25</sup>

**Figure 3.** BSEE Inspections and Incident of Non-Compliance (INC) Issuances  
FY 2019 vs. FY 2009-16 Averages



## Other Administration Policies

Through the White House Office of Management and Budget (OMB), the Trump administration has pursued a whole-of-government approach to curtailing enforcement of environmental regulations. In addition, numerous federal agencies have used the coronavirus pandemic as cover to scale back or suspend their enforcement activities.

### Soliciting Input on Weakening Regulatory Enforcement

In January 2020, OMB published a request for input on limiting the ability of federal agencies to investigate, enforce and adjudicate violations of environmental, public health and civil rights laws.<sup>26</sup> The request followed an October 2019 executive order that accused some federal agencies of having unfairly enforced federal regulations, and directed federal agencies to no longer consider noncompliance with agency guidance documents alone as regulatory violations.<sup>27</sup> In March 2020, a coalition of state attorneys general warned that OMB's initiative would expand the administration's "dismal record on enforcement of environmental, civil rights, and consumer protection laws."<sup>28</sup>

### Sidelining Enforcement During the Pandemic

Several agencies issued policies that cite the coronavirus pandemic as justification for limiting or suspending enforcement of key environmental laws and regulations. The EPA, for example, announced an effective suspension of monitoring and reporting requirements through a guarantee of "No Action Assurance" to facilities that the agency deems essential, which could include oil refineries, chemical plants and power plants.<sup>29</sup> The Interior Department issued guidance that allows oil and gas producers to apply for lease suspensions<sup>30</sup> and dramatically reduced royalty payments.<sup>31</sup> The Federal Energy Regulatory Commission (FERC) suspended audits<sup>32</sup> and allowed pipeline operators to request extensions and waivers for regulatory violations.<sup>33</sup> The Justice Department instituted a blanket policy delaying collection of civil penalties for violations of environmental and other regulations until August 1, 2020.<sup>34</sup>

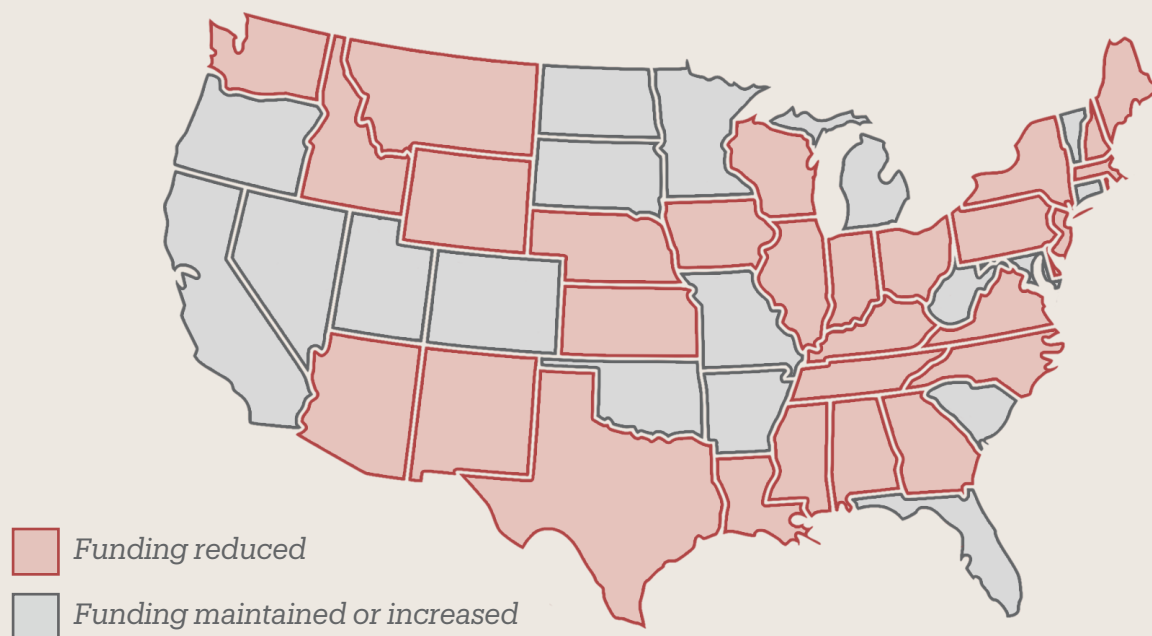
# Placing Unreasonable Burdens on States

As the Trump administration works to diminish the federal government’s role in environmental enforcement, it is pushing greater enforcement responsibilities onto state agencies, claiming that doing so will increase efficiency and avoid duplicative actions taken at both the state and federal level.<sup>35</sup> Yet, facing budget cuts and dwindling staffing levels, most states are not equipped to fill the sudden void in enforcement left by this administration, leaving the nation’s air and water vulnerable to dangerous levels of pollution.

According to analysis by the Environmental Integrity Project (EIP), states eliminated an estimated 4,400 jobs at environmental protection agencies between 2008 and 2018.<sup>36</sup> EIP also found that 30 states cut funding for pollution control programs that ensure compliance with federal environmental laws. These reductions come with serious risks, considering that 80% of the industrial facilities in chronic violation of federal pollution control laws are located in states that have experienced cuts to their staffing levels.<sup>37</sup>

Even while shifting more enforcement responsibility onto states, the Trump administration has proposed its own funding cuts for state enforcement programs, limiting states’ abilities to take necessary enforcement actions. For example, in its FY 2021 budget proposal, the administration proposed a 44% reduction in categorical grants given to states to fund programs that implement and enforce federal environmental laws, including the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act.<sup>38</sup> To further compound these budgetary problems, the economic crisis caused by the coronavirus pandemic has placed additional strain on states’ already limited budgets, making this administration’s approach to enforcement especially ill-suited for this moment in time.

**Figure 4.** Funding Levels for State Pollution Control Programs, FY 2008 vs. FY 2018



In some cases, the federal government has vacated the regulatory playing field altogether — to the detriment of states, which must somehow fill the regulatory or enforcement gap or suffer potentially serious damage to state resources. This was the predicament highlighted in Colorado Attorney General Phil Weiser’s lawsuit challenging the EPA’s revised definition of “waters of the United States.” In its suit, Colorado explained that because the EPA has withdrawn federal jurisdiction over a substantial portion of the waters that the federal government had previously protected, the state will be required to divert new resources to enforce state-based protections for those now-abandoned waters. A federal court recently concluded that this diversion of resources constitutes “irreparable harm” to state interests. This fact, along with the court’s conclusion that the EPA relied on an interpretation of the Clean Water Act that a majority of the U.S. Supreme Court rejected, prompted the court to enjoin application of the new rule in the state.<sup>39</sup>

In addition to capacity limitations, states lack jurisdiction to bring enforcement actions against certain polluters.<sup>40</sup> If harmful effects of pollution are caused by sources located in upwind or upstream states, for example, downwind or downstream states must rely on the EPA to step in and correct these violations. States also face significant hurdles when attempting to take enforcement actions against locally influential businesses, particularly when such efforts do not fall under the umbrella of a national enforcement initiative that the EPA is fully engaged in and supporting. And in some states, legislatures have imposed limitations on state environmental protection agencies that preclude them from adopting standards more stringent than federal law — meaning that as the EPA races to the bottom, a number of states will fall further behind in their ability to protect vital resources within their borders.<sup>41</sup>

**Figure 1.**

U.S. EPA, FISCAL YEAR 2019 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS (2020), <https://www.epa.gov/sites/production/files/2020-02/documents/fy19-enforcement-annual-results-data-graphs.pdf>; U.S. EPA, *Enforcement Case Search*, <https://echo.epa.gov/facilities/enforcement-case-search> (follow “Case Identifiers” hyperlink; then select “Civil” case type; then select “any” case category; then select “Federal EPA”; then follow “Case Milestones and Dates” hyperlink; then select “Complaint Filed with Court” under judicial and select “Complaint/Proposed Order” under administrative).

**Figure 2.**

U.S. EPA, FY 2017 EPA BUDGET IN BRIEF (2016), <https://www.epa.gov/sites/production/files/2016-02/documents/fy17-budget-in-brief.pdf>; U.S. EPA, FY 2018 EPA BUDGET IN BRIEF (2017), <https://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-budget-in-brief.pdf>.

**Figure 3.**

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**Figure 4.**

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# Endnotes

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