

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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December 6, 2018

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Acting Administrator Wheeler:

We are writing to request information on a series of actions by the Trump Administration regarding the U.S. Environmental Protection Agency (EPA) Office of Enforcement and Compliance Assurance (OECA). EPA documents and press reports over the past year indicate several disturbing trends, including a decline in the number of enforcement cases initiated; a reduction in enforcement staff; an overreliance on state enforcement programs; and an increased political review of potential or pending enforcement actions. We are deeply concerned that these actions undermine key enforcement programs and severely limit EPA's ability to address climate change and protect public health and the environment.

Enforcement Action Reductions Suggest EPA Is Taking Lenient Approach to Polluters

EPA continues to reduce the number of enforcement actions against polluters. Agency data indicates an ongoing decline across a range of key EPA enforcement activity during the first year of the Trump Administration.¹ An analysis by NBC News noted:

The EPA initiated 20 percent fewer civil cases against polluters for violating environmental laws from the beginning of September 2016 to end of September 2017, as compared to the previous fiscal year, according to the EPA's latest enforcement numbers. The EPA also opened 30 percent fewer criminal enforcement cases during the same time period. The past fiscal year marked a historic low for enforcement actions across the board: the number of new civil and criminal cases, defendants charged, and federal EPA

¹ U.S. Environmental Protection Agency, *Enforcement Annual Results Analysis and Trends for Fiscal Year 2017* (<https://www.epa.gov/enforcement/enforcement-annual-results-analysis-and-trends-fiscal-year-2017>).

inspections and evaluations all reached their lowest levels in at least a decade, according to the data.²

A similar analysis by *The New York Times* also suggested that the Agency has adopted a more lenient approach to enforcement compared to the two previous administrations.³ As the *Times* noted:

During the first nine months under Mr. Pruitt's leadership, the E.P.A. started about 1,900 cases, about one-third fewer than the number under President Barack Obama's first E.P.A. director and about one-quarter fewer than under President George W. Bush's over the same time period.

In addition, the agency sought civil penalties of about \$50.4 million from polluters for cases initiated under Mr. Trump. Adjusted for inflation, that is about 39 percent of what the Obama administration sought and about 70 percent of what the Bush administration sought over the same time period.⁴

Former enforcement experts described these reductions as stark, noting "if you're not filing cases, the cop's not on the beat ... [o]r has the cop been taken off the beat?"⁵

Staff Reductions Hinder EPA's Ability to Protect the Public

We are concerned that historically low staffing levels, combined with a series of recent actions taken by EPA management, undermine the Agency's enforcement capability. Over 1,600 workers reportedly departed EPA during the first 18 months of the Trump Administration, bringing the Agency's staffing levels to an historic low.⁶

² *EPA Enforcement Actions Hit 10-year low in 2017*, NBC News (Feb. 8, 2018) (www.nbcnews.com/politics/white-house/epa-enforcement-actions-hit-10-year-low-2017-n846151).

³ *Under Trump, EPA Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, New York Times (Dec. 10, 2017) (www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html).

⁴ *Id.*

⁵ See note 3.

⁶ *With a Shrinking EPA, Trump Delivers on His Promise to Cut Government*, Washington Post (Sept. 8, 2018) (www.washingtonpost.com/national/health-science/with-a-shrinking-epa-trump-delivers-on-his-promise-to-cut-government/2018/09/08/6b058f9e-b143-11e8-a20b-5f4f84429666_story.html?utm_term=.663579406f6b).

EPA's enforcement operation has been particularly hard hit by staff departures, losing more than 100 employees in that time.⁷ Experts have warned that a staffing cut of this significance will require the Agency to reduce both enforcement and compliance efforts.⁸ As noted by the *Washington Post*:

One of the EPA divisions hardest hit by staff cuts is the Office of Enforcement and Compliance Assurance, whose numbers dipped 15.7 percent between January 2017 and August 2018. Several experts said that any cuts to that division have a major impact because the vast majority of its budget comes from personnel costs rather than grants or other expenditures.

Granta Nakayama, who headed the office from 2005 to 2009, said that it couldn't sustain that deep a staffing cut without curtailing some of its operations.⁹

Additional Political Review and Overreliance on State Enforcement Programs Could Deter Enforcement Activity

EPA recently announced a series of policies which require political appointees to review enforcement activities. Examples of enforcement announcements with review requirements include:

- A May 31, 2017 memorandum stating that EPA enforcement staff no longer have authority to require information requests under the Clean Air Act and the Resource Conservation and Recovery Act (RCRA) without first receiving approval from EPA headquarters for requests where EPA has no information that a recipient is in violation of the law; those requests which require testing or sampling; or requests in authorized or delegated states where EPA and a state are not in agreement.¹⁰
- A January 22, 2018 interim guidance memorandum requiring review by the Assistant Administrator in certain instances where EPA and a State do not agree on a particular enforcement matter.¹¹

⁷ Email from Christian Rodrick, U.S. Environmental Protection Agency, Office of Congressional Affairs to Minority Staff, House Energy and Commerce Committee and Majority Staff, House Energy and Commerce Committee (June 21, 2018).

⁸ See note 6.

⁹ See note 6.

¹⁰ U.S. Environmental Protection Agency, Memorandum from Susan Shinkman, Office of Civil Enforcement Director to EPA Regional Counsels, Regional Enforcement Directors, Regional Enforcement Coordinators, and Office of Civil Enforcement Division Directors on Interim Procedures for Issuing Information Requests Pursuant to Clean Air Act (May 31, 2017).

¹¹ U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance to Regional

- A March 23, 2018 memorandum instituting interim procedures requiring early notice to EPA political appointees of civil judicial referrals to the U.S. Department of Justice (DOJ).¹²
- An April 31, 2018 memorandum introducing interim procedures for providing early notice of civil judicial referrals under the Comprehensive Environment Response, Compensation, and Liability Act (CERCLA) to the Office of Enforcement and Compliance Assurance (OECA) Assistant Administrator.¹³

According to a recent *Washington Post* report regarding political review of referrals to DOJ:

Former enforcement officials worry the new procedures will have a chilling effect among career employees who are already worried about running afoul of an administration that is trying to roll back many environmental rules at the behest of companies the agency regulates.

George Czerniak, the former director of the air and radiation division at the EPA's Chicago office, said the new policy is a sign to potential polluters that they will face less scrutiny. "Industry will take this as a signal that the cop on the beat is relaxing a little," Czerniak said, "and I think a little bit of the deterrence that has been built up will be lost."¹⁴

We are concerned these changes could also undermine EPA's ability to ensure states are, in fact, executing their delegated authorities to ensure a consistent minimum level of protection nationwide, particularly in states which are "philosophically opposed to taking enforcement

Administrators on Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (Jan. 22, 2018).

¹² U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine Office of Enforcement and Compliance Assurance Assistant Administrator to EPA Regional Counsels, Regional Enforcement Directors, Regional Enforcement Coordinators, and Office of Civil Enforcement Division Directors Director, Deputy Director, and Division Directors on Interim Procedures for Providing Early Notice of Civil Judicial Referrals (Mar. 23, 2018).

¹³ U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine Office of Enforcement and Compliance Assurance Assistant Administrator to EPA Regional Counsels and Regional Superfund Directors on Interim Procedures for Providing Early Notice of CERCLA Civil Judicial Referrals (Apr. 31, 2018).

¹⁴ *The Energy 202: Trump Appointee at EPA to Scrutinize Which Pollution Cases May Go to Court*, *Washington Post* (June 15, 2018) (www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/06/15/the-energy-202-trump-appointee-at-epa-to-scrutinize-which-pollution-cases-may-go-to-court/5b22ee7e1b326b3967989aee/?utm_term=.351047094bb3).

action.”¹⁵ In addition, we are concerned that headquarters review will cause further delays in the enforcement process. According to Justin Pidot, former deputy solicitor for land resources at the Interior Department, “[t]he notion that this process will speed up enforcement is laughable to me ... anytime you bring in the front office, everything slows down.”¹⁶

To better understand changes the Administration made to EPA’s enforcement program, and the human health and environmental impacts of these changes, we request a briefing on these issues and that you provide the following:

1. A list of the following OECA positions at headquarters and EPA regional offices. For each, please provide position title, description, GS level, and location:
 - a. Positions vacated during the period from January 2017 to present, including the reason the position was vacated (e.g. buyout, retirement, dismissal) and current status of the position (e.g. filled by new hire, currently vacant, eliminated).
 - b. Positions created or filled from January 20, 2017 to present, through new agency hires and intra-agency hires.
2. Did EPA conduct any workforce analysis of the impact on OECA operations and enforcement activity of staff reductions and staff turnover since January 2017, current OECA staffing levels, or the Agency’s proposed reorganization of regional offices? If so, please provide this analysis.
3. Regarding the May 31, 2017 memorandum which established headquarters review prior to the issuance of certain information requests pursuant to major environmental statutes:¹⁷
 - a. How many requests for sampling, monitoring, and testing that meet the criteria of the May 31, 2017 memorandum did OECA send in FY2014, FY2015, FY2016, and FY2017?
 - b. In the period from May 31, 2017 to present:
 - i. How many requests for sampling, monitoring, and testing have been submitted to headquarters for review?

¹⁵ U.S Environmental Protection Agency, Office of Inspector General, *EPA Must Improve Oversight of State Enforcement* (Dec. 9, 2011) (Report No. 12-P-0113).

¹⁶ See note 14.

¹⁷ See note 10.

- ii. How many have headquarters reviewed and, of those reviewed, how many were approved and how many were denied?
 - c. How many information requests are currently pending headquarters review?
- 4. Regarding the March 23, 2018 memorandum instituting interim procedures requiring early notice to EPA political appointees of civil judicial referrals to DOJ:¹⁸
 - a. How many civil judicial referrals did the OECA Assistant Administrator, Regional Administrator, or other EPA political appointees receive briefings on or otherwise review, and decide not refer to DOJ? Please provide the number of civil judicial referrals to DOJ, by month, from January 2017 to present.
 - b. How many civil judicial referral recommendations are currently pending review by the OECA Assistant Administrator or Regional Administrators?
- 5. Regarding the April 31, 2018 memorandum that introduced interim procedures for providing early notice of CERCLA civil judicial referrals:¹⁹
 - a. Since the introduction of this policy, has the OECA Assistant Administrator requested additional review time of a week or greater for any CERCLA referrals going to DOJ?
 - b. Since introduction of this policy, has the OECA Assistant Administrator or any other EPA political appointee prevented referrals from going to DOJ?
- 6. With respect to the January 22, 2018 interim guidance memorandum:²⁰
 - a. Which state enforcement officials are eligible to raise disagreements that require elevating issues to the OECA Assistant Administrator under this policy? Is this power limited to certain positions?
 - b. The memorandum imposed a September 28, 2018 deadline for regions to provide OECA with a progress report on work following this interim guidance, including their views on how well it is working and areas for improvement. We request a copy of all progress reports.
 - c. Under this policy, are EPA enforcement officials authorized to independently decide to no longer pursue an enforcement issue even if a state disagrees? Or does this policy require EPA enforcement officials to elevate to the OECA

¹⁸ See note 12.

¹⁹ See note 13.

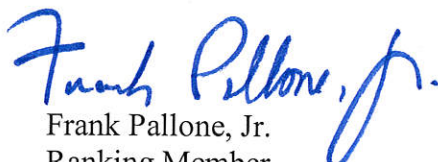
²⁰ See note 11.

Assistant Administrator the decision to no longer pursue the enforcement issue?


7. For each consent decree under the Clean Air Act, Safe Drinking Water Act, CERCLA, and RCRA revised by EPA from January 20, 2017 to present:
 - a. Please explain which EPA political appointees participated in EPA's decision to authorize the revisions.
 - b. For each revised consent decree, does the Agency calculate the anticipated emissions impacts of the revised consent decree compared to the consent decree before revisions? If so, please explain the anticipated emissions impacts for each revised consent decree compared to that consent decree before revision.

Thank you in advance for your prompt and full attention to this request. Please respond to this inquiry as soon as possible, but no later than December 20, 2018. Should you have any questions, please contact Jon Monger with the Democratic Committee staff at (202) 225-3641.

Sincerely,


Frank Pallone, Jr.
Ranking Member


Paul D. Tonko
Ranking Member
Subcommittee on Environment


Diana DeGette
Ranking Member
Subcommittee on Oversight
and Investigations