

Pace Environmental Law Review

Volume 32
Issue 2 *Reconceptualizing the Future of
Environmental Law*
Spring 2015

Article 6

April 2015

Environmental Law in Austerity

James Salzman
Duke University

J.B. Ruhl
Vanderbilt Law School

Jonathan Remy Nash
Emory University School of Law

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>



Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

James Salzman, J.B. Ruhl, and Jonathan Remy Nash, *Environmental Law in Austerity*, 32 Pace Envtl. L. Rev. 481 (2015)

DOI: <https://doi.org/10.58948/0738-6206.1768>

Available at: <https://digitalcommons.pace.edu/pelr/vol32/iss2/6>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

ARTICLE

Environmental Law in Austerity

JAMES SALZMAN,* J.B. RUHL,** AND JONATHAN REMY NASH***

The EPA has always had enemies. Vigorously denouncing EPA's activities as "overzealous," "job killing," or a "regulatory train wreck" has become commonplace on the campaign trail and from special interest groups covered by the agency's reach.¹ Perhaps this is to be expected, since EPA's regulations influence a remarkably wide range of activities throughout the country. The agency, though, has been subject to far more than just harsh rhetoric.

Over the past three decades, there have been concerted efforts in Congress to restrain the EPA both by legislation and, less directly, by reducing its resources. Crippling amendments have largely failed but efforts to restrict budgets and personnel have been far more successful. Consider, for example, a description of Congress' most recent EPA budget by the Center for Effective Government:

* Samuel Fox Mordecai Professor of Law, Nicholas Institute Professor of Environmental Policy, Duke University. We are grateful for the research assistance of Daniel Stockton and the comments of Joel Mintz.

** David Daniels Allen Distinguished Chair of Law, Vanderbilt Law School.

*** Professor of Law and David J. Bederman Research Professor (2014-15), Emory University School of Law.

1. Ruth Marcus, *Bad Science Around "Job-Killing Regulations,"* WASH. POST, Apr. 24, 2012, http://www.washingtonpost.com/opinions/bad-science-around-job-killing-regulations/2012/04/24/gIARQQTfT_story.html, archived at <http://perma.cc/SR8Z-ECKR>; Press Release, America's Power, Exposing the Truth Behind EPA Regulations (Nov. 17, 2014), available at <http://www.americaspower.org/exposing-truth-behind-epa-regulations>, archived at <http://perma.cc/W3YS-UVB8>; *EPA's Regulatory Train Wreck*, AM. LEGIS. EXCH. COUNCIL, <http://www.alec.org/initiatives/epas-regulatory-train-wreck/> (last visited Apr. 20, 2015), archived at <http://perma.cc/6PCT-UVSP>.

In a continuing effort to dismantle the ability of the [EPA] to protect public health and the environment, Congress is poised to adopt a fiscal year 2015 budget that would reduce the agency's funding for the fifth year in a row. The \$60 million cut in EPA's budget, which builds on previous reductions, will bring the agency's staffing to its lowest level since 1989. These funding cuts are not surprising, given that anti-regulatory forces in Congress have made clear their intent to use the budget process to block EPA's work.²

NRDC similarly decried the budget reductions in 2011 as "a contract on America masquerading as a spending bill. It's nothing short of a declaration of war on our most basic health protections. It would do away with fundamental safeguards that keep our air, water and lands clean."³ Nor has the pressure to limit EPA's resources only come from Capital Hill. The Obama administration acquiesced to significant personnel cuts in 2013 and 2014.⁴

Chart 1 on the next page, which is drawn from EPA data, presents how the EPA's budget (left axis, expressed in billions of dollars) and the EPA's workforce (right axis) have varied over time.⁵ Looking at the numbers since 1990, the last time a major environmental law was enacted, tells an interesting story. With the exception of the last two years when there were significant reductions, the workforce has remained roughly flat. Overall,

2. Ronald White, *Congress Slashes EPA Budget Again Despite Strong Public Support for Strengthening Health Protections*, CTR. FOR EFFECTIVE GOV'T (Dec. 12, 2014), <http://www.foreffectivegov.org/blog/congress-slashes-epa-budget-again-despite-strong-public-support-strengthening-health-protection>, archived at <http://perma.cc/3WAM-65WK>.

3. Press Release, Natural Resources Defense Council, House Panel's Spending Bill Threatens Public Health Protections (July 6, 2011), available at <http://www.nrdc.org/media/2011/110706.asp>, archived at <http://perma.cc/D7W8-UDKQ>.

4. See Andy Amici, *Government Cuts 84,500 Federal Employees in Three Years*, FEDERAL TIMES (Jan. 20, 2015, 2:44 PM), <http://www.federaltimes.com/story/government/management/agency/2015/01/20/agencies-cut-feds/22012321/>, archived at <http://perma.cc/M49B-NKC7>.

5. See *Planning, Budget, and Results*, EPA, <http://www.epa.gov/planandbudget/budget> (last updated Feb. 2, 2015), archived at <http://perma.cc/3WAL-W2BC> (last visited Mar. 11, 2015); U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com/> (last visited Mar. 11, 2015), archived at <http://perma.cc/YQV6-YAZP>.

2015] *ENVIRONMENTAL LAW IN AUSTERITY* 483

EPA has faced a static or slightly declining level of total resources.⁶

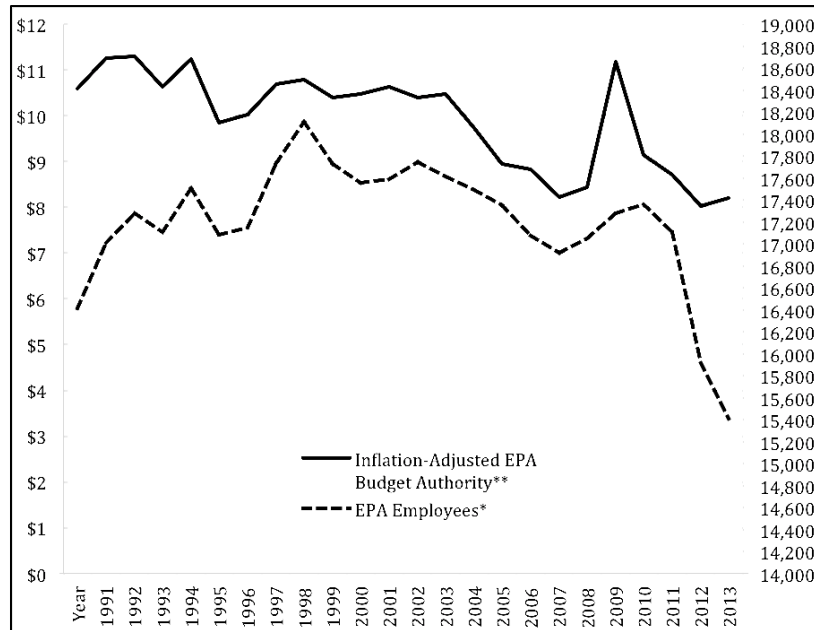


Chart 1 – EPA Workforce and Budget

In real terms, however, this represents a reduction. In addition to the increased cost of employees, the scope of EPA's responsibilities has significantly increased. Over the years, the EPA has regulated an ever larger number of sources in a much larger economy, dealt with new issues such as greenhouse gases and endocrine disruptors, as well managed its longstanding obligations to protect the environment and public health in an era of increasing complexity and procedural requirements for rulemaking.

Given the political dynamic in play at the national level, with the country evenly split between Republicans and Democrats, and incumbent Tea Party and other politicians highly critical of the

6. Mason Inman, *Removing the Baseline*, 1 NATURE CLIMATE CHANGE 430 (2011).

EPA, there is no reason to think this trend in decreasing environmental budgets will change any time soon. In some states the trend is even more pronounced.⁷

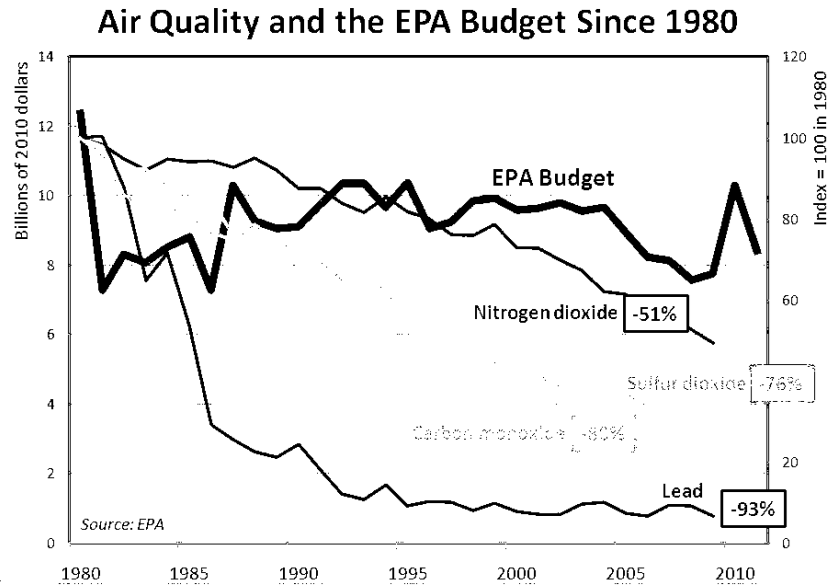
Fiscal austerity has become the new norm. The interesting questions are whether this matters for environmental law, how it matters, and what it means going forward.

One possible scenario seems obvious. Reduced resources for EPA means reduced environmental protection and reduced environmental quality. The connections are easy to draw – fewer personnel and inspections mean reduced compliance monitoring, fewer enforcement actions with less deterrent effect, and more violations that harm the environment. It means fewer resources for permitting, drafting new regulations, and revising existing regulations. In all, not a pretty picture. One can well understand the concerns expressed by NRDC and the Center for Effective Government. One might call this future one of “Doing less with less.”

There is, of course, another perspective. Those defending sequestration and budget cuts defend their actions as trimming fat from the bureaucracy, forcing agencies to do “more with less.” This was one of the central themes behind the butcher’s cleaver strategy of sequestration—cutting equal amounts from all agencies. Terry Anderson, for example, has argued that “increasing the EPA’s budget, as the Obama administration has proposed, will only increase bureaucracy, not air quality.”⁸ As demonstrated in Chart 2 on the next page, Anderson contrasts Chart 1 of EPA’s inflation-adjusted budget with measures of air quality. The budget line looks similar to the previous chart. But the overall picture shows declining pollution, not what one might expect from the “Doing less with less” dystopia. Indeed, this seems strong evidence for a “Doing *more* with less” scenario.

7. STEVEN BROWN, STATUS OF STATE ENVIRONMENTAL AGENCY BUDGETS 3 (2012), available at <https://dl.dropboxusercontent.com/u/41680992/September%202012%20Green%20Report.pdf>, archived at <http://perma.cc/SB6G-792E>.

8. Terry Anderson, *EPA Budget Cuts: Reducing Bureaucracy, Not Environmental Quality*, THE PERC BLOG, <http://perc.org/blog/epa-budget-cuts-reducing-bureaucracy-not-environmental-quality#sthash.vT4i3Ayx.dpuf> (last visited Mar. 11, 2015), archived at <http://perma.cc/8SWW-L4ZQ>.

Chart 1 – Air Quality and EPA Budget⁹

In fact, the interrelationships between EPA resources, environmental protection activities, and environmental quality are far from straightforward. In the extreme, of course, dramatic cuts in funding will likely harm the environment, but what about marginal reductions over time? Do greater EPA resources actually lead to greater environmental protection efforts? And to what extent do these efforts lead to improved environmental quality in the field? Is the converse true, with reduced resources causing poorer environmental quality? These are empirical questions that belie easy answers. It is possible, after all, that the improvements in air quality shown above may be attributed as much to path dependency as to dedicated EPA resources. And what about the role played by non-state actors in the role of citizen suits or industry codes of conduct?

The three of us are engaged in a larger research project trying to gain insights into these interrelationships as well as their implications for environmental law. In the next few pages, we work off the assumption that EPA's fiscal austerity will

9. *Id.*

continue or grow even more extreme, suggesting how this might lead to specific changes in the fields of enforcement, compliance monitoring, permitting, and regulation. We explore the different ways fiscal austerity has influenced EPA and how this might continue to shape what environmental law and protection look like in the decades to come.

Will this result in a future of EPA Doing more with less, Doing less with less, or perhaps Doing different with less?

I. ENFORCEMENT

Joel Mintz and others have written persuasively on the dangers posed by reducing enforcement budgets. As he has concluded, “any form of budget cutting in EPA’s severely understaffed enforcement program is likely to have an adverse effect on the robustness and effectiveness of the Agency’s critical enforcement work.”¹⁰ Nor is the impact felt only in staffing. Reduced budgets also affect data management capacity. According to the Center for Effective Government, the EPA’s strategic plan calls for a 40-50% reduction in inspection and enforcement cases.¹¹ How might we expect environmental law in practice to adapt?

An obvious approach involves greater reliance on others who can contribute their resources. The EPA, for example, may cede or encourage a greater role to states. State environmental agencies, though, are equally under budget pressure. A more likely route would involve non-state actors. EPA could encourage greater use of citizen suits (though, of course, brought against polluters rather than against the agency). The Endangered Species Act and Act to Prevent Pollution from Ships currently

10. Joel Mintz, *Cutting EPA’s Enforcement Budget: What It Might Mean*, CENTER FOR PROGRESSIVE REFORM BLOG (Apr. 12, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=A6A2E941-98B3-8007-9CEE42458BED78E>, archived at <http://perma.cc/6DSX-6T98>.

11. Ronald White, *Congress Slashes EPA Budget Again Despite Strong Public Support for Strengthening Health Protections*, CENTER FOR EFFECTIVE GOV’T (Dec. 12, 2014), <http://www.foreffectivegov.org/blog/congress-slashes-epa-budget-again-despite-strong-public-support-strengthening-health-protection>, archived at <http://perma.cc/EF99-BRNJ>.

offer bounty provisions for successful actions in court.¹² This could be extended to other statutes, as well.

More strategically, EPA could shift its enforcement emphasis from specific deterrence (changing the behavior of the individual charged) to general deterrence (influencing the regulated community). To some extent, EPA already does this through high-profile litigation. As a general practice, however, EPA has not publicized most of its non-trivial enforcement actions.¹³ In the future, one might envision fewer enforcement cases but brought against larger and more visible targets for more egregious violations. While this might, as some fear, lead to greater noncompliance by small sources, it is an empirical question whether this would actually lead to significant deterioration of environmental quality.

II. COMPLIANCE MONITORING

Dan Esty, Melissa Scanlan, and others have written about the potential for “smart” technologies to transform how agencies gather information from the regulated community.¹⁴ Fewer inspectors need not mean less rigorous compliance monitoring. The advent of low-cost, tamper-proof, real-time monitors that regularly transmit data to regulators holds great promise, as do remote sensing technologies.¹⁵ One could imagine in the not too distant future, for example, greater reliance on drones for collecting air quality data or biomarkers to track effluent

12. Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2012); *see generally* Act to Prevent Pollution from Ships, 33 U.S.C. § 1908 (2012).

13. Joel Mintz, *Shaping Next Generation Compliance at EPA: Lessons from the Agency's Past and Some Post-Workshop Thoughts*, in NEXT GENERATION ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 327, 323-39 (Leroy C. Paddock & Jessica A. Wentz, eds., 2014).

14. *See* Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115 (2004); Melissa Scanlan & Stephanie Tai, *Marginalized Monitoring: Adaptively Managing Urban Stormwater*, 31 UCLA J. ENVTL. L. & POL'Y 1 (2013). *See also* Dave Owen, *Mapping, Modeling, and the Fragmentation of Environmental Law*, 2013 UTAH L. REV. 219 (2013) (discussing how major advances in electronic mapping and spatially explicit, computer-based simulation modeling are transforming how researchers conceptualize environmental systems).

15. Esty, *supra* note 14, at 118, 160.

discharges to specific polluters. There is already a product in development for fracking that does just this.¹⁶

Compliance monitoring and enforcement are, of course, interconnected. Better monitoring of violations makes enforcement much easier. As Linda Breggin has described, developments in big data of compliance also could promote more effective enforcement activities.¹⁷

The problem, of course, is that EPA's fiscal austerity may well prevent it from investing in either advanced monitoring technologies or big data computing capacity. Moreover, if there is little prospect of EPA purchasing such equipment, there is little incentive for entrepreneurs to develop these technologies.

This leads to the final potential implication of austerity in compliance monitoring—shifting ever-more costs onto regulated parties. EPA could, for example, create a significant market signal by requiring regulated parties to adopt state-of-the-art monitoring technologies. This would have little impact on the agency budget while sending market signals that could drive a new generation of monitoring technology.

III. PERMITTING

And what of permitting? Reduced EPA resources suggest that permitting will take longer. One might also expect EPA to shift more permitting authority and responsibility to states. The challenge here is the same as with monitoring and enforcement—states operate in a similarly austere fiscal environment.

There are possible structural adaptations that could emerge. One would involve greater reliance on the use of general permits. As Eric Biber and J.B. Ruhl have explained, expanded use of general permits creates opportunities for adaptive management and can significantly streamline costs.¹⁸ A similar strategy might

16. See James Salzman & Martin Doyle, *Turning the World Upside Down: How Frames of Reference Shape Environmental Law*, 44 ENVTL. L. 1, 24 (2014) (discussing Base Trace).

17. LINDA K. BREGGIN & JUDITH AMSALEM, ENVIRONMENTAL LAW INSTITUTE, *BIG DATA AND ENVIRONMENTAL PROTECTION: AN INITIAL SURVEY OF PUBLIC AND PRIVATE INITIATIVES* 3 (2014).

18. See Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Permitting in the Regulatory State*, 64 DUKE L.J. 133, 230 (2014).

2015] *ENVIRONMENTAL LAW IN AUSTERITY* 489

rely on greater programmatic scale permitting and planning as is currently seen in NEPA through tiering.

IV. REGULATIONS

We would expect tight resources to result in fewer regulations being written, particularly given the added costs imposed by statute and executive orders for cost benefit analyses, risk assessments, impacts on small businesses, etc. Interestingly, measured in terms of the number of rules published in the Federal Register, this has not been evident. According to the Americans for Competitive Enterprise, a deregulatory think tank, apart from the drop in 2012-2013 that the authors attribute to a decrease in regulatory activity in the run-up to the 2012 election, EPA regulations have not noticeably been declining, as demonstrated in Chart 3 below.¹⁹

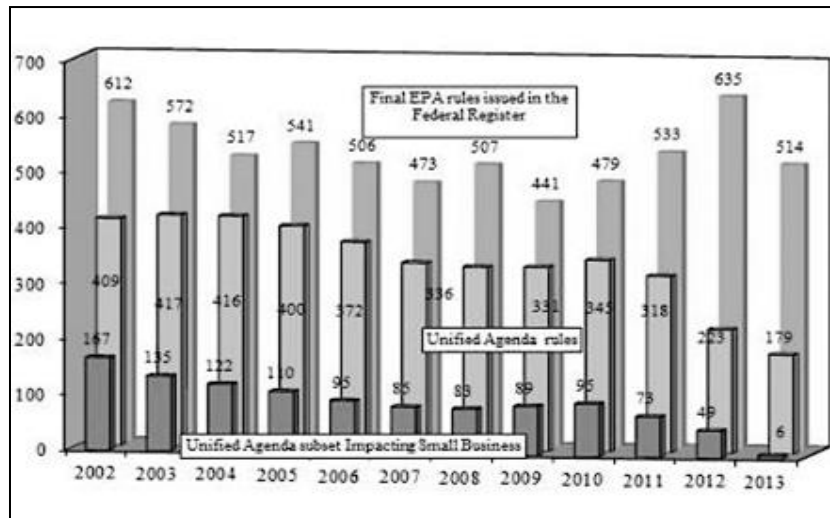


Chart 2 – EPA Regulations Trends²⁰

19. See generally Clyde Wayne Crews, *Red Tapeworm 2014: Environmental Protection Agency Regulations Declining? Don't Bet on It*, AMERICANS FOR COMPETITIVE ENTERPRISE (Sept. 23, 2014), <http://freedomaction.org/2014/09/red-tapeworm-2014-are-environmental-protection-agency-regulations-declining-dont-bet-on-it/>, archived at <http://perma.cc/7LYJ-76X6>.

20. *Id.*

How might we expect to see regulation adapt to an era of fiscal austerity? The agency necessarily will need to prioritize and triage, focusing their rulemaking resources on the most important rules. We may already see aspects of this with the proposed rules for the definition of Waters of the United States and the greenhouse gas regulations under the Clean Air Act. A related strategy might rely more on guidance documents and nonlegislative rules that avoid the additional analyses and costs of notice-and-comment rulemaking.

There may also be more incorporation by reference of private standards, passing the costs of standard-setting to other actors. Michael Vandenberg has provided many examples of private certification systems, for example, effectively acting as regulations through supply chains and enforced by large retailers such as Walmart and Home Depot.²¹ The key question, of course, is to what extent such private standards should complement rather than replace binding regulatory standards.

In tandem with fewer new rules, we would also expect to see fewer revisions of current rules reflecting either improvements in best available technologies or research indicating that current ambient levels, for example, pose a threat to public health and need to be lowered.

V. CONCLUSION

By no means do we think that EPA's continuing fiscal austerity is necessarily a good thing. Much of the motivation behind these efforts clearly comes from industries and their allies who simply wish to reduce their costs of operation and could not care less whether the future is one of Doing more with less or Doing less with less. That said, the relationship between agency resources and environmental quality is complicated and has not been adequately examined in the literature.

In the months ahead, we intend to explore not just whether agency resources matter—of course they do—but which resources matter and why.

21. Michael P. Vandenberg, David Daniels Allen Distinguished Chair of Law, Director, Climate Change Research Network, Vanderbilt Law School, Keynote Address at Pace Environmental Law Review Symposium: Reconceptualizing the Future of Environmental Law (Mar. 20, 2015) (transcript on file with Pace Law School), *available at* <http://www.law.pace.edu/symposium-reconceptualizing-future-environmental-law>, *archived at* <http://perma.cc/YG2E-RH7D>.

2015] *ENVIRONMENTAL LAW IN AUSTERITY* 491

Which aspects of environmental quality are most at risk from reduced EPA activity and which are less vulnerable to backsliding? How will the likely adaptations of EPA to fiscal austerity influence environmental quality? And, what have been the consequences of EPA's adaptations to date? These are important, unresolved questions. They warrant further study for they bear directly on the future of our environment in the continuing era of fiscal austerity.