

COMMENTARY

ENVIRONMENTAL LAW

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Government Enforcement in a Time of Budget Constraints

On Nov. 19, the U.S. Environmental Protection Agency released a discussion draft of the fiscal year 2014-18 EPA strategic plan for public comment. In the document, the EPA proposes to reduce substantially the level of effort that it expends on enforcement of the environmental laws. It does not, however, propose to scope the reach of environmental laws to match the available enforcement resources, and it probably could not legally or practically do that. This strategy leaves us either with no one enforcing some environmental requirements or, more troublingly, someone other than the government doing so. Maybe that is what Congress and the Obama administration want, but I question whether it is a good idea.

The EPA issues a strategic plan as a broad budget document. Budgets are, of course, policy statements, and so this is an outline of where the EPA expects its policy focus to be for the remainder of this administration and into the next. You can read this draft at <http://1.usa.gov/1fZupls>.

The draft strategic plan identifies five strategic goals:

- Addressing climate change and improving air quality.
- Protecting America's waters.
- Cleaning up communities and advancing sustainable development.
- Ensuring the safety of chemicals and preventing pollution.
- Protecting human health and the environment by enforcing laws and assuring compliance.

However, the draft describes an intention to reduce the rate of EPA enforcement inspections from more than 20,000 to about 14,000 per year. The EPA intends to bring enforcement cases at a rate of about 2,320 per year, even though it has averaged 3,900 cases over the past five years and brought 3,000 in fiscal year 2012.

This reduction in enforcement effort reflects two realities. First, the EPA's budget faces overall cuts, as is true generally of non-defense, non-entitlement programs. Second, enforcement draws very focused political opposition. Environmental protection is all well and good for many people, until they have to change what they or their

employer are doing as the result of an enforcement action.

The EPA believes it can achieve some efficiencies in enforcement through better use of information technology—what it is calling “next-generation compliance strategies.” But knowing that a facility is out of compliance and doing something about it are two different things.

In reality, this strategy, if implemented, would amount to an attempt to outsource some enforcement from the EPA and the Department of Justice to states and private environmental groups. But because most states suffer from budget strictures every bit as tight as the federal government, non-governmental organizations, not states, are most likely to fill the gap created by a reduced federal enforcement effort.

Those following Pennsylvania news may think I have this wrong. Recently, after XTO Energy entered into a settlement with the EPA purporting to resolve federal claims arising from a discharge of waste water from natural gas production, the state brought a criminal indictment arising from the same incident. That is a single case. Overall, the Pennsylvania Department of Environmental Protection has very thin enforcement resources, as do most states.

NGOs have a right to sue under the citizen suit provisions of most environmental statutes, provided that the state or federal government has not brought or is not diligently prosecuting an enforcement action. In this way, government enforcement blocks private enforcement.

The policy objectives of the enforcing entity make a difference not only in which cases get brought but also in how they get resolved. What you think will count as a “cleanup” or a “fix” to an environmental problem will vary depending on who you are and what you care about. How much you care about deterrence or “punishing evil” will also differ from person to person and organization to organization.

Governmental organizations have different policy agendas than NGOs. Indeed, many environmental NGOs have relatively narrow agendas. Environmental groups are often organized around a single resource. You may have encountered many “friends of” organizations in your practice or in your personal life. The Friends of XYZ Park are

interested in preserving and enhancing XYZ Park, and they really do not have a charter to consider other environmental or non-environmental interests.

Such organizations need not be small. Some large resources—the Chesapeake Bay or the Delaware River, to pick two high-profile examples—have at least one private NGO devoted to their protection. But that NGO does not usually seek to optimize environmental protection across resources (this river versus that river), across media (water quality versus air quality), or against other values (this river versus environmental justice or economic development). An NGO focused on the individual resource may be extremely important to achieving environmental quality goals for the resource, but it is a single resource.

The single-focus NGO seeks to maximize the quality of the individual resource, perhaps even at the expense of some other resource. Excluding development from the vicinity of the resource furthers the single-purpose NGO's objective. Excluding development generally doesn't serve the purposes of most people, especially the people who live in the non-development area. It will not further the objectives of those most interested in the resources affected by development in the location to which it is displaced.

But that sort of trade-off inheres in typical federal enforcement. Indeed, if you look carefully at the EPA's priorities, some of them are in obvious tension. Conventional environmental regulation under the Clean Water Act and the Clean Air Act, for example, provides incentives to space similar uses apart. Too many air pollution sources too close together will cause a violation of the national ambient air quality standards. Too many water sources on the same waterway may cause degradation below the applicable water quality standards. However, putting uses together in a more compact footprint may promote climate change mitigation or sustainable development. Industrial zones may promote more efficient transportation and may reduce the overall impact of industrial activity. Locating those industrial uses on brownfield sites may be even more desirable from the perspective of minimizing overall environmental impact. But brownfield reuse may come into tension

with a concern over inequitable impacts in environmental justice communities.

Single-focus NGOs may serve an important purpose; however, they do not really represent a broad public policy perspective. One would not want to entrust environmental policy generally to single-focus entities any more than one would want to entrust it to private businesses. One would not want single-focus NGOs resolving these tensions.

Moreover, you probably would not want generally focused environmental NGOs resolving tensions between environmental and other spending. Whether you believe that spending by business and government on environmental protection helps the economy or hurts it, that spending certainly changes the mix of goods and services produced. If the government insists that billions be spent to clean up contaminated sediment in old industrial waterways, we will make more dredging and capping services and less of everything else. If the government insists that local governments spend at a faster rate to correct combined sewer overflows or to control municipal separate storm sewer discharges, they will have less available for other things.

There is probably some maximum amount that the United States is prepared to spend on environmental protection in any given year, whether from public or private sources. People will disagree over what that amount is. Political processes usually answer that question. It is not clear that NGOs have the ability to make trade-offs between aggressive enforcement that will call for rapid environmental protection spending and other values.

Relying on private enforcement raises other issues of settlement and preclusion. If an NGO brings a citizen suit, it has different incentives to settle than does the government. More importantly, a settlement with the NGO plaintiff may not preclude the government or another private plaintiff from bringing the same claim; some would say that it does, but there is disagreement. Accordingly, the defendant faces markedly different incentives to settle. Relying on private enforcement may push more cases to a judgment.

The EPA's strategic plan heeds a directive from the Obama administration and Congress to scale back the EPA's efforts. However, imposing obligations that the government cannot enforce and then relegating enforcement to private parties seems like a poor policy idea, no matter your politics. The EPA will receive comments until Jan. 3, 2014. •

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