

Next Generation Compliance: Environmental Enforcement in the Trump Administration

MATTHEW D. THURLOW
PARTNER
BAKER & HOSTETLER LLP

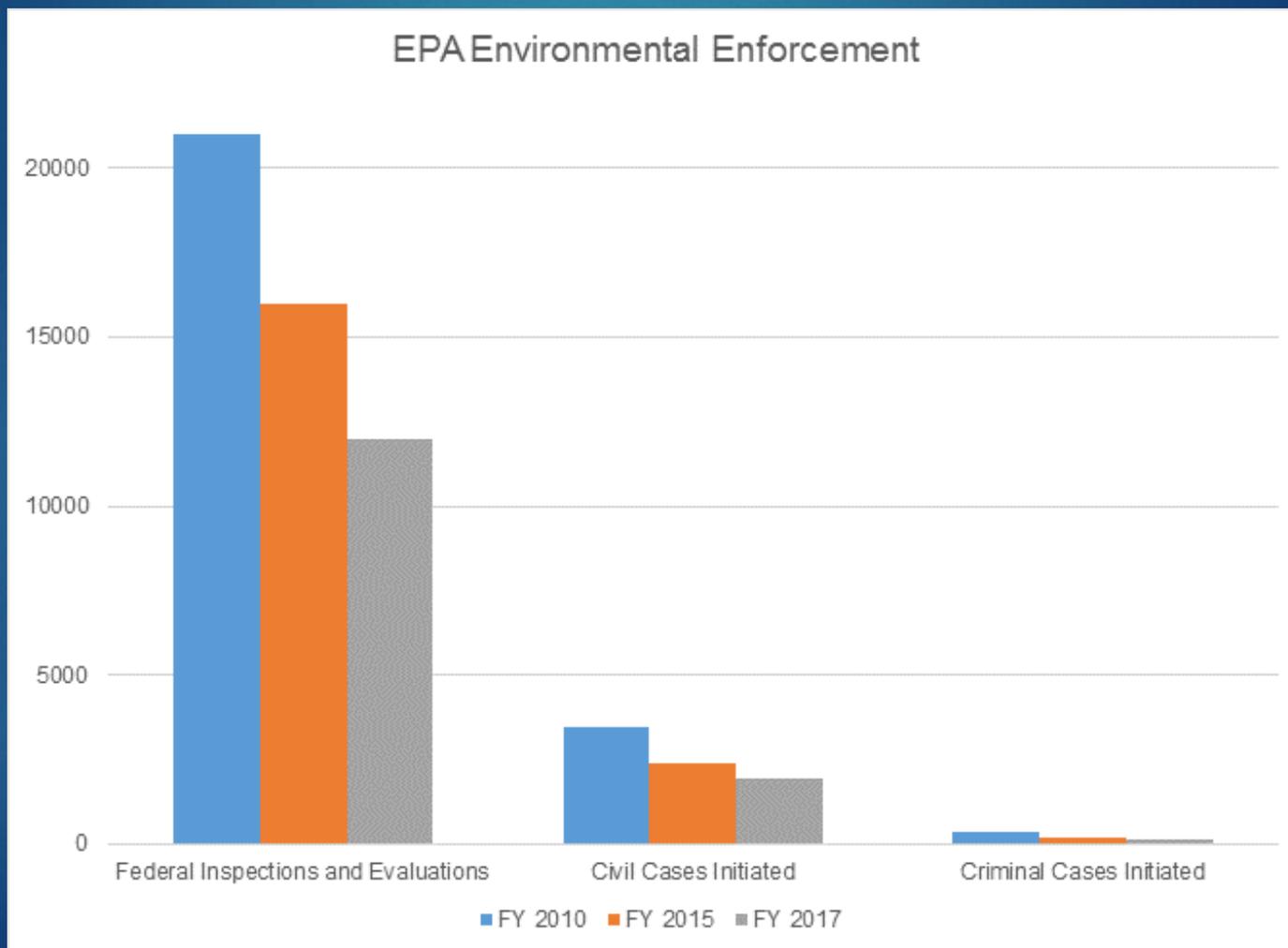
Environmental Enforcement Trends

2

- ▶ Federal Environmental Enforcement Has Dramatically Declined in the Past Decade
- ▶ Overall, there are many fewer inspections and fewer civil and criminal cases being initiated and resolved by U.S. EPA and the Department of Justice
- ▶ But several headline cases including Deepwater Horizon have resulted in high penalty recoveries for the federal government in recent years
- ▶ The role of EPA in enforcement matters is declining overall, but significant federal cases are likely to continue to be filed



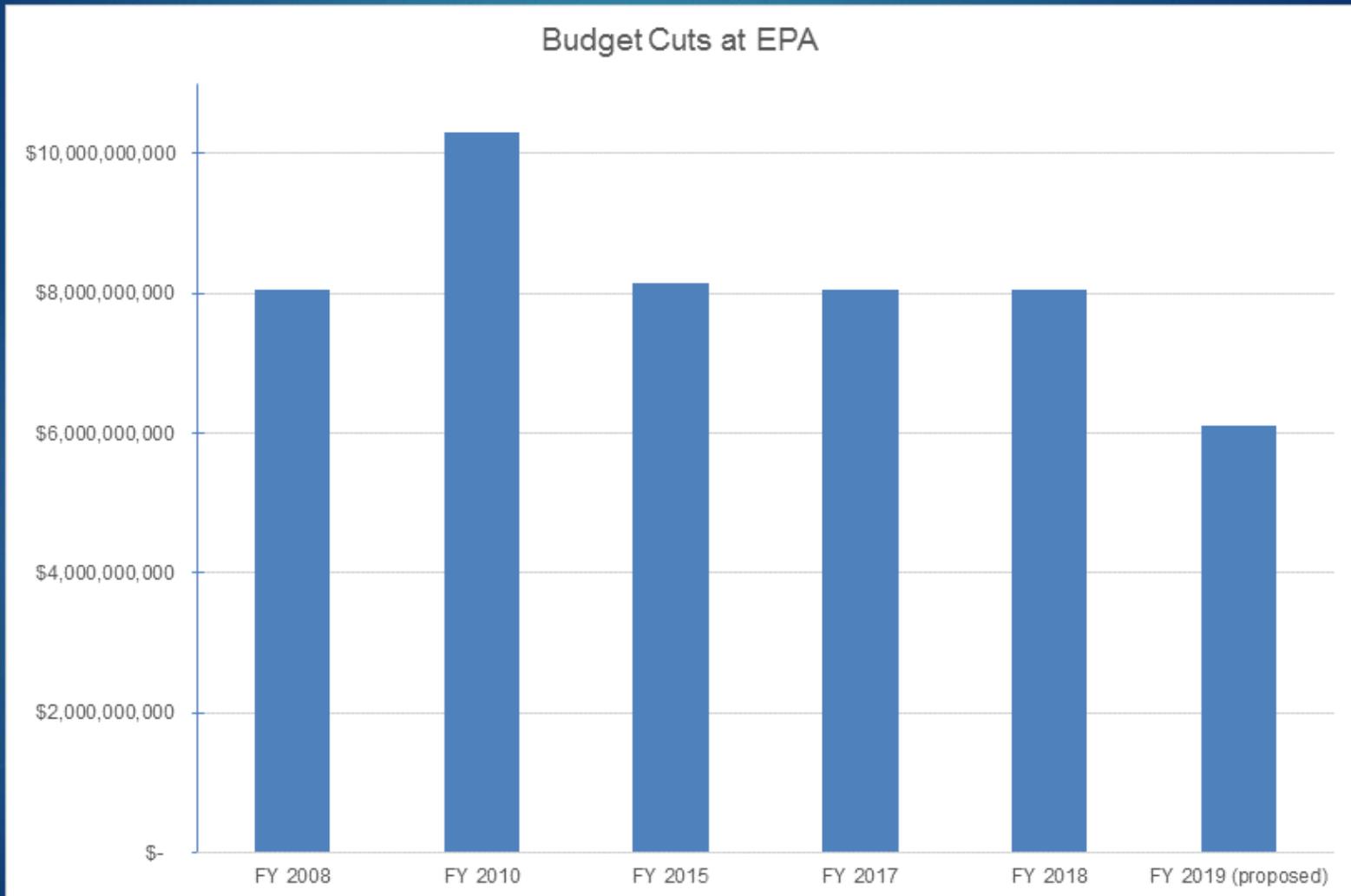
Decline of EPA Environmental Enforcement



Reduced Environmental Enforcement Coincides with EPA Staff Reductions and Budget Cuts

- ▶ EPA staff has declined dramatically over the past decade
 - ▶ FY 2010: 17,278 employees
 - ▶ FY 2015: 14,725 employees
 - ▶ FY 2017: 15,408 employees
 - ▶ Projected FY 2018-19: 11,611 employees
- ▶ EPA budgets have fallen since FY 2010
 - ▶ FY 2010: \$10.3 billion
 - ▶ FY 2015: \$8.14 billion
 - ▶ FY 2017: \$8.06 billion
 - ▶ FY 2019 (proposed): \$6.1 billion

EPA Budgets FY 2008-2019



Retirements and Buyouts: Changes in the Workforce at EPA

- ▶ Retirements of EPA career staff are accelerating as the first generation of EPA employees reach retirement age
 - ▶ 23% of EPA employees are already at retirement age
 - ▶ 45% of EPA employees will be at retirement age in the next three years
- ▶ Trump administration is offering buyouts and early retirement
 - ▶ FY 2017: EPA offered buyouts to 1,227 employees and early retirement to another 3,654 employees
 - ▶ Approximately 700 employees left in 2017; 400 left through incentive programs and 300 through retirement

Generational Changes and Structural Shifts at EPA

- ▶ Staff reductions at EPA headquarters and EPA regional offices
- ▶ Retirements represent generational shift with many of the original or early EPA staff with decades of experience departing the agency
- ▶ New generation of staffers (millennials) may have a different view of environmental law, role of the agency, and technology
- ▶ March 2017: OMB requests that EPA close two of its ten regional offices; proposal is on hold because of concerns regarding Superfund enforcement

The First Year of the Trump Administration: Environmental Enforcement Declined

- ▶ Environmental enforcement declined significantly between FY 2016 and FY 2017
- ▶ EPA's fiscal year ends in September, so this initial data from EPA is only partial
- ▶ 15% year-over-year drop in environmental inspections and evaluations
- ▶ 20% year-over-year drop in civil cases initiated

Further Environmental Enforcement Cuts Appear Imminent

- ▶ FY 2019 budget is down to \$6.1 billion from approximately \$8 billion in FY 2018
- ▶ FY 2019 budget requests 20% less funding for EPA's Office of Enforcement and Compliance (OECA)
- ▶ FY 2019 budget proposed cuts to civil enforcement activities of 17% and cuts to criminal enforcement activities of 9%
- ▶ FY 2019 Superfund Budget will remain the same



EPA is Evolving: Next Generation Compliance

10

- ▶ Next Generation Compliance adopted by the Obama administration in October 2014
- ▶ Five key principles: Regulation and Permitting Design; Advanced Monitoring; Electronic Reporting; Transparency; and Innovative Enforcement
- ▶ Intended to “increase compliance with environmental regulations by using advances in pollutant monitoring and information technology combined with a focus on designing more effective regulations and permits to reduce pollution”
- ▶ Trump administration appears to be following many of the tenets of Next Generation Compliance including focusing on improving the permitting process, reducing regulatory burdens, and embracing self-reporting and advanced monitoring technologies

Improved Regulation and Permitting

- ▶ Cynthia Giles (Obama-era EPA official): “We can get a bigger bang for the buck by working hard to make sure we design rules that will work in the real world – rules with compliance built in.”
- ▶ Obama administration recommends training EPA staff to identify potential regulatory bottlenecks and works with industry in some cases to identify flaws in the application of permits and regulations
- ▶ Trump administration is focused on reducing regulatory burdens; EPA has set a goal of reaching all permitting decisions within 6 months by FY 2022; and EPA wants to adopt e-permitting to streamline the permitting process

Technology: Advanced Environmental Monitoring and Compliance

- ▶ Fence-line monitoring technologies
- ▶ Use of infrared cameras, artificial intelligence, drones, and advanced flaring and leak detection technologies
- ▶ Continuous air and water quality monitors
- ▶ Focus on cost savings and reducing delays in sharing information with EPA and the public, and quickly remedying potential environmental violations
- ▶ Trump administration FY 2018-19 Guidance: “The Agency will prioritize work with co-regulators to develop methods that successfully leverage advances in both monitoring and information technology”



Increased Self-Reporting and Use of Electronic Databases

- ▶ Electronic reporting of compliance data with more accurate and timely information
- ▶ Self-reporting of violations and information sharing on EPA's Central Data Exchange; EPA audits self-reported information and then makes much of the information available to the public
- ▶ Trump administration is implementing NPDES e-reporting and an e-manifest program; also supporting use of E-Enterprise Web Portal for information sharing by regulated community, states, and tribes
- ▶ Trump administration wants to eliminate duplicative or unnecessary reporting obligations by 10 million hours by FY 2022



Increased Transparency and Reliance on Public, States, and Tribes for Compliance Assistance



- ▶ More data regarding facility operations made available to public; potentially available in real-time
- ▶ Increased opportunities for states, tribes, and the public to monitor community health and enforce compliance
- ▶ Third party verification of compliance with laws and settlement agreements
- ▶ Trump administration: “In consultation with state, tribal, and local partners, EPA will make monitoring data publicly available, providing context and relevancy” (2018-2022 Strategic Plan)

National Enforcement Initiative Priorities 2017-2019

15

- ▶ NEIs remain in place from Obama administration; Trump administration continues to track progress on the NEIs
 - ▶ Reducing Air Pollution from the Largest Sources
 - ▶ Cutting Hazardous Air Pollutants (HAPs)
 - ▶ Reducing Air Emissions of Hazardous Wastes from RCRA Regulated Facilities
 - ▶ Ensuring Energy Extraction Activities Comply with Environmental Laws
 - ▶ Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
 - ▶ Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters
 - ▶ Preventing Animal Waste from Contaminating Surface and Ground Water
 - ▶ Keeping Industrial Pollutants Out of the Nation's Waters

Trump EPA: Environmental Enforcement Priorities

16

“Back to Basics” Approach

- ▶ Cooperative Federalism
- ▶ Superfund Enforcement
- ▶ Water Infrastructure and Lead
- ▶ Lean Government and Informal Enforcement Tools
- ▶ Focus on Rule of Law
- ▶ Updated Settlement Policies and Informal Enforcement



Cooperative Federalism

17

- ▶ Many environmental programs are jointly administered by states and federal government (exs. Clean Water Act and Clean Air Act permits)
- ▶ Trump administration plans to adopt more “shared governance” strategies with states and tribes; EPA Working Group formed Sept. 2017
- ▶ Jan. 2018: EPA announces policy of State Primacy in Authorized Programs: “EPA will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs, except in specific situations”
- ▶ Exceptions include non-delegable authorities; state program deficiencies; state requests; emergencies; criminal investigations; federal or state-owned facilities; and multi-state or cross-border issues
- ▶ EPA encouraging coordination and cooperation on national issues including use of the State Review Framework for national consistency
- ▶ National working groups formed on significant issues including lead and perfluorinated chemicals (PFAS)



Superfund Enforcement

18

- ▶ **March 2017: Administrator Pruitt forms a taskforce focused on Superfund reforms**
- ▶ **July 2017: EPA issues memo with 42 recommendations for reform; Administrator Pruitt initially adopts 11 recommendations**
 - ▶ **Focus on high risk Superfund sites**
 - ▶ **Evaluate cleanup status and potential for reuse of the more than 1,300 Superfund sites remaining on the NPL; by September 2019 EPA plans to make an additional 102 Superfund sites and 1,368 Brownfields sites ready for anticipated use (RAU)**
 - ▶ **Reduce EPA's site costs by reviewing how the Agency calculates indirect agency costs**
 - ▶ **Agency plans to review all listed Superfund sites and will delete or partially delete a number of sites from the NPL**
- ▶ **Administrator Pruitt has also signaled that he intends to “[u]se enforcement authorities,” including unilateral orders, to force the hand of “recalcitrant” Superfund defendants and reduce the time and effort EPA expends on litigation at Superfund sites**
- ▶ **Dec. 2017: EPA identifies 21 high priority sites targeted for cleanup**

Water Infrastructure and Lead Contamination

- ▶ In the wake of the Flint crisis, increased emphasis on reducing public exposure to lead and other emerging contaminants in drinking water
- ▶ EPA wants to reduce the number of water systems out of compliance with health-based standards
- ▶ EPA plans to increase funding for water infrastructure by \$40 billion by FY 2022
- ▶ EPA plans to make funds available to states and localities for infrastructure improvements
- ▶ Administrator Pruitt convenes President's Task Force on Environmental Health Risks and Safety Risks to Children to address lead exposures

Lean Government Strategy

20

- ▶ **Lean Government Strategy at EPA**
 - ▶ Private sector concept from manufacturing industry
 - ▶ Focus on efficiency, transparency, and responsiveness
 - ▶ Elimination of administrative waste
 - ▶ Reducing process steps
 - ▶ Doing more with fewer resources
- ▶ EPA plans to reduce its office space by over 850,000 feet, reduce procurement time, and improve 250 operational processes by FY 2022

Rule of Law Principles

21

- ▶ Jan. 2018: Memo issued by Department of Justice requiring DOJ and EPA to identify support for positions in complaints and settlements in environmental laws and rules (rather than using guidance documents as the basis for enforcement actions)
- ▶ Applies to all DOJ cases, not just environmental enforcement cases
- ▶ Intended to ensure opportunity for public review and comment on any enforceable standards through the rulemaking or legislative processes
- ▶ Problem: CERCLA program largely relies on EPA guidance documents rather than formal regulations

Updated Settlement Policies

22

- ▶ EPA revisiting prior settlements and settlement policies
- ▶ Elimination of “sue and settle” policy with non-profits (especially in deadline cases involving rulemakings)
- ▶ Elimination of payments to third parties in settlements (SEPs); EPA later confirms SEPs are still permissible in settlements
- ▶ Reduced emphasis on civil penalty collection
- ▶ Informal environmental enforcement prioritized over litigation

Localization and Fragmentation of Environmental Enforcement

- ▶ Budget cuts at EPA also include potential cuts to federal grants for support of state environmental programs, including state enforcement efforts
- ▶ Despite some coordination of efforts, more conflicts may emerge in regulation and enforcement of environmental laws (50 states = 50 standards)
- ▶ Potential for uneven playing field; differing standards for companies with multi-state operations
- ▶ Do companies accept strictest environmental standards (California, New Jersey) or risk having an inconsistent approach across the country?

Environmental Enforcement: The Road Ahead

24

POSITIVE	NEGATIVE
EPA has signaled that it will work to resolve environmental violations more efficiently with less litigation and less emphasis on civil penalties	There may be increased litigation by private plaintiffs including citizens groups and state attorneys general
Data and technology may help optimize environmental compliance with less need for regulatory oversight	Increased transparency, data sharing, and new technologies may create new risks for industry (data security, misuse/misinterpretation of data, and overreliance on automation)
EPA is becoming more streamlined and there is likely to be less regulation and enforcement in the short term	State standards are inconsistent; regulatory uncertainty still remains