10-2004 34 ELR 10933

ELR
NEWS & ANALYSIS

"Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration

by Joel A. Mintz

In the public mind, vigorous, effective enforcement of environmental laws has consistently been seen as a crucial prerequisite to the protection of environmental values and public health. Since the inception of the U.S. Environmental Protection Agency (EPA) in 1970, the Agency has scored political points with the public when its enforcement efforts were viewed as robust, assertive, and evenhanded.[1] Conversely, public perceptions that EPA enforcement was lackluster, inconsistent, or subject to unfair political manipulation or favoritism, have often resulted in public anger, dismay, and criticism.[2] As Peter Yeager has observed:

> [E]nforcement is the centerpiece of regulation, the visible hand of the state reaching into society to correct wrongs. . . . Both symbolically and practically, enforcement is a capstone, a final indicator of the state's seriousness of purpose and a key determinant of the barrier between compliance and lawlessness.[3]

This Article is a preliminary attempt to examine the strengths and shortcomings of enforcement at EPA during the first term of the Administration of President George W. Bush (the Bush II Administration). In various respects—both substantive and methodological—the Article is a follow-up to my 1995 monograph, *Enforcement at the EPA: High Stakes and Hard Choices*,[4] in which I surveyed the major trends, events, and developments in EPA enforcement from the Agency's beginnings through the Administration of President George H.W. Bush (the Bush I Administration). In that work I also focused on some larger questions of congressional oversight, partisan politics, and measurements of program success, questions that arose from and were closely related to EPA's enforcement efforts.

After a brief summary of the research methods that I have employed herein, and a quick overview of the major trends in EPA enforcement during the Administration of President William J. Clinton, this Article begins with a description of certain events in the opening months of the Bush II Administration that EPA's permanent career staff viewed as a set of "signals" that enforcement was being de-valued and deemphasized at the Agency. The Article then treats the well-publicized and highly contentious effort by the Bush II Administrator to "reform" EPA's new source review (NSR) regulations. It assays the impact of that ill-timed, heavy-handed attempt at regulatory change, both generally and on an already ongoing large-scale EPA enforcement initiative against fossil fuel-fired electric utilities regarding violations of NSR standards.

From the NSR reforms and their implications, I shall turn to a number of other tendencies, trends, and constraints in EPA enforcement in the Bush II era. These range from continuing enforcement resource and budgetary limitations to official secretiveness, intra-Agency perceptions of enforcement politicization, declines in staff morale, and decreased levels of enforcement activities in various categories. I will also describe some institutional enforcement relationships, e.g., between EPA headquarters and regions, EPA enforcement attorneys and technical staff and the Agency and states, the U.S. Department of Justice (DOJ), the U.S. Congress, and other entities, as they have evolved during the Bush II period to date.

Another focus of this Article is the brief, contentious tenure of J.P. Suarez as EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA). I will consider Suarez's Smart Enforcement Initiative, and some of the controversies and institutional rivalries in which he became embroiled, as Suarez attempted, against stubborn internal resistance, to pursue a traditional, deterrent EPA enforcement approach. I will also assess some key events of the middle and later portions of the Bush II era, including the resignations of former Gov. Christine Todd Whitman (R-N.Y.) as EPA Administrator and of Suarez as OECA Assistant Administrator, the nomination and confirmation of Gov. Michael Leavitt (R-Utah) as EPA's new Administrator, and the installation of Region V Regional Administrator Tom Skinner as acting Assistant Administrator for the OECA.

Finally, I will consider what (if anything) EPA's enforcement record in the first term of the Bush II period can tell us about how assertively EPA will go about enforcing environmental laws if there is a second Bush II term; and I will discuss some challenges and some choices that the Bush II EPA enforcement record to date may well necessitate, in the event of a victory by Sen. John Kerry (D-Mass.) in the coming presidential election, for a new set of managers in EPA's enforcement program.

Professor of Law, Nova Southeastern University Law Center and Member Scholar, Center for Progressive Regulation; B.A., Columbia University; J.D., New York University School of Law; LL.M., Columbia Law School; J.S.D., Columbia Law School. The author gratefully acknowledges the Nova Southeastern University President's Faculty Scholarship Award that financed most of the costs of the research he did for this Article. He also wishes to thank his friends, Gail and Bob Ginsberg, Rana Segal, Mike Smith, and Noël and Roger Wise, for their gracious and kind hospitality in inviting him to stay in their homes as a guest during his research travels around the country.

1. Joel A. Mintz, Enforcement at the EPA: High Stakes and Hard Choices chs. 1 and 3 (University of Texas Press 1995).
2. *Id.* ch. 4.
3. Peter C. Yeager, The Limits of Law: The Public Regulation of Private Pollution 251 (1990).
4. Mintz, *supra* note 1.

I. Introduction—A Word on Methodology

In preparing this Article, I followed a research methodology that was substantially patterned on the methodological approach that I took in researching and writing *Enforcement at the EPA*. Specifically, I reviewed the body of academic literature that concerns EPA enforcement in the past three and one-half years, EPA enforcement policy documents prepared in the same period, and a variety of other EPA files and records of enforcement activities. I also examined pertinent newspaper and trade journal articles and other summary materials.

During the spring of 2003, and the winter and spring of 2004, I interviewed, in person, 55 present and former government officials, from EPA and the DOJ, to obtain their recollections of the critical trends, developments, and events in EPA enforcement in the Clinton and Bush II Administrations.[5] I questioned these individuals as well with respect to the various sets of intragovernmental and intergovernmental relationships that exist in the federal enforcement field.

I selected my interviewees on the basis of the breadth of their experience in the federal government and the likelihood that they would have been involved in or knowledgeable about EPA hazardous waste enforcement. I sought interviews with present and former officials who had diverse professional backgrounds and perspectives. For the most part, respondents held top-level or mid-level managerial positions with EPA or were attorneys or scientists and technical experts on the Agency's enforcement staff.

Because of the importance of EPA's regional offices in implementing the Agency's enforcement program, I conducted interviews with present and former officials in EPA Regions II (New York), V (Chicago), and IX (San Francisco), as well as in the Agency's headquarters office in Washington, D.C. I also held interviews with upper-level and mid-level managers and attorneys in the DOJ's Washington, D.C., headquarters.[6]

Regardless of their past or present institutional affiliations, I asked respondents a standard set of questions, which was furnished to them in advance whenever possible, along with a brief description of the purposes for and methods in the study.[7] I asked most respondents all of the questions. In a few isolated instances, the respondent completed only portions of the standard interview, due to limitations of time or circumstances, or because the interviewee's pertinent views had elsewhere been made part of the public record. I did not omit any items from the standard set of questions—in any interview—because of the actual [or perceived] political preferences of the interviewee.

To avoid losing the complexity of the respondents' perceptions and attitudes, I posed open-ended questions. In addition to the questions included in the standard interview format, I frequently asked spontaneous follow-up questions.

In order to encourage candor and comprehensiveness in the comments I received, I offered all interviewees the option of speaking with me "off the record," in the sense that I would refrain from quoting them by name or attributing their remarks to them directly. Approximately one-third of those I spoke with elected to do so "on the record." The rest of my interviewees, however, asked that I obtain their permission before quoting them or attributing their remarks to them directly. I have attempted to honor that commitment in all instances.

One methodological issue which again arose in the course of my research concerned the relative weight to be given the results of my interviews with present and former government officials, as compared with primary documents written during the period of this study. I have on balance tended to place more emphasis on the comments gathered from participants in (or government observers of) EPA's enforcement efforts. Where these comments contradict one another or contemporary written documents I have noted that fact.

Emphasis on the results of oral interviews stems, in part, from impressions formed during my own professional work with EPA. In particular, during my own time in the Agency from 1975 to 1981, I learned firsthand that a great many documents on enforcement policies, guidances, and other matters generated by the managers at the Agency's headquarters, are drafted with the overriding goal of winning the political support of one or more constituencies. Such constituencies may include other officials within the executive branch, congressional committees and their staffs, environmental organizations, regulated industries, and state and local government officials. Although such primary EPA documents are not devoid of historical significance, I believe that relying on them too heavily would be analogous to making judgments about the efforts and products of a private enterprise based solely on its public advertising. In contrast, in my judgment the interviews I conducted provide a less distorted picture of the most significant trends, developments, and events in EPA's enforcement history.

II. A Brief Overview of EPA Enforcement During the Clinton Administration

In order to place developments in EPA enforcement during the current Administration in proper context, one must first comprehend at least some of the most important trends and events in the Agency's enforcement work during the Clinton Administration (from 1993 to 2000). This section of this Article, while far from a complete compendium, provides at least a partial description of EPA's enforcement efforts as they evolved over that eight-year period.

In fact, the 1990s were a time of both continuity and change in EPA's enforcement work. EPA's political appointees most directly involved with enforcement in that era, Administrator Carol Browner and Assistant Administrator Steve Herman, served for nearly all of the eight years of the Clinton Administration, a fact that lent relative internal stability and continuity to the Agency's enforcement work. Although not without their shortcomings, these two EPA managers were generally associated with a vigorous enforcement approach that was free from outside political influence. They publicized the initiation and the outcomes of im-

5. I am currently at work on a separate article regarding EPA enforcement in the Clinton Administration which I am hoping to publish next spring. My initial plan was to publish that piece of writing prior to publishing this Article. At the conclusion of my research, however, I found that I had too much material in hand with respect to the Clinton period to complete an article regarding it before returning to my law school teaching assignment this fall. In contrast, this Article could be (and obviously was) completed in the limited, uninterrupted "writing time" that was available to me.

6. *See* Appendix A (interview list).

7. *See* Appendix B (standard questions).

portant enforcement cases, battled successfully with Congress (especially from the beginning of 1995) for continued Agency survival and reasonable funding levels for EPA, and introduced a new and useful set of environmentally outcome-based measures of enforcement success. They also initiated an effective set of nationally led "sector-based enforcement initiatives" against entire industries and multi-facility companies, fought state efforts to allow forms of amnesty to environmental violators, reformed the Superfund program, and increased the size and effectiveness of the Agency's criminal enforcement program.

At the same time, however, not all aspects of EPA enforcement in the 1990s was an improvement or a success. From the mid-1990s on, EPA faced a series of continuing (and partially camouflaged) budget decreases that gradually diminished the critical enforcement "extramural budget," which the Agency's headquarters and regional offices use to pay for vital support for case development. Although the Clinton Administration took the bold and useful step of reorganizing the Agency to create a larger, more centralized headquarters of the OECA, the implementation of that reorganization was unnecessarily slow, chaotic, and incomplete. It brought on a period of intensified interoffice rivalry, especially at EPA headquarters, which better planning and more careful follow through might have averted.

EPA experienced heightened frictions with many individual states and with the Environmental Council of States (ECOS) in this period. Clinton's appointees implemented centrally imposed managerial changes, under the rubric of "reinvention of government," that unintentionally magnified dissatisfaction among the "rank and file" enforcement staff. They also missed some opportunities for regulatory improvements, drafted certain new, opaque regulations that created needless problems of "enforceability," and faced an almost continued threat that Congress would weaken or overturn, by amendment, basic environmental legislation that EPA administered.

As one former EPA attorney with a fondness for Charles Dickens described it: "EPA enforcement in the Clinton [A]dministration was neither the best of times nor the worst of times." Nonetheless, particularly toward the end of President Clinton's second term, the Agency's enforcement efforts appeared to be moving ahead reasonably smoothly. EPA enjoyed notable success in the mid-1990s with its sector-based enforcement initiatives, in which considerable pollution cleanup was achieved—or was about to be achieved—in such industrial sectors as wood products, diesel engine manufacturing, automobiles, and petroleum refining. In tandem with the DOJ, the Agency began to initiate the first set of what promised to be the most environmentally beneficial and public-health promoting of those industrial sector-based enforcement initiatives, a set of civil lawsuits against large fossil fuel-fired electric utilities to redress violations of Clean Air Act (CAA) NSR requirements.

III. Opening Mistakes and Early Signals: EPA Enforcement in the Initial Phases of the Bush II Administration

Of the various attributes of regulatory enforcement in a large government agency such as EPA, two of its characteristics have hitherto been the subject of relatively little discussion: enforcement's "inelasticity" and its high sensitivity to staff-level perceptions and concerns. An effective, functional enforcement program may take a long time to develop fully. To succeed, such a program requires a trained professional staff with a critical mass of field experience, a capable set of supervisors and mid-level managers, enforceable standards to work with, and a sense that the staff's efforts, even when they go against the interests and actions of large and politically powerful adversaries, will be supported by the entire organization's managerial structure. Where any of those key elements are missing—or where they are present at an insufficient level—enforcement activities, particularly the generation of new enforcement cases against suspected violators, can and usually do fall off rapidly. Moreover, once that occurs, the level of enforcement work cannot promptly be brought back to where it previously was.

As David A. Ullrich, a highly experienced and well respected former EPA regional manager, explained it:

> The people [at EPA] who work on enforcement are very, very sensitive to signals about what they are doing. Because enforcement has always been and will always be controversial and contentious, it is very critical that the people working on it have entirely clear signals that enforcement is important, that compliance with environmental laws is important, and that the people who do the work will be supported. Those signals have to come from the top. They have to come from the Administrator and from the Assistant Administrator for [the OECA].[8]

Regrettably for all concerned, the first contacts between EPA's career enforcement staff and the Agency's new top managers did not go well. Instead, some of the staff saw in those early meetings and actions a harbinger of an era in which federal enforcement of environmental laws would be given short shrift. These EPA employees assumed that the states would be given a far more prominent role in enforcement than the federal government would be permitted to play, and that the Agency, in general, would drastically cut back on its commitment to regulate and enforce actively, in the public interest.

The first perceived "signal" of what the new set of political appointees at EPA would do occurred only a few days into the tenure of Whitman as EPA's Administrator. Whitman, who had actively supported and campaigned for President Bush in the general election of 2000, had never previously managed a regulatory agency. At the time she assumed office at EPA, her policy approaches were largely unknown to her career staff, and her views on enforcement issues were similarly an enigma. At least some staff members, however, viewed her as at least moderately progressive. It thus came as a shock to some that, without consulting with or notifying in advance any members of her enforcement staff, Whitman publicly announced that the president's first budget for EPA would ask Congress to set aside $25 million from the OECA budget line and use it for grants to individual states to help fund their enforcement programs.

That proposal provoked an immediate outcry from environmental organizations and their allies among the Democratic minority on Capitol Hill. As then-EPA Deputy Administrator Linda Fisher later remembered it, "nobody really liked [the proposal] other than the states, and the states didn't even fight for it that much."[9] Concerned about the po-

8. Interview with David Ullrich. *Accord* Interview with Sylvia Lowrance.

9. Interview with Linda Fisher.

tential harm that the fund transfer arrangement would have on the ongoing efforts of the OECA, these administration critics, after eliciting an analysis from the U.S. General Accounting Office (GAO) which found the proposal deeply flawed, moved swiftly and successfully to defeat it in the U.S. Senate Appropriations Committee. One year later, a scaled-down Bush II Administration proposal to convert $15 million in OECA funds into federal enforcement grants to the states, also went down to defeat in congressional committees.[10]

Notwithstanding Congress' rejections of them, however, inside EPA, some of the career enforcement staff viewed the proposed state enforcement grant proposals as particularly worrisome. Not only had the new Administrator tendered a proposal that would have cut significantly into the OECA's already resource-starved work in several areas, they had done so, the staff noted, without any prior discussions with them. The staff thus began to have concerns that the new administration might be anti-enforcement in its orientation—and also unwilling to accept their own input on important issues.

Those perceptions were strengthened soon thereafter by the Bush II Administration's unsuccessful attempts to gain congressional approval for Donald Schregardus, the former head of the Ohio EPA, who was the first administration nominee to be Assistant Administrator for the OECA. Schregardus was a non-lawyer with little direct experience in environmental enforcement. His nomination, which was made late in June 2001, once again without any advance consultation with the Agency's career staff, almost immediately engendered sharp opposition from both Ohio-based and national environmental organizations.

Schregardus did not help his own faltering cause when he submitted written answers to questions posed by Democrats on the Environment and Public Works Committee, responses that some members of that committee viewed as "incomplete, evasive[,] and implausible."[11] In the end, however, Schregardus' confirmation chances were irrevocably damaged by the release of a report prepared in EPA's Midwest regional office that was sharply critical of the Ohio EPA's enforcement record during the eight-year period in which Schregardus had headed that agency.[12]

At EPA's headquarters, and in some regional offices, the Agency's career staff viewed the entire Schregardus nomination and confirmation battle with deep anxiety. Career staff members had not been consulted on an important decision affecting enforcement, and only the actions of Congress, rather than the preferences of the new administration, seemed to have protected the integrity of EPA's enforcement program.

As time went by, EPA staff began to note what they perceived as other trouble signs as well. They observed, for example, that in her public statements and speeches, Administrator Whitman repeatedly declined to identify enforcement of applicable laws as a high Agency priority. Instead, Whitman often referred to enforcement in the context of a litany of EPA activities, including regulatory standard-setting, compliance assistance and research, as an example of what the Agency did. Enforcement was almost never singled out by her as an important and worthwhile EPA task.

In addition, in at least some EPA offices, Bush II Administration political appointees continued to leave experienced EPA career staff members out of the "decision loop," or even to seek pertinent information from the staff that would have been highly useful to them. As Gail Ginsberg, the former EPA Region V Regional Counsel, observed:

> This administration showed no respect for the knowledge base that existed among EPA career staff employees and managers. People at the career level were not only cut out but decisions were made that were stupid, avoidable, and politically disadvantageous to the administration. People were not consulted who had the institutional knowledge to at least help them know when sensitive issues might arise.[13]

Other senior staff members observed additional early administration reluctance to enforce in certain circumstances. Sylvia Lowrance, for example, indicated:

> The current administration would typically say[:] "Oh, I want you to enforce, but can you please check in with us before you do any major new cases, e.g., concentrated animal feeding operations (CAFOs)." That was taken by the staff as a directive not to enforce. . . . Whitman also sent her political staffers out to check on particular cases. That also chilled enforcement.[14]

Beyond the enforcement realm, EPA's staff were well aware of other well-publicized early Bush II Administration decisions that affected EPA's enforcement work, and its reputation for independence and scientific integrity. The first of those determinations, announced in March 2001, was an ill-advised decision not to finalize a standard proposed by EPA at the end of the Clinton Administration as to the allowable concentration of toxic arsenic in drinking water.[15] That major regulatory shift was met with a loud and sustained outcry from scientists and environmental organizations. It proved to be a significant political embarrassment to the administration, and a lasting stain on its environmental reputation.

Even more damaging than the arsenic fiasco, however, was the Bush II Administration's controversial announcement, in March 2001, that the United States would not ratify the Kyoto Protocol with regard to carbon dioxide (CO_2) pollution.[16] This international agreement, which George W. Bush had unambiguously endorsed during his campaign for

10. *EPA Budget Request Includes Staff Cut at Enforcement Office, Grants to States*, Env't Rep. (BNA), Feb. 8, 2002, at 286.

11. Inside EPA, Aug. 31, 2001, at 1, 16.

12. *Jeffords Announces New Investigation of Schregardus in Wake of EPA Report*, Env't Rep. (BNA), Sept. 14, 2001, at 1776; Katharine Q. Seelye, *EPA Faults Ohio Agency Headed by a Bush Nominee*, N.Y. Times, Sept. 5, 2001, at A12; Katharine Q. Seelye, *EPA Enforcement Nominee Withdraws*, N.Y. Times, Sept. 18, 2001, at A16.

13. Interview with Gail Ginsberg.

14. Interview with Sylvia Lowrance.

15. *See* Douglas Jehl, *EPA to Abandon New Arsenic Limits for Water Supply*, N.Y. Times, Mar. 21, 2001, at A1. After embarrassing public criticism by environmental organizations and scientists, and a 97-1 vote in the U.S. Senate in favor of new arsenic standards, this decision was reversed by the Bush II Administration several months later. *See Senate Backs New Standards for Arsenic Levels*, N.Y. Times, Aug. 2, 2001, at A16; Katharine Q. Seelye, *Arsenic Standard for Water Is Too Low, Study Concludes*, N.Y. Times, Sept. 11, 2001, at A20; Katharine Q. Seelye, *EPA to Adopt Clinton Arsenic Standard*, N.Y. Times, Nov. 1, 2001, at A18.

16. *See* Douglas Jehl & Andrew C. Revkin, *Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide*, N.Y. Times, Mar. 14, 2001, at A1; Douglas Jehl, *Bush Defends Emissions Stance*, N.Y. Times, Mar. 15, 2001, at A23.

the presidency in 2000, would have required significant cuts in CO_2 emissions to the atmosphere from power plants and other sources. Within the Administration, Whitman had vigorously advocated continued adherence to the Kyoto Protocol, and her position on the issue had been widely known. The White House's sudden decision to abandon the Kyoto Protocol was thus viewed, both outside of EPA and among its permanent staff, as a "public slap in the face" to EPA's Administrator, as well as a clear sign that the Agency was anything but its own boss on important, contentious issues of environmental policy.

The work of the Agency's senior career staff was also affected, beginning in November 2001, by an Agencywide plan, devised by then-EPA Deputy Administrator Fisher, to rotate members of EPA's Senior Executive Service (SES)—its highest-ranking career staff members—from program office to program office in headquarters, and among top management position in the Program Divisions at EPA regional offices. As Fisher subsequently explained the plan's rationale:

> We had situations where people had been in their jobs for over [10] years. We had people who wanted other [career] opportunities but did not know how to create them. The main idea was to keep people fresh. Very few people do their job well if they have done it for [10] years. We all get stale. Secondly, the Agency has more and more been looking at issues from a multimedia point of view. But a lot of senior EPA managers have not had jobs in their careers outside of one program. There was a lot of interesting work going on in different programs. It was really an opportunity to strengthen career managers and get them prepared to lead the Agency in a more holistic way. Also, it gave new managers coming up an opportunity to work for someone new.[17]

To implement this new personnel rotation plan, EPA's Administrator and her Deputy Administrator asked each member of the SES to fill out and return a survey regarding the SES member's long-term career goals and ambitions, and to identify several other SES positions within the Agency that the executive would like to be considered for. These surveys were followed up by individual interviews with SES members conducted by Linda Fisher and her staff, to further elicit SES job preferences and plans.

Over the course of one and one-half years, approximately 70 people (roughly one-fourth of the SES staff) did rotate to new positions within EPA under this rotation plan. Most of those job changes occurred at the headquarters level; EPA regional office personnel were affected less significantly.

Unfortunately, however, as we have seen, this SES position rotation came at a time of growing suspicion among EPA's career staff as to the motives of the Agency's political appointees and other Bush II Administration officials. Not surprisingly, among some staff members, the move raised caveats and concerns. As EPA SES member Michael Walker stated: "The idea for many of the skeptics was that this [rotation] was a chance to make [SES] people more vulnerable. You could be removed. There might now be some retaliation [against dissenters]."[18] Similarly, Ginsberg noted that "there was a lot of angst among the SES corps, because they didn't even know where they would be a week from now, and even more angst at the [line] staff level, not knowing whom their boss was going to be."[19] At the same time, however, other SES members either welcomed the rotation pledge or viewed it as a mixed blessing.[20]

In the end, EPA may have benefitted modestly from the rotation of some of its senior career executives. Certainly, the appropriateness and utility of a round of forced high-level staff changes for a governmental agency like EPA is a question as to which reasonable people may differ.

From her demeanor during our interview, I am fully convinced of the sincerity of Fisher's statement that "the rotation was not politically motivated. I felt that it needed to happen, that it was good for the Agency and good for the career folks."[21] Nonetheless, particularly coming when it did, the SES rotation initiated in November 2001, would undoubtedly have benefitted if its aims and potential benefits had been more clearly articulated at the time—beyond the circulation of a memorandum—both to those who were directly affected by it and to those who were not. Regrettably, that explanation was not provided effectively. Thus, in the event, the SES rotation proved to be yet another dry stick tossed on the glowing embers of discontent and fear that were quietly smoldering among EPA's permanent enforcement staff.

IV. The NSR Reform Debacle

The policy change which EPA's staff viewed as the clearest, and most deleterious, signal of Bush II Administration antipathy to EPA enforcement, however, occurred in a different context. It stemmed from a decision, apparently made in mid-2001 within the White House, over the express objections of EPA Administrator Whitman, to "reform" EPA's CAA NSR regulations.[22] This obtuse, entirely avoidable error, weakened EPA's and the DOJ's equitable basis for pursuing already initiated lawsuits against electric utility companies found in violation of NSR requirements. It slowed and then brought to a standstill the vast, time-consuming, labor-intensive investigations that a number of EPA regional offices had pursued with regard to suspected NSR violations at aging electric-generating stations. Moreover, it compli-

17. Interview with Linda Fisher. Fisher also noted that her SES rotation proposal was consistent with a previous suggestion of EPA's Human Resources Council, which had recommended that the Agency develop a workplace development strategy, including a senior executive succession planning component. For additional explanation of the SES rotation, see Memorandum from Linda Fisher, U.S. EPA, to All SES Members, U.S. EPA, Senior Executive Service Mobility Program (Nov. 14, 2001).

18. Interview with Michael Walker.

19. Interview with Gail Ginsberg.

20. E.g., Interviews with Mike Stahl: ("If done in a fair way, I think it can actually be a positive for the organization."); Eric Schaeffer: ("I didn't see [the SES rotation] as either political or a bad thing. On the other hand, you do need at least five years in a major office to have a major impact there."); and Walter Mugdan: ("Among the SES, there was neither universal happiness nor universal skepticism with the rotation, especially after it was implemented.").

21. Interview with Linda Fisher.

22. This NSR "reform initiative" and its consequences did not go unnoticed by investigative journalists. In the spring of 2004, the *New York Times* published two separate detailed accounts of it in Christopher Drew & Richard A. Oppel Jr., *How Industry Won the Battle of Pollution Control*, N.Y. TIMES, Mar. 6, 2004, at A1, and Bruce Barcott, *Changing All the Rules*, N.Y. TIMES (Magazine), Apr. 4, 2004, at 38. In addition to the comments of those whom I interviewed, this section relies on the information gathered by those journalists. The accuracy of that information was independently confirmed by several EPA officials I spoke with who had read the newspaper analyses in question and had first-hand familiarity with the NSR reform dispute.

cated the work of DOJ attorneys, harmed the reputation of EPA's enforcement efforts, demoralized a significant segment of EPA's enforcement staff, and cast a pall of gloom and disaffection over almost all of the Agency's ongoing enforcement work, for many months.

The NSR reform debacle had its roots in a comprehensive set of amendments to the CAA that was enacted by Congress in 1977.[23] At that time, codifying a compromise between lobbyists, Congress accepted the notion that the electric utility companies should not be required to improve air pollution problems at their oldest power plants all at once. Instead, it was deemed best to have the industry gradually improve its air pollution problems by replacing the plants with new facilities, equipped with the best available pollution control technology, as the old facilities became obsolete. The amendments also required that if existing plants were "modified," they too were to be subject to the strict standards imposed under NSR, standards that usually necessitated the installation, at electric-generating stations, of sulfur dioxide (SO_2) scrubbers, electrostatic precipitators, and other very effective, although relatively expensive, air pollution control technology.

From the late 1970s through the early 1990s, with only a few exceptions, EPA did little to enforce NSR requirements against electric utilities.[24] Focusing on other priorities, the Agency's regional offices typically deferred to state governmental findings that virtually all aging power plants were not being "modified" in a way that would subject them to NSR requirements.

In the mid-1990s, however, EPA's enforcement passivity with respect to aging power plants and NSR standards evaporated. An important catalyst for that change was the appointment of Bruce Buckheit, an energetic and experienced DOJ attorney who had also previously worked on auto safety issues with the U.S. Department of Transportation, to be Director of the Air Enforcement Division of the Office of Regulatory Enforcement in the OECA. As Bob Kaplan (one of Buckheit's former colleagues at the DOJ and now himself an enforcement official in EPA headquarters) told me:

> To a large extent, this [power plant] initiative was leadership[-] and personality[-]driven. To do something big takes a lot of energy and personal investment, and it takes someone who can really do the stuff. [Buckheit] is someone who can. He is a person who accomplishes things.[25]

Together with his staff, Buckheit became aware that since the 1977 CAA Amendments had been passed, coal consumption across the United States had increased very significantly. At the same time, though, virtually no new power plants had been commissioned, and almost no utility companies had applied for or received governmental permits to operate "modified" facilities under NSR standards. "Thus," Buckheit later indicated, "the question that arose was where was all this additional coal-burning happening?"[26]

With the full support of Eric Schaeffer, then the head of the Office of Regulatory Enforcement, as well as Herman, at that time EPA's Assistant Administrator at the OECA, Buckheit launched a massive investigation of the electric utility industry that involved numerous EPA enforcement personnel in headquarters and in several EPA regional offices. This investigation rather stunningly revealed that approximately 70% of coal-fired electric-generating stations across the United States were in violation of NSR standards.[27] The violations it uncovered ranged from failures by utility officials to complete CAA permit applications properly to instances in which some power plants that had not sought modification determinations from appropriate authorities, on the pretext that they were merely engaged in "routine maintenance activities," had actually engaged in very large and costly equipment replacement projects.[28]

On the basis of these findings, in 1999, EPA referred to the DOJ nine lawsuits against large electric utility companies whose plants generated approximately 40% of the megawattage created in the United States.[29] It also continued its investigation of electric utility companies, with a view toward filing subsequent lawsuits against power plants generating yet another 40% of U.S. electricity megawattage.[30]

The potential environmental implications of those civil enforcement cases, which the DOJ filed in 1999, were immense. As one current EPA headquarters enforcement official indicated: "There is no bigger air pollution problem than utility pollution. It is an order of magnitude bigger than the second biggest problem (refineries), which is in turn an order of magnitude bigger than anything else."[31]

By some estimates, in fact, if the NSR power plant enforcement initiative had been permitted to run its course, it would have resulted in annual emission decreases of 7 million tons of SO_2, and 2.4 million tons of nitrogen oxides, until the year 2020.[32]

Those potential gains, however, were never realized. Viewing EPA's enforcement suits as overregulation, as well as a potentially expensive problem for them, significant parts of the electricity industry devised a massive po-

23. *See* 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

24. The major exception to this was in EPA Region IX, where a number of NSR enforcement cases were initiated against power plants in the early 1990s and thereafter.

25. Interview with Bob Kaplan. *Accord* Interview with John Cruden: ("Without question, [Buckheit] made a significant contribution to enhancing [CAA] enforcement of [NSR] requirements during his tenure as the head of the air enforcement program.").

26. Interview with Bruce Buckheit.

27. *Id.*

28. Interview with Bob Kaplan.

29. In what later became a controversial tactic, the lawsuits included *all* violation counts found by EPA investigators, both minor and major. Suarez told me that he viewed that as a poor tactic which allowed opponents of the initiative to "distort" the debate regarding. "If I were head of EPA enforcement at that time," he stated, "I would not have included a good one-third to one-half of the counts in the cases that were brought." Interview with J.P. Suarez. Buckheit later agreed with Suarez in the sense that, "in hindsight, from a political standpoint," it would have been more advantageous only to file "the sexier claims" against utility defendants. Buckheit noted, however, that up to that point the filing of *all* viable, legally supportable claims against defendants in civil judicial enforcement cases was the usual practice of the DOJ and EPA. He also observed that, since it was unprecedented, the OECA could not reasonably have anticipated political interference by the White House with any EPA cases or initiatives. Telephone Conversation with Brucew Buckheit, Aug. 3, 2004.

30. Interview with Bruce Buckheit.

31. Interview with an EPA official that was conducted "off the record." I received similar comments in interviews with other EPA officials, including Bert Frey: ("The NSR cases involved immense amounts of NO_x and SO_x emissions, often as much as 50,000 tons per year of excess emissions of SO_x from one plant. Those are huge amounts of pollution."); and George Czerniak: ("[The NSR initiative was aimed at] a significant part of the potential emissions that were there to be reduced.").

32. *See* Barcott, *supra* note 22, at 77.

litical lobbying strategy to derail the suits and avoid liability. Arguing that EPA's NSR regulations subjected them to harsh penalties for "light bulb changing," the utilities' first step was to turn to Congress and request that a rider be attached to the appropriations bill which would fund EPA, allowing electric utility companies to perform "routine maintenance" while EPA's lawsuits were pending. That effort was unsuccessful.[33]

At that point, however, segments of the utility industry took a different tack. They began to contribute heavily to the presidential campaign of Bush, in the hope that, if elected, a Bush II Administration would be more sympathetic to measures that would eliminate the industry's regulatory exposure under NSR. In fact, a number of utility lawyers and lobbyists earned the label of executive "pioneers," in Bush's campaign by personally raising more than $100,000 in campaign contributions. These included executives from electric companies (such as First Energy, Reliant Resources, Mid-American Energy, and the Southern Company) that were already in litigation with the government regarding NSR regulations, or else under active investigation by EPA's enforcement staff.[34] Their contributions to Bush's 2000 election campaign were the largest sum donated to it by any single industry.

After Bush was sworn in as president, the utility industry did indeed find helpful, influential supporters within his Administration. They apparently included, among others, Vice President Richard Cheney and Jeffrey Holmstead, EPA's Assistant Administrator for Air and Radiation. The industry also found firm allies at the U.S. Department of Energy (DOE) and the White House Council on Environmental Quality (CEQ).

Only nine days after assuming office, Bush created a task force headed by Vice President Cheney, the National Energy Policy Development Group, that was given responsibility for crafting a new national energy policy. According to the best available information, this task force received considerable advice and information from utility industry sources, and relatively little input from any other sources. Its recommendations, released in May 2001, called for changes and rollbacks in a number of aspects of U.S. energy and environmental laws, along with a formal review of both EPA's NSR rules and the legal basis for the DOJ's already filed lawsuits.[35]

Soon thereafter, President Bush ordered EPA to conduct a three-month public review of its NSR rules; and he directed the DOJ to review the adequacy and appropriateness of its previously filed NSR cases. The latter review was conducted by a previously obscure office within the DOJ, the Office of Legal Policy (OLP), which closely scrutinized the DOJ's files in each of the ongoing NSR power plant cases. According to one former DOJ lawyer, this OLP review raised concerns among DOJ attorneys litigating the power plant NSR cases, because they feared that anything detrimental which the OLP found would have undermined the ongoing cases, both in court and on Capitol Hill.[36] In the end, however, the OLP came out with an opinion that was largely limited to constitutional issues, and reasonably favorable to the positions taken by the DOJ's litigators.

Within EPA, however, events developed quite differently. During the pendency of the 90-day NSR rule review, Assistant Administrator for Air and Radiation Holmstead, and his staff, with active input from the DOE and other utility-industry sympathizers within the executive branch, began the task of rewriting EPA's NSR rules. A key focus of their efforts was the regulatory definition of "routine maintenance," i.e., the amount of money a utility company would be permitted to spend annually to upgrade a power plant without "modifying" the facility, and thus tripping the NSR threshold. The OECA, through its then-acting Assistant Administrator, Lowrance, recommended that companies be allowed to spend up to 0.75% of a generating unit's replacement cost, per year, without becoming subject to NSR requirements.[37] In August 2003, however, when the Agency's final NSR revisions were at last announced, EPA's new regulations included an "equipment replacement rule" that permitted electricity manufacturers to spend as much as 20% of generating unit replacement costs on plant upgrades each year before NSR standards could be applied.[38] In effect, although the framework of NSR was retained, the new rules established a threshold so extraordinarily (and unnecessarily) high as to make it almost inconceivable that NSR standards would ever apply to actual electric-generating stations in particular cases.

As Suarez, EPA's Assistant Administrator at the OECA during parts of 2002 and 2003, perceived it:

> It became clear to me, fairly early on, that the NSR reform was focused solely on power plants. It also became clear to me, during my tenure at EPA, that the goal of NSR reform was to prevent any enforcement case from going forward. Some people thought the [NSR power plant enforcement initiative] should never have been brought. The reform was really designed to thwart our ability to do it.[39]

Suarez, who (along with Administrator Whitman) had opposed the reform proposal in private debates within the Administration, called the 20% rule that was finally adopted "overdone," and he stated that the "reason for reform was oversold." Suarez indicated that, while some form of NSR reform might have been beneficial, "because we were so inflamed and overheated about the reform, we ended up with a reform package that doesn't pass the laugh test."[40]

The protracted struggle within the Bush II Administration over NSR enforcement "reform" (and its regulatory outcome) did not escape the notice of the Administration's critics among environmental groups and some state officials, along with their allies on Capitol Hill. Throughout 2002, a number of prominent state attorneys general, senators, and congresspersons expressed serious substantive and procedural concerns with the way EPA was going about re-

33. *Id*. at 43.

34. *Id*.

35. *Id*. at 66. *See also* David E. Sanger, *In Energy Plan, Bush Urges New Drilling, Conservation and Nuclear Power Review,* N.Y. Times, May 17, 2001, at A1.

36. Interview with Bob Kaplan; Christopher Marquis, *EPA Power Plant Cases to Proceed, Ashcroft Says*, N.Y. Times, Jan. 16, 2002, at A12.

37. Barcott, *supra* note 22, at 76-77.

38. *See* Katharine Q. Seelye, *White House Seeks a Change in Rules on Air Pollution*, N.Y. Times, June 14, 2001, at A1. According to a DOJ attorney who preferred anonymity, EPA did not follow its typical procedure and formally consult with the DOJ prior to proposing, and then promulgating, this significant regulatory change.

39. Interview with J.P. Suarez.

40. *Id*.

considering its NSR regulations, concerns that were ultimately ignored by the Administration.[41]

In the meanwhile, the DOJ continued to pursue the NSR lawsuits it had filed against power plants, and to attempt settling in those cases on terms favorable to the government. Those negotiations soon faltered, however. Utility company defendants began to anticipate that the suits pending against them would be eviscerated by EPA changes in the NSR rules.[42] As Buckheit remembered the situation: "We were 80[%] of the way done, with seven or eight companies, and one by one they backed away."[43]

EPA's investigations of additional NSR violations also continued during 2001 and 2002. The pace and scale of those investigations began to diminish, however, amidst staff uncertainty and concern over the future direction of the NSR power plant enforcement initiative.

When, after lengthy internal debates with the Administration, EPA's approach to NSR reform was at last made final, the impact of that change on the Agency and its overall performance program was profound and long lasting. A number of high-ranking Agency officials, including Schaeffer, Rich Biondi, Buckheit, and Whitman all resigned or retired from the government within a relatively short time period. Some, like Schaeffer and Biondi, publicly announced that their departure was in protest against the new direction the Agency was taking with regard to NSR.[44] Others, such as Administrator Whitman, gave more personal reasons for leaving their posts.[45] Suarez, who was to resign from EPA early in 2004, regretfully informed members of his staff in November 2003, that the Agency would very likely not further pursue NSR investigations against utility companies that were not directly related to already filed NSR enforcement cases.[46]

Soon thereafter, however, in late December 2003, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit breathed some new life into the federal government's all-but-defunct power plant enforcement initiative. Ruling in a lawsuit initiated by a group of state governments in challenge to EPA's NSR reforms, the court issued an order staying EPA's implementation of the equipment replacement rule that was at the heart of the promulgated reforms.[47] In response, EPA's new Administrator, Leavitt, soon announced that the Agency's policy of abandoning its investigation of NSR violations at electric-generating stations would be reversed.[48]

As of this writing, however, only one new NSR enforcement case has been brought by EPA and the DOJ.[49] Moreover, given the intrinsic "inelasticity" of regulatory enforcement activities adverted to earlier, additional NSR power plant cases may well be very, very slow to emerge from EPA's regional offices.

Whatever the future may hold in this area, however, few within EPA whom I spoke with would disagree with former EPA enforcement official Ann Lassiter's statement that "the NSR power plant initiative was a big loss. No one should doubt that. That was a major, major loss."[50] In terms of wasted effort, missed opportunities for important environmental improvement and plummeting staff morale,[51] the NSR power plant initiative to date has been little short of a disaster for EPA's enforcement efforts. Moreover, in the words of one DOJ attorney who requested that he or she not be identified by name:

> The change [in NSR policy] at [EPA] has had an effect on what we do [at the DOJ] as well. The already filed cases have been preserved. Some settlements have gone forward but it would be disingenuous for anyone to say that there hasn't been a change. The enforcement program cannot be perceived by regulated industry as vigorous as it was. Too much has happened in the press. Too much has happened for anyone to candidly think otherwise. That has had an effect upon morale, if nothing else. Many people, including myself, have thrown a lot of personal energy into these cases. . . . It has made life more difficult for the attorneys litigating the cases, and it has made life more difficult for the enforcement people at EPA.

V. Other Recent Enforcement Tendencies, Trends, and Constraints

Beyond the drastic changes that it fashioned in the area of NSR enforcement, and its early "signals" of antipathy to or disinterest in EPA enforcement activities, the Bush II Administration's handling of EPA enforcement matters had a number of other unfortunate, distinguishing characteristics. One of those was secretiveness in the development of enforcement policies. In the words of one well-respected, regional office career manager:

> Nearly all of the political appointees in the Bush [II] Administration play things very close to the vest. They are now open in terms of getting information [from their staffs] that will help them make decisions. But then when

41. *See Six Senate Chairmen Call on Whitman to Repropose Changes to Clean Air Program*, Env't Rep. (BNA), Mar. 8, 2002, at 526; *Whitman, Lieberman Spar Over Future of Enforcement Actions Against Utilities*, Env't Rep. (BNA), Mar. 15, 2002, at 575; *Senate Democrat Threatens to Block EPA Changes to Enforcement Program*, Env't Rep. (BNA), Aug. 2, 2002, at 1695; *Senators Press Whitman to Better Pursue NSR Enforcement Cases*, Inside EPA, Oct. 25, 2002, at 19; *Bipartisan House Letter to EPA Chief Opposes Changes to Enforcement Program*, Env't Rep. (BNA), Aug. 2, 2002, at 1696. *See also* David Kocieniewski, *States to Fight Easing of Rules on Pollution by Power Plants*, N.Y. Times, Aug. 29, 2003, at B1; Richard A. Oppel Jr. & Christopher Drew, *Senators and Attorneys General Seek Investigation Into EPA Rules Change*, N.Y. Times, Nov. 7, 2003, at A25.

42. The government's negotiating position was also harmed when Administrator Whitman, testifying before the Senate Committee on Government Affairs in March 2002, stated that, if she were an attorney for a utility defendant, she would not settle with the government until she knew the outcome of a challenge by the Tennessee Valley Authority to EPA's then-existing NSR rules. Though the statement appears to have been made without any intention of interfering with any ongoing negotiations, nonetheless it had the effect of discouraging utility industry settlement. Barcott, *supra* note 22, at 73.

43. *Id.*

44. *See* Katharine Q. Seelye, *Top EPA Official Quits Criticizing Bush's Policies*, N.Y. Times, Feb. 28, 2002, at A15; Jennifer Lee, *Three Top EPA Officials Say They Will Leave EPA*, N.Y. Times, Jan. 6, 2002, at A15.

45. *See* Katharine Q. Seelye, *Often Isolated, Whitman Quits as EPA Chief*, N.Y. Times, May 22, 2003, at A1.

46. Christopher Drew & Richard A. Oppel Jr., *Lawyers at EPA Say It Will Drop Pollution Cases*, N.Y. Times, Nov. 6, 2003, at A1.

47. New York v. EPA, No. 03-1380 (D.C. Cir. filed Dec. 24, 2003).

48. *EPA to File New Lawsuits for Violations of New Source Review, Leavitt Says*, Env't Rep. (BNA), Jan. 27, 2004, at 2435.

49. *EPA Initiates NSR Enforcement Steps, But Policy Impact Uncertain*, Inside EPA, Jan. 30, 2004, at 18.

50. Interview with Ann Lassiter.

51. This decline in morale was confirmed in interviews with Czerniak and Frey.

> it comes time for them to make those decisions they will retire to their own chambers.[52]

Rather than attempting to publicize new enforcement cases and settlements as much as possible, the Administration's political appointees centralized its press office information releases regarding enforcement matters in EPA headquarters; and it adopted a more low-key approach to publicizing enforcement successes than had been true of prior administrations.[53]

A perception, both outside of and within EPA, that the Bush II Administration had "politicized" EPA enforcement took hold, particularly in 2002 and early 2003. In addition to the NSR reform controversy, that view was reinforced by two long-standing controversies, internal to EPA, with regard to enforcement-related policy questions. The first of those involved an air pollution problem with significant public health implications: concentrated animal feeding operations (CAFOs). These operations emit vast quantities of harmful air pollutants. As Steve Rothblatt, the Director of EPA Region V's Air and Radiation Division told me: "The amount of pollutants [CAFO's] give off—both [particulate matter of a diameter of 2.5 microns or less ($PM_{2.5}$)] and ammonia—is mind-boggling; and the ammonia contributes to fine particulate formation, too. It is very bad."[54]

In the early days of the Bush II Administration, the OECA, then under the acting leadership of Lowrance, was told that no enforcement actions were to be taken without the advance approval of the headquarters Office of Air and Radiation. Convinced that approval of such cases would never be forthcoming, the head of the Office of Regulatory Enforcement at that time, Schaeffer, decided not to seek CAFO enforcement cases from regional offices or to refer any such matters to the DOJ.[55] As Buckheit saw it:

> Regarding CAFO's, the politics have slowed us down. It has been a battle within EPA, and with the [U.S.] Department of Agriculture [(USDA)], to mount an effective enforcement program there. Again, we started getting some momentum and we were stopped.[56]

The next phase of EPA's contentious in-house struggle with respect to CAFO enforcement was described quite candidly by Suarez in an interview:

> [The] OECA had been working with industry for 6 months on an agreement whereby the industry would sign-up and pay a modest penalty and then EPA would gather data for 18 months about air emissions from CAFOs, mostly from chickens and hogs. We worked with the industry and we pounded out a deal. The industry agreed with us that more data was needed [to set more specific emissions limits] because a National Academy of Sciences report has told us that we had inadequate data.
>
> We told the Air Office that we were doing all this. We wanted their buy-in. We coordinated with them.
>
> We finally got to the point, in our negotiations with the industry, where we were literally on the doorstep, ready to go within a week, when the Air Office contacted us and told us they were drafting a regulation that would treat all CAFO air emissions as "fugitive" and [thus] take them outside the realm of regulatory control.
>
> To say that something like that brings you to a grinding halt is an understatement. We scrambled back to the head of the Air Office who told us[:] "I don't understand that. That's not the direction I've given." Then we went back to our negotiations with the industry only to find, three weeks later, that the Air Office had, in fact, decided, and had started to communicate with people that they were going to treat [CAFO emissions] as fugitive emissions. It was unbelievable and it was frustrating![57]

A second intra-Agency controversy regarding an enforcement-related policy concerned a draft guidance document, prepared by the Office of Water at the urging of representatives of sewage treatment operators, that would have permitted sewage treatment plants to blend fully treated sewage with rainwater and partially treated sewage during periods of heavy rainfall. The OECA objected to this proposal on the basis that it was unenforceable against companies that blended sewage in a way that ran afoul of the proposed guidance, and that the only way to comply with permit limitations, consistent with the guidance, was to use amounts of chlorine that would not have killed all of the underlying pathogens discharged through the plants' outfalls. This controversy, which also became heated and shrill at times, was still not fully resolved within EPA by this writing.[58]

From the perspective of EPA's career enforcement staff, these developments were still further evidence that EPA's enforcement work, which had traditionally been managed on a professional, nonpartisan basis, was now far more politicized. As one EPA regional official put it: "There is now a greater sense, among the staff, that there is greater political scrutiny of our cases."[59] Moreover, for at least some of the Agency's enforcement managers, that perception has led to a more constrained, circumspect approach to potential enforcement cases. To quote Tom Bramscher, a water enforcement manager in EPA Region V:

> There is now always attention, that we did not have in the past, to[:] "What are the political ramifications [of our cases]?" It is always an internal issue. We always ask ourselves: "Where can we expect conflicts to arise from specific cases, and why?"[60]

As noted in the earlier discussion of the changes in NSR regulations, taken together these various developments had powerful, negative effects on the morale of a number of

52. Interview with an EPA official who also requested anonymity.

53. Interviews with John Lyons and Gail Ginsberg.

54. Interview with Steve Rothblatt.

55. Interview with Eric Schaeffer.

56. Interview with Bruce Buckheit.

57. Interview with J.P. Suarez.

58. As Suarez saw it: "That controversy was viewed by the Water Office only in terms of 'did we win or not?' This is not a way to run an Agency. It is especially bad for enforcement, which needs to be independent and objective in looking at potential cases." Interview with J.P. Suarez.

59. Interview with an EPA employee, who spoke off the record. This view was shared by a number of other EPA officials whom I spoke with, e.g., an EPA attorney who requested anonymity: ("[The Administration] is pro-energy and pro-industry. . . . Every time they can weaken the regulations they do so. They are trying to relax everything in sight."); Muszynski also stated: ("There has been more engagement [in this Administration] in the working pieces of the programs by political appointees. There seems to be more external pressure to make changes in EPA's regulations than had previously been true."); and another EPA lawyer who preferred not to be identified by name: ("There is a tremendous lack of courage and convictions in the Agency overall, and there is very little support for decisiveness outside of this region.").

60. Interview with Tom Bramscher.

members of EPA's career enforcement staff. Thus, when I interviewed EPA enforcement employees, I received such comments as: "We are hunkered down. There has been a chilling effect. There is a pervasive concern that if you pick up the ball and run with it you are going to get hammered by Washington"[61]; "People are nervous. They are trying to keep a low profile. They don't have that fire in the belly"[62]; "We've been treading water and marking time. There's a lot of nervousness"[63]; "The situation is very depressing"[64]; and "If I were writing a book on EPA enforcement right now I might title it *Bleakhouse*. I just try to push out of my mind all of the changes I see happening right now. . . . The situation is dire."[65]

EPA's enforcement work in the Bush II era has also been undercut by a trend that (as mentioned above) actually began in the second term of the Clinton Administration: mounting resource and budget constraints in a period of ostensibly "flat" EPA budgets. Many people I spoke with at the Agency echoed the view of one experienced EPA official that "enforcement resources has been an issue almost constantly in the 1990s and the 2000s. There are a lot of budget constraints at the present time, especially in the area of compliance monitoring inspections. Payroll has [also] been an area where there has been growth, and that has put pressure on other aspects of the account. There is much less money available than previously."[66]

Some EPA regional office enforcement efforts have suffered to a very significant extent in the Agency's resource crunch. Thus, for example, beginning in the mid-1990s, EPA Region V lost approximately 10% from its budgetary allocations for regulatory enforcement programs.[67] As a result, that Region's Office of Regional Counsel was forced to cut its workforce (mostly by attrition) to a notable extent. The number of enforcement attorneys in that office thus declined from a peak of 116 to under 100 in late fiscal year (FY) 2002.[68] Region V also sustained deep cuts in its important enforcement "extramural budget," which is used to contract the services of expert witness and for other, crucially important, litigation support expenses. That regional budget line decreased from $1.46 million in FY 1996 to $746,000 in the present FY. Moreover, because Congress ordered EPA to use some of those extramural budget funds only for specifically designated purposes, e.g., for lead paint inspections and enforcement on tribal lands, Region V has only $438,500 in extramural discretionary funds available to it in the current FY, a paltry sum relative to the Region's urgent needs for those monies.[69]

At the root of most of these budgetary problems is what some EPA employees refer to as "Congress' cost-of-living allowance (COLA) trick." For the past several years, Congress has mandated that all federal agencies and departments provide their employees with COLAs. At the same time, however, Congress has not actually appropriated any funds to pay for these required payroll increases. The agencies and departments have thus been forced to economize on other budgeted items to comply with Congress' commands.

Federal agencies and departments have chosen to handle this situation in several different ways. Some have "frozen" staff hiring and saved money by diminishing the size of their staffs by attrition. Others have left staff positions for which funds were appropriated vacant for extended periods—an economizing technique that has the drawback of giving others (inside and outside the Agency) the false impression that it has a larger staff than is actually the case.

The most widely used response to the "COLA trick," however, has been for agencies to increase their salary pools by diverting funds from extramural budgets. This approach, however, has its long-term difficulties as well. In the words of Suarez:

> We [at EPA] do not have enough extramural dollars. I actually think it is at a crisis stage. The last budget I worked on, EPA [enforcement] was going to be in a position where we had people and not enough dollars to support them. We did not have money for travel, for technical support, for investigations, for depositions [and] for experts. . . . I can tell you that there is going to be a major collapse if that is not rectified in terms of our ability to get work done.[70]

Notably, the kinds of resource constraints that have been harmful to EPA's enforcement effort have also raised problems for EPA's counterparts at the DOJ. The situation came to a head in the Spring of 2003, when the DOJ was forced to postpone the filing of a large number of EPA civil enforcement case referrals until the end of the FY.[71] The resulting delays caused understandable frustrations among EPA's enforcement staff, and temporary strains on the Agency's working relationship with the DOJ. Moreover, at least for now, the problem seems unlikely to disappear. As former DOJ manager David Buente perceptively noted, funding for the DOJ and EPA's enforcement work is now basically equal to 1994 levels. However, over the past decade there has been slow but steady inflation and also an increase in the number of entities that must be regulated. Thus, he declared: "You have to wonder whether, in the long range, the available resource base [for federal environmental enforcement] will be even remotely adequate to the task."[72]

61. Interview with an EPA regional enforcement attorney who spoke on condition of anonymity.
62. Interview with Cheryl Wasserman.
63. Interview with Mike Walker.
64. Interview with Tom Mintz.
65. Interview with an EPA employee who requested anonymity. *See also EPA Staff Morale Slumps Amid Fears of Budget Cuts, Controversy*, INSIDE EPA, Nov. 22, 2002, at 1. Notably, those kinds of perceptions were not unanimous. Thus, I was also told that "morale in Region IX is not too bad." Interview with Ann Lyons; and "I still think that what we do here is worth doing. I'm proud that I work here. I hope that we're able to do our job and make the world a better place for our kids." Interview with Rick Duffy.
66. Interview with an EPA official who requested anonymity. *Accord* Interviews with Bob Tolpa, Rett Nelson, Kathleen Johnson (as to Superfund enforcement); John Lyons (as to Superfund enforcement); and Mimi Newton (as to RCRA UST enforcement on tribal lands). *See also EPA Budget Request Includes Staff Cut at Enforcement Office, Grants to States*, Env't Rep. (BNA), Feb. 8, 2002, at 286; *EPA Officials Brace for Cuts in Stripped Down FY 04 Spending Bill*, INSIDE EPA, July 25, 2003, at 1.
67. Interview with Tinka Hyde.
68. Interview with Bert Frey. This office was able to hire 11 new attorneys in FY 2003. However, even this addition to its staff leaves it short of previous higher levels of staffing. *Id*. From FY 1996 to FY 2004, the number of full-time employees in Region V's regulatory enforcement programs fell from 367 to 268. Interview with Tinka Hyde.
69. Interview with Tinka Hyde.
70. Interview with J.P. Suarez.
71. *See Resource Limits Slow DOJ's Enforcement Early in FY 03*, INSIDE EPA, Apr. 4, 2003, at 1.
72. Interview with David Buente. *Accord* Interview with Nöel Wise.

Beyond these general difficulties, certain components of EPA's enforcement program have faced some unique, specific obstacles during the Bush II period to date. For example, in the area of wetlands enforcement, a knowledgeable, experienced EPA enforcement official confided that "wetlands enforcement in general is in a mess."[73] That individual explained that the problem stems from *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[74] a U.S. Supreme Court decision, handed down in 2001, that interpreted the Clean Water Act (CWA) as not conferring federal authority over "an abandoned sand and gravel pit in [n]orthern Illinois which provides habitat for migrating birds." This opinion left in doubt the precise extent of federal jurisdiction to regulate the dredging and filling of wetlands. In its aftermath, the DOJ has been resistant to filing any civil enforcement cases referred to it by EPA that had facts at all similar to those in *SWANCC*.[75] The DOJ also declined to bring cases that seek the restoration of relatively small tracts of damaged wetlands. At the same time, however, EPA appears to be limited in its authority to obtain wetlands restoration by means of administrative orders. The Agency has thus been stymied in key facets of its regional wetlands enforcement initiatives.

With respect to criminal enforcement at the end of 2001 and in the first half of 2002, EPA's efforts were set back considerably by a large-scale diversion of EPA criminal investigators to nonenvironmental matters. In the aftermath of the September 11, 2001, terrorist attacks on New York City and Washington, D.C., many of those investigators were reassigned to focus on the adequacy of security for public water supplies, chemical manufacturing facilities, pipelines, and the like. Other agents were diverted to "security details" which provided personal security for Administrator Whitman. Beyond this, a number of Federal Bureau of Investigation (FBI) agents, who would previously be available to accompany EPA criminal investigators on witness interviews—and to testify in court with regard to the results of such interviews—were also ordered to spend all of their work time on security matters.

Those personnel shifts had major consequences for federal environmental criminal enforcement. As I was told by an attorney familiar with EPA's criminal enforcement program who requested anonymity: "That [diversion of investigators] has had a big impact. It has not been easy to integrate that role with the Agency's traditional environmental responsibilities."[76]

EPA's Superfund program also faced continuing financial shortfalls, and other systemic problems, during the Bush II Administration. Notwithstanding some sporadic, unsuccessful efforts in Congress (which the current Administration declined to support) to revive the tax on petroleum and chemical feedstocks which had been the source of Superfund trust monies until that tax expired late in 1995,[77] the Superfund program was drastically underfunded.

This circumstance led to several consequences. First, EPA put more effort into Superfund enforcement, particularly in the area of "cost recovery" cases against potentially responsible parties (PRPs), than it had done previously. Second, with the encouragement of some state environmental agencies, EPA became very reluctant to list new hazardous waste sites on the national priorities list (NPL).[78] Finally, the Agency put more emphasis on short-term removal actions at disposal sites than on long-term remedial actions. That approach has tended to "piecemeal" hazardous waste site cleanups, in the view of some at the Agency.[79]

Not surprisingly, particularly during the first two years of the Bush II Administration, the trends, events, and obstacles described above had the cumulative impact of decreasing the "outputs" of civil enforcement referred to the DOJ, Superfund site cleanup completions, and other traditionally employed measures of enforcement success. Despite their widespread use by critics of EPA enforcement, those statistics, standing alone, do not provide a complete and accurate picture of the Agency's enforcement effectiveness. Nonetheless, at least some of the time, these numbers may present a crude measurement of how active EPA's enforcement personnel have been in a particular time period.

For that reason, it probably bears mentioning that the number of cases that EPA referred to the DOJ in 2002 for civil judicial enforcement fell by 20% from earlier high levels, i.e., from 203 to 158.[80] In FY 2002, the federal government received $51 million in civil enforcement case settlements, a decline by one-half compared to the average of civil settlement funds received in the preceding three FYs.[81] Criminal enforcement penalties declined from $122 million in FY 2000 to $62.2 million in FY 2002; and, during that same period, the number of facility inspectors conducted by EPA plummeted from 20,417 to 17,668.[82] Moreover, the

73. Interview with an EPA official who requested anonymity.

74. 531 U.S. 159, 31 ELR 20382 (2001).

75. *See DOJ Opposes Appeal of the Wetlands Case Limiting EPA Authority*, Inside EPA, May 17, 2002, at 1.

76. Toward the end of his tenure, Suarez initiated what appears to have been a useful review and restructuring of EPA's criminal enforcement program. In his words:

> We made some changes that are very painful but nonetheless important changes in the criminal program. . . . I think you are [now] going to see a criminal enforcement program that is appropriately focused on its core mission. It will be better integrated and you will see leadership that is more involved with the day-to-day activities of EPA.

Interview with J.P. Suarez.

77. *See GOP Support for Superfund Tax Raises Industry Fear on Energy Bill*, Inside EPA, Feb. 15, 2001, at 1; *Bush Administration Reconsidering Superfund Tax Authorization*, Inside EPA, Apr. 12, 2002, at 5; *With Trust Fund Depleting, Battle Brews Over Whether to Reinstate Industry Taxes*, Env't Rep. (BNA), May 10, 2004, at 1078; *Democrats Press Unlikely Superfund Tax Reauthorization Bill*, Inside EPA, Feb. 21, 2003, at 15.

78. Interview with Bill Muno. With regard to this trend, Johnson perceptively observed:

> From my perspective that is a bad cycle to get into. If we don't put sites on the NPL, Congress will reduce its funding of the program, based on a perceived lack of need, and the program will spiral downward. I think that the reality is that there continues to be a critical need for the Superfund program.

Interview with Kathleen Johnson. In fact, there is some evidence that EPA increased the number of sites listed on the NPL during 2004.

79. Interview with Gail Ginsberg.

80. James R. May, *Now More Than Ever: Trends In Environmental Citizen Suits at 30*, 10 Widener L. Rev. 1, 43 (2003).

81. *New Report Charges Enforcement Penalties Decline Under Bush EPA*, Inside EPA, Nov. 8, 2002, at 4.

82. *Dingell Targets Whitman in Attack on EPA Enforcement Decline*, Inside EPA, Feb. 7, 2003, at 9.

rate of Superfund cleanups fell from an average of 87 during the Clinton Administration to 47 in FY 2002.[83]

VI. EPA's Institutional Enforcement Relationships in the Bush II Era

One potential measure of the successfulness of a presidential administration's enforcement efforts at a federal administrative agency is the nature of its impact on a critical set of intragovernmental relationships that are an important part of federal enforcement work. At EPA, nearly all of those working relationships pose challenges to the Agency's enforcement managers. They are often affected by past events. They can change quickly; and some of them are almost entirely outside of EPA's control. Nonetheless, at least within constraints, the attitudes, actions and positions of the Agency's political appointees at least sometimes do have a meaningful impact on both EPA's internal and its external governmental relationships in enforcement.

In this section, I will attempt to summarize the views and impressions of EPA and DOJ officials I interviewed as to eight sets of intragovernmental relationships that concern EPA enforcement during the Bush II Administration. They include the relationships within EPA between the Agency's regional offices and its headquarters and the interaction between EPA's enforcement attorneys and its staff enforcement engineers and scientists. They also concern the "external" relationships between those who do, or supervise, EPA enforcement work, and state environmental protection agencies, the DOJ, offices of the U.S. Attorneys, Congress, other federal agencies and departments, and the White House.

With regard to the working relationship between headquarters and EPA enforcement matters in the Bush II Administration period, little consensus emerged among those I interviewed, This relationship has been widely (but not universally) perceived as smooth and harmonious over the past three and one-half years. However, that state of affairs does not represent any significant change from the Clinton Administration.[84]

Among the regional office enforcement personnel whom I spoke with, there were clear differences of view as to the value of EPA headquarters' role in the enforcement process. A narrow majority of the regional enforcement attorneys, engineers and managers whom I interviewed feel that their counterparts in headquarters are helpful, collegial, and supportive. However, other regional EPA enforcers described frictions and tensions in their interactions with Agency headquarters officials. That latter set of interviewees complained about the "hierarchical" and "bureaucratic" culture of the OECA, the delays in settlement negotiations that result from requirements that the regions obtain headquarters' approval or concurrence, the relative inexperience of some headquarters' staff members, and the absence of communication between and among various headquarters offices.

Mimi Newton, an attorney in EPA Region IX took the position that regional attorneys are frequently not provided with needed information as to whom they should speak, within EPA headquarters, regarding particular questions of enforcement policy.[85] She also opined that headquarters does an inadequate job of making certain that the Agency's regional offices respond, in a consistent fashion, to large information requests submitted under the Freedom of Information Act.[86] Moreover, Bill Muszinski, a former deputy regional administrator in EPA Region II noted some ongoing tensions between the national case priorities of the OECA and the more narrowly focused, locally oriented priorities of EPA's regional offices, especially (but not exclusively) with regard to the enforcement of asbestos demolition and renovation requirements, violations of pesticide application standards, and enforcement of lead in drinking water requirements.[87]

From the comments of regional EPA attorneys who are most familiar with the Superfund program, it appears that regional-headquarters relationships in the Superfund program have been particularly close and cooperative.[88] The major exception to that has been with respect to the sometimes contentious issue of regional office autonomy and independence in settlement negotiations with PRPs.[89]

The headquarters enforcement managers that I met with were mostly, though not entirely, satisfied with the nature of their interactions with regional office enforcement personnel. They seemed to feel that regional-headquarters relations are a "mixed bag." One former headquarters manager felt the relationship had "improved" relative to the early to mid-1990s[90]; and most would probably agree with David Nielson's statement that headquarters' relationship with regional enforcement people is "cyclical." "These things go up and down," Nielson stated. "In some regions the relationship with headquarters is good. In others the relationship is more problematic. It depends on personalities and the problems that come up."[91]

Many of the individuals I spoke with were of the view that the interrelationship of EPA enforcement attorneys and EPA scientists and engineers varied widely from individual to individual, and from enforcement team to enforcement team. They also agreed that those relationships were substantially unaffected by the actions and approaches of EPA political appointees.

Both within the regional offices and in the OECA, a clear majority of those whom I interviewed felt that (with occasional exceptions) the Agency's enforcement staff is now working effectively across disciplinary lines in the offices in which they work. Many credited that success to the positive motivation and maturity of the staff members involved, as well as the sound guidance provided to the staff by EPA's enforcement program's first-line supervisors.

83. *EPA Acknowledges Funding Pinch Has Slowed Superfund Cleanups*, INSIDE EPA, Feb. 8, 2002. These quantitative decreases in EPA enforcement outputs were widely reported in the press. *See, e.g.*, Chris Bowman, *EPA Under Bush Not as Aggressive*, SACRAMENTO BEE, May 25, 2003; *EPA Data Shows Drop in Administrative Enforcement Actions*, INSIDE EPA, July 5, 2002, at 1. Notably, some more recent enforcement statistics from the Bush II period are more positive. In FY 2003, for example, the DOJ collected more than $300 million in penalties, a uniquely high sum for a single year. Interview with John Cruden.

84. Interview with David Buente.

85. Interview with Mimi Newton.

86. *Id.*

87. Interview with Bill Muszinski.

88. Interviews with Bill Muno, Larry Kyte, and Kathleen Johnson.

89. Interview with Kathleen Johnson.

90. Interview with Eric Schaeffer.

91. Interview with David Nielson.

EPA's relationships with state environmental officials appear to vary immensely from state to state (and sometimes from environmental medium to environmental medium within particular states). Some EPA officials perceived at least a marginal improvement in these relationships in the past three and one-half years, as compared with the period of the 1990s. Others observed that EPA-state enforcement relationships were most fruitful and cooperative at the staff level, as opposed to the relationship that exist at higher levels of the respective agencies, where intergovernmental discussions often tend to be more publicized, more "ideological," and more divisive than at the career staff level.[92]

With regard to EPA's interactions with the DOJ, many EPA and DOJ lawyers and managers apparently feel that a solid foundation of cooperation and mutual respect was established between the two institutions over the 1990s, and that this positive situation has continued throughout the Bush II Administration to date. In fact, John Cruden went so far as to state: "We are probably at a high point right now in our relations with the regions and EPA headquarters. Although there are occasional bumps on the road, I have a profound respect for the men and women of EPA."[93]

EPA and DOJ enforcement managers now meet on a periodic basis to discuss the status of every filed and potential enforcement case. Each civil enforcement case referred by EPA to the DOJ is reviewed and "triaged" by the DOJ, with the top priority afforded to "health impact cases," and cases in which there is concern that a defendant is about to file a petition for bankruptcy. This procedure appears to help eliminate or avoid some interdepartmental tensions and rivalries. Another helpful factor has been the concerted effort made by Cruden and his boss, Assistant Administrator Tom Sansonetti, to cooperate with EPA. Nonetheless, some tensions and problems between EPA and the DOJ do remain.

From EPA's perspective, resource shortages among the DOJ's staff have sometimes unduly delayed the filing of civil enforcement cases that the Agency has referred to the DOJ. That has given rise to frustration on the part of EPA's enforcement staff.[94] In addition, EPA regional attorneys have perceived that some DOJ lawyers view themselves as "superior" to EPA lawyers, despite the relative lack of experience of the same DOJ attorneys in environmental enforcement matters. In a similar vein, Suarez told me:

> [The] DOJ has good attorneys. However, some of them overanalyze everything. My biggest frustration with them, however, is that they second guess EPA's policies on cases. It is not DOJ's job to tell us we should get better environmental results in cases. They sometimes see themselves as superior to EPA and that it is appropriate for them to question EPA's substantive policy judgment.[95]

In contrast with the DOJ, the offices of the U.S. Attorneys appear to play only a very minor role in EPA civil judicial enforcement matters. Where they have been involved in such cases, however, the quality of their work has earned the praise of several of EPA employees I interviewed.[96] U.S. Attorneys often have a relatively greater role in prosecuting criminal cases developed by EPA's criminal investigators and criminal enforcement attorneys. In that context, their level of interest, and their willingness to invest staff resources in pursuing such cases, has evidently varied greatly from office to office.

With regard to EPA's relationship with Congress, quite a few of the officials I spoke with made a point of noting the extent to which congressional oversight of the Agency's enforcement work has declined, particularly relative to the very active (and effective) oversight that Congress undertook in the 1980s and early 1990s.[97] Many enforcement officials at EPA and the DOJ would clearly agree with the opinions of one experienced attorney (who asked that his or her identity not be revealed) who told me: "Candidly, from the 1990s on, I don't think Congress has done a particularly good job in its oversight of either EPA or [the DOJ]. The public has not been well served by that."

Aside from occasional congressional oversight hearings and generalized requests for information, the main contact that EPA enforcers appear to have with Congress is in responding to requests for information regarding particular enforcement cases submitted by individual senators and representatives. These so-called "congressionals" are viewed as "just a fact of life" by EPA enforcement staff members who are assigned to respond to them. Typically, however, they have little impact on the progress of the cases they concern.

Congress' collective influence on federal enforcement of environmental laws, however, is not limited to its oversight activities and its requests for information. Obviously, the federal legislative branch is the architect—and, potentially, the modifier—of the fundamental environmental legislation that EPA and the DOJ are charged with enforcing. Moreover, Congress has ultimate control over the size and direction of the Agency's (and the DOJ's budget). With regard to the last of those functions, Congress' record during the Bush II Administration has been decidedly mixed.

On the one hand, since 2001, Congress has thus far tended to rebuff attempts by the Bush II Administration for decreases in EPA's budgetary allotments, including cuts in the monies the Agency would use for its enforcement work. On the other hand, however, as we have seen, both at EPA and the DOJ, "Congress' COLA trick" has had the result of reducing the environmental enforcement budgets of those executive branch agencies while giving a misleading public appearance of budgetary stability.[98] Moreover, the congressional practice of "earmarking" certain EPA budgetary for particular types of enforcement and compliance work, e.g., compliance assistance, has limited the discretion of Agency

92. Interviews with Sylvia Lowrance, George Czerniak, and Tom Bramscher. Notably, EPA's oversight of state performance during the Bush II period has been criticized harshly by the Agency's Office of Inspector General (OIG). *See, e.g.*, U.S. EPA, OIG EPA Region 6 Needs to Improve Oversight of Louisiana's Environmental Programs (2003).

93. Interview with John Cruden.

94. In June 2003, Kaplan, an EPA headquarters manager who had previously served as a Senior Attorney at the DOJ, told me: "There is a massive budget crisis at [the] DOJ going on right now. There are no travel funds and no deposition funds. . . . They are just going on fumes. It is a desperate situation. It has affected morale."

95. Interview with J.P. Suarez. Suarez also took the position that the DOJ tends to "overstaff" some enforcement cases and to make them "overly complex," a practice that makes it difficult to get the cases brought to conclusion. *Id*.

96. The U.S. Attorneys' offices that handle civil judicial enforcement cases on behalf of EPA typically tend to be located in large cities, e.g., Chicago, Las Vegas, Los Angeles, New York, and San Diego.

97. *See* Mintz, *supra* note 1, chs. 4, 5, and 6.

98. *See supra* note 69 and accompanying text.

officials to spend EPA's very limited enforcement funds where they are the most needed.

The relationships between EPA's enforcement programs and federal agencies and departments (other than the DOJ and U.S. Attorneys and their staffs) are often short-lived, case-specific, and highly varied. The government officials I interviewed mentioned that they had, collectively, worked with different federal agencies and departments in the course of their enforcement work. These institutions include the U.S. Customs Service, the DOE, the U.S. Department of Defense, the Drug Enforcement Agency, the USDA, the U.S. Army Corps of Engineers (the Corps), the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, the FBI, the National Park Service, the Securities and Exchange Commission, the U.S. Coast Guard, the Occupational Safety and Health Administration and the federal trustees of natural resources. Some of these entities have provided EPA with expert assistance in developing its enforcement cases, other agencies have sought EPA's help with environmental pollution problems. Some federal institutions have opposed EPA's positions in intraadministration policy discussions; and another set of departments have been the targets of EPA enforcement investigations or actions.

For the most part, those EPA officials I spoke with indicated that their contacts with the other federal institutions they mentioned were relatively brief—too short-lived, in fact, to provide a basis for characterization. One of the few exceptions to that is with respect to the Corps which, together with EPA, is responsible for administering the wetlands protection program established under the CWA. In that regard, a difference of opinion emerged among those I spoke with. Some interviewees discussed EPA's working relationship with the Corps in terms of persistent conflict.[99] Others viewed EPA's interactions with the Corps in a more positive light.[100]

Finally, with regard to the White House, the consensus among those I met with is that in following a tradition established in previous presidential administrations, there has been virtually no attempt by the Bush II Administration to interfere in the enforcement of individual environmental cases. In sharp contrast, however, the Bush II White House appears to have had a far greater involvement in the establishment of EPA policies that affect significant numbers of enforcement matters than was characteristic of previous administrations. As discussed previously, the White House played a leading role in the anti-enforcement reform of EPA's CAA regulations as they affect electric-generating stations.[101] Moreover, several of EPA enforcement staff members whom I interviewed have the clear impression that the White House, including particularly its Office of Management and Budget (OMB) and the CEQ, has been involved, quietly but nonetheless quite directly, in the development of other enforcement-related Agency policies.[102]

What, then, may be gleaned from this summary of the Agency's recent institutional relationship in enforcement about the Bush II Administration's role in, and impact upon, EPA enforcement? On balance, the answer seems to be less than one might expect.

As we have observed, even though (in the words of Buckheit): "To my knowledge, the [Bush II] White House has not called over and killed [enforcement] cases, at least not directly,"[103] the bulk of the available evidence suggests that that institution has involved itself—quietly but directly, and to an unprecedented extent—in decisionmaking involving EPA policies with major implications for federal environmental enforcement. Beyond that, however, aside from what may have been a modest improvement in the Agency's enforcement relationship with some states, the current administration's preferences and activities seem to have had no more than a minimal impact on EPA's ongoing institutional enforcement relationships. The Agency's headquarters/regional office and attorney/technical staff interactions seem substantially unchanged from what they were under previous administrations; and the same may be said with respect to EPA's working relationships with the DOJ, U.S. Attorneys, and other federal agencies and departments in the enforcement area. Finally, although Congress has played less of a role with respect to EPA enforcement questions during the Bush II Administration than was the case in past years, that fact seems more a result of decisions made in the legislative branch of the federal government than it is a function of anything that the present Administration has done or attempted.

VII. The Short, Eventful Tenure of Enforcement Assistant Administrator Suarez

To this point, nearly all that I have mentioned respecting EPA enforcement in the Bush II Administration has been critical of its policies and activities or, at best, an indication that its managerial efforts had only a minimal impact on Agency enforcement relationships. To leave the discussion there, however, would be unfair. In fact—albeit at a low level of visibility—there have been at least some, modest enforcement successes at EPA in the past three and one-half years. Most of those successes occurred during the 14-month period (from August 2002 to January 2004) in which the Agency's enforcement program was led by Suarez.

99. Interviews with Gail Ginsberg: ("There were always conflicts with the [Corps] over wetlands issues."); and Sylvia Lowrance ("The [Corps] makes no pretense of working with the EPA.").

100. Interviews with Bob Tolpa: ("We have had a good rapport with the [Corps]."); Tom Bramscher: ("There has generally been a good relationship with the Corps."); and an EPA regional official who spoke on condition of anonymity: ("The [Corps'] cooperation in [CWA] §404 cases varies from Corps district office to Corps district office. Our relationship with them depends upon the identity of the District Engineer and the size of the District Office's staff.").

101. *See supra* notes 33-45 and accompanying text.

102. *Compare* Interviews with an EPA lawyer who asked not to be identified by name: ("The White House, through [the] OMB, has been involved in the development of policies usually, with rare exceptions, from an industry point of view."); another EPA attorney who spoke off the record: ("I have a clear sense that EPA's assistant administrators have been given clear direction as to what they must do from the White House."); a senior EPA enforcement official who spoke upon condition of anonymity: ("I do get the feeling that the Agency is much more under the thumb of the White House than it was under other administrations."); an EPA supervisor who asked that I not divulge his or her identity: ("The assistant administrators and regional administrators talk directly with people in the White House. There is more control at higher levels than there used to be. We are not as independent as we may have been a while back."); and Gail Ginsberg: ("I think clearly now the White House controls everything in the Bush [A]dministration.") *with* Interview with J.P. Suarez ("My relationship with the White House was very good, very respectful. I appreciated their support.").

103. Interview with Bruce Buckheit.

After the U.S. Senate's rejection of Schregardus as the Bush II Administration's choice to be EPA Assistant Administrator of the OECA,[104] on September 17, 2001, the Administration engaged in a relatively lengthy search for its second nominee to fill the same position. Suarez, whose selection by the president was announced on February 26, 2002, was strongly supported by Administrator Whitman.

Suarez was then 37 years old. He had served as an Assistant U.S. Attorney in New Jersey from 1992 to 1998, as counsel for Whitman for criminal justice matters when she was the governor of New Jersey and, for three years, as the director of the New Jersey Division of Gaming Enforcement.[105] Suarez's nomination was approved by the Senate in August 2002, after having been temporarily blocked by Sen. Barbara Boxer (D-Cal.) in a protest against EPA's refusal to provide her with documents she had requested concerning the Superfund program.[106]

Personable, dynamic, passionate, and a quick study, Suarez quickly won the approval of both those he reported to at EPA and the career staff who worked for him. Thus, Fisher, EPA's Deputy Administrator during Suarez's tenure, told me: "[Suarez] came in and he kind of energized the place."[107] Along similar lines, Bob Tolpa, a member of Suarez's headquarters staff, stated: "[Suarez] was very energetic, very personable, and worked well with the staff. You wanted to do good work with him. He had charisma and a good environmental heart. He was a firm manager who was not afraid to take on the big issues."[108]

Under Suarez's leadership, EPA's enforcement program made several modest, but not insignificant, strides forward. The OECA continued—and rededicated itself—to gathering more (and more accurate) data on industrial and municipal compliance with environmental requirements, on the environmental outcomes of enforcement actions, and on the environmental impacts of EPA's compliance assistance efforts. The same office also pressed for the creation of an Enforcement Compliance History Online (ECHO) database that would make environmental compliance information regarding EPA-regulated facilities available on the Internet. After some resistance by industry,[109] and delay at the White House pending a review of whether the proposed web page would provide information of potential benefit to terrorists, this database was ultimately launched as a publicly accessible pilot in November 2002 and (following a public comment period) converted to a fully operational public website in August 2003.[110]

Perhaps the most well-publicized of Suarez's actions was the so-called Smart Enforcement Initiative, developed by the Assistant Administrator and his staff during "a little retreat, including all of the [OECA] office managers, in which we really focused on how to make the enforcement program go to the next level."[111] Although the results of that thinking process are not entirely original,[112] they are nonetheless sensible, reasonable, and largely noncontroversial.

As Suarez later explained, the policy initiative

> forced people in EPA enforcement to ask themselves[:] "Is this the most significant case we should be working on?," and also, as a corollary to that[:] "Is this really a federal enforcement case?" We don't have limitless resources for enforcement at EPA, and thus we should only be doing those cases that are the most significant because, for example, they are transboundary cases, they are significantly complex, they have significant [environmental] impacts, or we are uniquely situated to make sure that nobody gains an unfair competitive advantage by complying in one state but not another. We should not be doing work that is merely a duplication of what a state could be doing."[113]

In a more formal sense, the Smart Enforcement Initiative asserted five "key areas of focus" for EPA enforcement officials: (1) addressing significant environmental, public health and compliance problems; (2) using data to make strategic decisions for better utilization of resources; (3) using the most appropriate tool to achieve the best outcome; (4) assessing the effectiveness of program activities; and (5) communicating effectively the environmental, public health, and compliance outcomes of the Agency's enforcement activities.[114]

Another positive development in the Bush II Administration period—and one which, potentially, has great long-term political significance for EPA's enforcement program—is the creation of "consenters groups" within industries that have been the target of one of EPA's industrywide, enforcement initiatives. Such groups consist of companies who reached agreements with the Agency to avoid, or settle, EPA enforcement actions against them. In addition to discussing recent technical advances in pollution control, those consenters groups are, understandably, very interested in having EPA take enforcement action against those of their industrial competitors who remain in violation of environmental requirements. To the extent that more such industry groups form, they may be willing to supplement the efforts of environmental organizations by lobbying Congress for

104. *See supra* notes 11-12 and accompanying text.

105. *See Bush Nominates N.J. Gaming Official to Be Head of EPA Enforcement Division*, Env't Rep. (BNA), Mar. 1, 2002, at 484.

106. *Boxer Blocks Enforcement Pick Over EPA Stalling on Superfund Data*, Inside EPA, June 21, 2002, at 1.

107. Interview with Linda Fisher.

108. Interview with Bob Tolpa. Similar comments were made by other EPA enforcement staff members and managers. Interviews with Bob Kaplan: ("[Suarez] is outstanding. He is first rate. He is tough on enforcement and a strong voice. He is someone the career people are very happy with."); Rick Duffy: ("Suarez packaged and gave new impetus to some good things that were ongoing. He also came in with some new ideas."); Cheryl Wasserman: ("[Suarez] is wonderful—a great guy. He really appreciates and cares about enforcement."); and Mike Stahl:

> [Suarez] tried very hard to do the right thing, and in his heart, he was in fact interested in enforcing the law. For the short time he was here, [Suarez] did a very nice job of identifying the appropriate strategic direction for the program. If you talk to the career staff, he would get very positive reviews for what he tried to do and the way he interacted with people.

109. *Industry Says EPA Enforcement Database May Violate Data Rules*, Inside EPA, Apr. 14, 2003, at 10.

110. Interview with Mike Stahl.

111. Interview with J.P. Suarez.

112. In fact, a number of features of the Smart Enforcement Initiative appear similar to the notion of Focused Enforcement that was in vogue at EPA during part of the Clinton Administration.

113. Interview with J.P. Suarez.

114. For a more complete discussion of the Smart Enforcement Initiative, see U.S. EPA, Environmental Results Through Smart Enforcement: OECA Accomplishments Report, FY 2002 (2002) (EPA 300-R-03-002).

increased congressional support (and funding) for EPA enforcement programs.[115]

Notwithstanding these modest EPA enforcement gains during late 2002-2003, however, the good intentions and focused efforts of Suarez and his personal staff met with numerous obstacles, and very determined resistance from within EPA itself. As we've seen, in the intraadministration disagreement over NSR reform, Suarez, a firm supporter of maintaining the regulatory status quo and continuing to pursue vigorously EPA's NSR enforcement initiative as to fossil fuel-fired power plants, did not prevail.[116] Beyond this, Suarez and his staff were embroiled in a number of other internal controversies in which they made determined, but nonetheless unsuccessful, efforts to alter proposals for Agency guidances or policy changes that would seriously complicate, or else thwart completely, EPA's enforcement of environmental requirements. Suarez later described these intense policy debates as "an unforgiving assault by the program offices on the enforcement program."[117] He stated:

> Except for [the office of] research and development, I cannot point to one single media program that looked on us as a team player to be called upon to help, but rather as an obstacle to be gotten around or to be ignored, and hopefully avoided at all costs. Every single one of the media programs in EPA resents the existence of enforcement. . . . It was confounding to me that we would reach out to our fellow program offices, we would tell them what we were going to do, we would get their "buy in" and "communication," only to find that they had gone out and tried to undermine what we were doing.
>
> It makes our job [at the OECA] very difficult when, at the end of the day, we are asked to enforce a regulation where we have never been asked before that whether it is even enforceable. It becomes a real impediment when we are asked to sign off on a regulation that is not protective on its face that is not enforceable by us or the states. [When we refuse, however, the OECA] is then viewed as a roadblock to good regulation.[118]

Suarez's position in internal EPA negotiations was further undermined when, on May 21, 2003, his principal supporter within the Bush II Administration, Administrator Whitman, resigned from her post. Whitman cited personal reasons—particularly the hardships caused by a commuter marriage—as the principal factor in her decision to leave the Agency.[119] It seems very likely that those hardships were at least part of what motivated her departure. Whether other factors were also involved in that decision, including the Administrator's reported isolation and powerlessness within the Bush II Administration, is a question on which this account can shed no light.[120] Without doubt, however, Whitman's departure did deprive Suarez of a key EPA ally at a time when his office was participating in a number of sensitive discussions as to policy matters with major implications for the Agency's enforcement efforts.

In reflecting on the reasons for his own resignation from office, in January 2004, Suarez confided that his time of service in EPA was "a long, long [14] months, a very long [14] months."[121] He candidly indicated:

> I got tired of going at it on every front, internal and external. . . . You know you find the daggers are drawn at every turn.
>
> It becomes very difficult when you feel that the people who are your colleagues do not believe in you or your mission, the people on the outside do not believe in you or your mission, and you are a little island out there trying to do the right thing. You start to question: "What on earth am I doing here?"[122]

VIII. Some Mid-Term and Late-Term Developments

The resignations of Whitman and Suarez initiated another period of anxiety and concern, among members of EPA's career enforcement staff and others, as to the identity of those top officials' successors and the positions those appointees might take regarding Agency enforcement questions. That apprehension was compounded when EPA Deputy Administrator Fisher—who had been rumored to be a candidate to replace Whitman, and whose professionalism and managerial ability were highly regarded by many on the Agency's enforcement staff—announced that she, too, would be leaving her post at EPA.

After a search, in which a number of candidates were considered,[123] the Bush II Administration nominated the Republican governor of Utah, Leavitt, to be EPA's new Administrator in August 2003. Leavitt's confirmation by the Senate was temporarily delayed when five Democratic senators placed "holds" blocking a vote on his nomination pending resolution of their particular concerns and/or submission by the Bush II Administration of certain specific information.[124] In the end, however, after partisan debate, Leavitt's nomination was confirmed by the full Senate, on October 28, 2003, by a vote of 88-8.[125]

115. EPA's enforcement output statistics for FY 2003 contain other, modest indications of EPA enforcement success in some categories, at least relative to the first two years of the Bush II Administration. *See* U.S. EPA, Office of Compliance, FY 2003 End-of-Year Enforcement and Compliance Assurance Results (2003).

116. *See supra* notes 38-45 and accompanying text.

117. Interview with J.P. Suarez.

118. *Id*.

119. Seelye, *supra* note 45, at A1.

120. Through an aide, Whitman informed me that she has a "no interview policy" and that she would be unavailable to speak with me as I conducted research for this Article. Whitman did not, however, rule out the possibility of my interviewing her following the 2004 general elections. In press accounts at the time of her resignation from EPA, Whitman was described as "the odd woman out in the Bush [A]dministration." *Id*. She was also characterized as "a [N]ortheast Republican moderate" who "always seemed out of step with this conservative administration." *Id*. at A27.

121. Interview with J.P. Suarez.

122. *Id*. In contrast, Suarez had high praise for the career staff in the OECA: ("Really some of the best, most dedicated, talented individuals I ever had the pleasure to work with."), and concerning Whitman: ("She was a fabulous leader and Administrator."). A team player, he also complimented the Bush II White House: ("I think it is important to say, politically, that an obstacle that was never before me was political resistance to what we wanted to do save one exception, and that was NSR.").

123. According to press accounts, those other candidates included at least Gov. Dirk Kempthorne (R-Idaho), Florida Secretary of the Department of Environmental Regulation David Struhs, Region V Regional Administrator Skinner, Josephine Cooper of the Alliance of Automobile Manufacturers, and Deputy Secretary of Agriculture Jim Moseley. *See Whitman's Departure Sets Stage for Partisan Clash Over Replacement*, Inside EPA, May 23, 2003, at 1; *White House Facing Competing Pressures Picking New EPA Nominee*, Inside EPA, May 30, 2003, at 16.

124. *Senate GOP Moves to Head Off Bush Recess Appointment for Leavitt*, Inside EPA, Oct. 3 2003, at 1.

125. Jennifer 8 Lee, *After Long Delay, Senate Confirms Utah Governor as Head of EPA*, N.Y. Times, Oct. 29, 2003, at A20.

Anxious to avoid similar delays, debates, and public controversies concerning its EPA appointees in an election year, the Bush II Administration took a decidedly different approach to replacing Suarez as Assistant Administrator of the OECA. Rather than nominate a permanent replacement for Suarez, whose selection would require Senate confirmation, the Administrator instead chose to appoint Skinner, EPA Region V's Regional Administrator, to serve as the Enforcement Assistant Administrator on an "acting" basis, beginning in April 2004.

At this writing, it is far too soon to assess the impact of either Leavitt or Skinner on EPA's enforcement program. Because Leavitt began his term in a presidential election year, his flexibility to shape an agenda of his own for EPA has been quite limited.

Thus far, Administrator Leavitt has spent much of his time defending EPA policies put in place before he took office.[126] On March 25, 2004, he released a "500-day plan" that set forth his personal priorities among potential EPA policies. However, that plan—which in some aspects bore similarities to the "Enlibra Principles" that Leavitt had developed as governor of Utah—was relatively vague, and also not terribly original, with regard to the enforcement approach that Leavitt favors.[127]

A few of Leavitt's actions thus far may provide some small basis for optimism among those who favor a vigorous approach to EPA environment. Thus, as we have seen, early in 2004, following the decision of the D.C. Circuit to remand EPA's flawed NSR reform "equipment replacement rule" to the Agency, Leavitt decided to once again permit the Agency to send the DOJ new civil actions that redress violations by power plants of the preexisting NSR regulations. Leavitt also resolved the intra-Agency controversy regarding air emissions from CAFOs discussed above[128] by apparently approving the modest agreement on emission monitoring that Suarez and his staff had initially made with the agriculture industry, which EPA's Office of Water had previously undermined.[129] Notwithstanding these developments however, virtually no new NSR power plant cases have been referred by EPA to the DOJ during Leavitt's term thus far. Moreover, following their deep, painful frustrations and disappointments with NSR enforcement early in the Bush II Administration, it may be some time before EPA's regional offices can again be coaxed into reviving anything resembling the robust EPA NSR power plant enforcement initiative of the late 1990s.

Skinner, the Agency's current Acting Enforcement Administrator was a controversial figure among the career staff in EPA Region V during his term as its Regional Administrator. Viewed as a "hands-off manager" on enforcement issues and a "distant, hierarchical guy" who "kept his own counsel" and was "impossible to get an appointment with,"[130] Skinner frequently clashed with Ullrich, his first Deputy Regional Administrator. Ullrich, a veteran career staff executive, had been an acting Regional Administrator on many past occasions and was highly regarded by his colleagues and staff. Their conflict, which ultimately led to Ullrich's demotion to acting Regional Counsel and his subsequent retirement from government service, gave rise to resentment and distrust of Skinner among a number of Region V's enforcement staff. That record notwithstanding, however, the policy positions Skinner will take while acting in his current post, and how long he will continue to serve in it, cannot now be foretold.

IX. What Might the Future Hold?

At this writing, the general election of 2004 has not yet taken place and its outcome is entirely in doubt. In particular, there is now great uncertainty as to the identity of the next president and the party that will have a majority in the Senate. In light of the enigmas that this transitional political situation creates, far-reaching, hard and fast prognostications about the short-term future of EPA's enforcement program are of scant value at best. Nonetheless, at this point one may still fruitfully consider various differing scenarios regarding the direction of EPA enforcement, based on different assumptions as to how the forthcoming election will be decided.

In this section, I will describe three such alternative scenarios for EPA enforcement in a hypothetical second term of a Bush II Administration. I will then discuss some of the "legacies" of EPA enforcement in the now almost completed first term of Bush's presidency in terms of their implications for EPA enforcement in a hypothetical Kerry Administration. Finally, I will suggest a few modest methods by which whoever is elected president later this year can improve the effectiveness of EPA's enforcement work in future years if, indeed, that person and his appointees at the Agency wish to do so.

Assuming first that Bush is reelected president, there are, I think, at least three plausible, yet entirely different directions that EPA enforcement might take in his second term.[131] The first of these I will label the "Deep Cuts, Devolution, and Divisiveness Scenario." Under this alternative—a "worst-case approach" for those who favor firm, evenhanded federal environmental enforcement—the Administration will decide that enforcement at EPA should be reduced to a bare minimum, if not eliminated entirely, in favor of increased environmental enforcement at the state and local levels. Budgetary allocations for the OECA will be drastically decreased and EPA's enforcement staff will be pared back very significantly. Those changes will give rise to bitter protests, primarily from environmental organizations and the Administration's critics in Congress, who will attempt to make EPA's nonenforcement posture into a public political issue.

A second possibility for EPA enforcement in a Bush II second term might be termed the "Staying the Winding Course Scenario." There the administration will try to make only minimal changes to the status quo. It will give rhetorical support to a strong, deterrent enforcement approach, yet

126. *See Leavitt Agenda Still Undefined as Election Years Debates Take Hold*, Inside EPA, Mar. 19, 2004, at 1.

127. The plan promised to "make compliance our enforcement objective," to apply "consistent and certain enforcement to motivate compliance," and to make enforcement decisions "using multiple factors, including available resources and desired environmental benefit." *See EPA Administrator Leavitt Outlines Priorities for First 500 Days of His Tenure*, Env't Rep. (BNA), Apr. 2, 2004, at 118.

128. *See supra* notes 53-56 and accompanying text.

129. *EPA Working Out Details of Agreement on Animal Feedlot Emissions Monitoring*, Env't Rep. (BNA), May 28, 2004, at 1141.

130. The EPA officials who made these remarks indicated a preference that I not identify them by name.

131. Some combination(s) of these scenarios is, of course, also a logical possibility.

it will refrain from commencing new national enforcement initiatives against regulated industries, particularly where the potential targets of those initiatives possess significant political influence. EPA's enforcement budgets will be nominally flat. Nonetheless, the Agency will gradually continue to lose budgetary resources for its enforcement work by reason of Congress' COLA trick and the effects of inflation. Most federal enforcement actions will involve smaller companies and, from an environmental standpoint, more trivial violations.

As a third alternative, the Bush II Administration may choose to create a "Slow, Steady Improvement Scenario" in its second term, under which badly needed EPA enforcement funding will slowly be increased. The Agency will undertake more targeted enforcement initiatives against companies and industries that do significant environmental harm. EPA will also avoid changing its regulations and policies in ways that will undercut ongoing enforcement cases; and the morale of the career enforcement staff will improve.

Which of the above-mentioned scenarios for EPA enforcement is the most plausible if Bush is reelected, given EPA's enforcement record of the Bush II Administration in its first term in office? In fact, the current Administration's inconsistencies in enforcing federal environmental laws, combined with its relatively hierarchical, secretive tendencies in policymaking, make definitive predictions difficult.

Certainly, the NSR reform debacle reflects a willingness on the Administration's part to derail ongoing EPA enforcement initiatives, even where the completion of those initiatives will yield important environmental benefits and discontinuing them will subject the Administration to harsh critiques and angry dissent. Moreover, given the size of the federal budget deficit, and the Administration's strong antipathy to raising taxes, the Bush II regime will certainly be under great pressure to make cuts in all domestic programs, including environmental programs, during a second term in office. It is also, once again, raising money for the president's reelection from business people who are regulated by EPA. In a second term, the administration may thus feel a sense of obligation to favor some of its supporters' anti-regulatory tendencies. These factors tend to make the "Deep Cuts" and "Staying the Winding Course" scenarios, or some combination of the two, entirely plausible.

At the same time, however, having absorbed extensive criticism for undermining the NSR power plant initiative, for its lackluster enforcement performance during the beginning of its first term, and for other anti-environmental positions and preferences, it is at least possible that those who guide administration environmental policies are now convinced that drastic disruptions of EPA's traditional enforcement efforts carry too high a political cost for the president. Conceivably, such considerations may guide Bush II Administration decisionmakers on questions of EPA enforcement policy in a second Bush II term as the president, no longer concerned with being reelected, focuses on his future place in history. That circumstance would, of course, make possible a "Slow, Steady Improvement Scenario," perhaps in some combination with a "Staying the Winding Course" approach.[132]

Since Kerry has never held a position in the federal executive branch, the direction and emphasis of EPA enforcement in a hypothetical Kerry Administration is also difficult to predict. As a senator, Kerry has tended to vote in favor of pro-environmental positions; and he has earned the endorsement of the League of Conservation Voters and other environmental organizations—facts which might be the basis for an assumption that EPA enforcement will receive strong, high-level support if Kerry wins the presidency. On the other hand, of course, on numerous past occasions after taking office, elected officials have changed their position on any number of public issues. Conceivably (although perhaps not probably) Kerry and his appointees may choose to do the same thing with regard to environmental enforcement at the federal level. For purposes of this Article, however, I will accept the "conventional wisdom," and assume that vigorous EPA enforcement will flourish in a Kerry Administration.

If that is the case, what results of EPA enforcement during the Bush II period will an incoming set of Kerry-appointed EPA officials especially need to be aware of, as they set about strengthening and reinvigorating EPA's enforcement efforts? In that regard, there is both "good news" and "bad news."

The good news is that the Bush II Administration did nothing to change or dismantle the organizational structure of EPA enforcement that it inherited from its predecessors in office. The OECA, as an institution, is still intact, as are the diverse organizational centers of enforcement work in the Agency's 10 regional offices. Many dedicated, talented enforcement staffers have remained at EPA. In addition, EPA continues to enjoy a sound working relationship with most of the staff and management of the DOJ's environmental enforcement section and a number of U.S. Attorneys' offices; and no new problems have recently emerged in the enforcement relationships between the Agency's regional offices and headquarters or among its multidisciplinary enforcement staffs.

On the other hand, EPA's enforcement program will not have emerged from a one-term Bush II Administration without damage. The anxiety and low morale that currently prevails among many members of the Agency's career enforcement staff seem likely to give rise to some continued reluctance to the initiation of new large-scale enforcement cases against major polluting industries, particularly in some of EPA's regional offices. Such regional office staff resistance may well be especially problematic if and when the Agency attempts, in earnest, to restart the NSR power plant initiative that was thrown into disarray in the Bush II period. In addition, through retirement and other means, EPA's enforcement program lost a good many very talented, experienced career staff members, along with their knowledge base and institutional memories, during the past three and one-half years. Moreover, in a new administration the career staffs of a number of EPA headquarters' program offices seem likely to retain their active antipathy to OECA, and the policy positions it is likely to favor in the future; and EPA's enforcement program also seems likely to continue to suffer from

132. Other variables would certainly affect the direction of EPA enforcement in a second Bush II term. These include, at least, the political composition and preferences of the 109th Congress, the identity and views of EPA's next permanent Administrator and Assistant Administrator at the OECA, the state of the U.S. economy, and the attitudes of the general public toward environmental protection as a whole.

systematic underfunding, particularly with regard to its critical extramural budget, in the short-term future.[133]

This set of obstacles gives rise to one final question: what specific steps can a new administration take to avoid (or minimize) its impact and enhance the effectiveness and efficiency of EPA's enforcement work?[134] One useful starting point would be an intensive, Agencywide effort to restart—and see through to a successful conclusion—an NSR enforcement initiative against the electric utility industry. That act would signal a dramatic shift from the most damaging EPA enforcement policies and approaches of the recent past. If successful, it would also result in very significant, beneficial decreases in atmospheric pollution.

Given the difficulties of recent past, however, reviving an NSR power plant initiative will closely require extra effort on the part of EPA's next set of top managers. In addition to communicating their preferences to the Agency's Regional Administrators and regional office Division Directors, EPA's next permanent Administrator and Assistant Administrator of the OECA will need to meet in person with the Agency's entire enforcement staff, both in headquarters and in all of its regional offices, and make clear to them, very directly and without equivocation or caveat, that enforcement in general—and an NSR power plant initiative in particular—are of the very highest importance. They must demonstrate, to the staff's satisfaction, that enforcement work will receive the continuing support (and active interest) of EPA's highest leaders; and they must reiterate and follow that message up as often as needed until it is fully understood and accepted.

Second, EPA's new appointed leadership must openly demonstrate its support for enforcement matters by encouraging additional sector-based enforcement initiatives, by again favoring the listing of Superfund sites on the NPL, and by lending their personal support to the OECA's Assistant Administrator and his or her staff in their (virtually inevitable) bureaucratic disagreements with other headquarters' program components. These actions, too, will help immensely in reviving the Agency's tepid, halting enforcement efforts.

Finally, EPA's new leaders must work closely with the Agency's allies in Congress to secure appropriate funding for EPA enforcement work, to restore the Superfund tax on certain industries, and to protect the integrity of the Agency's statutory enforcement tools and prerogatives. Without congressional understanding and active support, EPA's enforcement program seems likely to struggle—and falter—in a quagmire of budgetary woes and insufficient legal authority.

EPA enforcement over the past three years has been enmeshed in controversy. The Agency's critics have sometimes used harsh rhetoric to describe its failings. Administrative officials have resolutely defended its vigor and effectiveness. In fact, the truth appears to lie somewhere in between.

Contrary to its critics, the Bush II Administration has not truly "abolished enforcement" at EPA; nor has the current regime "politicized" that program in every respect. Nonetheless, despite some intermittent bright spots, it is hard to escape the conclusion that the Agency's enforcement efforts have foundered, in quite significant and damaging ways, over the past few years. As a result of their inexperience with the workings of federal regulatory agencies, their lack of communication, their mistaken preconceptions, their indifference and/or their ideological convictions, the Bush II Administration's appointed officials frightened and alienated some members of EPA's dedicated career enforcement staff. They have supported—or tolerated—changes in Agency policy that have clearly undermined EPA's enforcement positions; and their very public, effective scuttling of a large-scale, vigorous, and promising enforcement initiative against the electric utility industry was a devastating, unprecedented interference with the integrity of Agency enforcement work.

Thus far, the Bush II Administration has not permanently dismantled enforcement at EPA. Nonetheless, the current Administration's (often uncoordinated) collective efforts have created a troubling set of problems and difficulties for the Agency's enforcement program. No matter what candidate wins the presidential election of 2004, the elimination of roadblocks to EPA enforcement success will require sustained, active leadership, hard work, patience, and skill in the months and years ahead.

133. Similar problems of underfunding seem likely to plague the DOJ's environmental enforcement section as well.

134. In fact, given the intrinsically technical, nonpolitical nature of EPA's enforcement activities, the steps discussed below may actually be taken, with good results, by any set of EPA leaders, no matter what the outcome of the 2004 election may be. On the other hand, of course, purely political variables may well have a bearing on the *probability* that particular officials will be amenable to pursuing such measures and approaches.

APPENDIX A - List of Persons Interviewed

INTERVIEWEE	PLACE OF INTERVIEW	DATE OF INTERVIEW
Michelle Benson	San Francisco, Cal.	June 24, 2003
Joe Boyle	Chicago, Ill.	March 4, 2004
Tom Bramscher	Chicago, Ill.	March 3, 2004
*Carol Browner	Washington, D.C.	May 17, 2004
Bruce Buckheit	Dulles Airport, Va.	June 18, 2003
David Buente	Washington, D.C.	June 17, 2003
Eric Cohen	Chicago, Ill.	March 2, 2004
John Cruden	Washington, D.C.	April 1, 2004
George Czerniak	Chicago, Ill.	March 2, 2004
Rick Duffy	Washington, D.C.	March 31, 2004
Linda Fisher	Washington, D.C.	April 14, 2004
Ben Fisherow	Washington, D.C.	April 2, 2004
Bert Frey	Chicago, Ill.	March 3, 2004
Bruce Gelber	Washington, D.C.	April 14, 2004
Gail Ginsberg	Ridgeway, Wis.	March 8, 2004
John Gregory	Washington, D.C.	June 16, 2003
Arthur Haubenstock	San Francisco, Cal.	June 27, 2004
George Hayes	San Francisco, Cal.	June 27, 2003
*Steve Herman	Washington, D.C.	June 17, 2003
Art Horowitz	Washington, D.C.	June 2, 2003
Tinka Hyde	Geneva, Ill.	March 10, 2004
Kathleen Johnson	San Francisco, Cal.	June 23, 2003
Bob Kaplan	Washington, D.C.	June 17, 2003
Larry Kyte	Chicago, Ill.	March 4, 2004
Ann Lassiter	Alexandria, Va.	April 2, 1004
Sylvia Lowrance	Bethesda, Md.	June 18, 2003
Ann Lyons	San Francisco, Cal.	June 25, 2003
John Lyons	San Francisco, Cal.	June 24, 2003
*Felicia Marcus	San Francisco, Cal.	June 23, 2003
Nancy Marvel	San Francisco, Cal.	June 26, 2003
Tom Mintz	San Francisco, Cal.	June 26, 2003
Walter Mugdan	New York, N.Y.	March 30, 2004
Bill Muno	Chicago, Ill.	March 2, 2004
Bill Muszynski	Philadelphia, Pa.	May 18, 2004
Rett Nelson	Chicago, Ill.	March 3, 2004
Mimi Newton	San Francisco, Cal.	June 27, 2003

APPENDIX A - List of Persons Interviewed (cont.)

INTERVIEWEE	PLACE OF INTERVIEW	DATE OF INTERVIEW
David Nielsen	Washington, D.C.	June 16, 2003
Ann Nutt	San Francisco, Cal.	June 25, 2003
Steve Rothblatt	Chicago, Ill.	March 4, 2004
John Rothman	San Francisco, Cal.	June 25, 2003
Eric Schaeffer	Washington, D.C.	April 13, 2004
*Lois Schiffer	Washington, D.C.	April 14, 2004
Walker Smith	Washington, D.C.	April 13, 2004
Mike Stahl	Washington, D.C.	March 31, 2004
Allyn Stern	San Francisco, Cal.	June 24, 2003
J.P. Suarez	Bentonville, Ark.	May 21, 2004
David Swack	Washington, D.C.	April 1, 2004
Dave Taliaferro	Chicago, Ill.	March 3, 2004
Bob Tolpa	Washington, D.C.	March 31, 2004
David Ullrich	Chicago, Ill.	March 5, 2004
Michael Walker	Washington, D.C.	March 29, 2004
John Warren	Washington, D.C.	March 29, 2004
Cheryl Wasserman	Washington, D.C.	June 16, 2003
Noël Wise	San Francisco, Cal.	June 26, 2003
Allan Zabel	San Francisco, Cal.	June 25, 2003

*Interviewee only discussed EPA enforcement in Clinton Administration and was thus not a source of information for this Article.

APPENDIX B - Standard Interview Questions

I. Preliminary Questions of a General Nature

A. What position (or positions) did you hold which involved EPA enforcement work?

B. As you look back on each of the periods in the history of EPA's enforcement programs from 1993 to the present time in which you were personally involved (or were aware of), what do you consider the most significant events, developments, and trends?

B. As to those same periods, what do you view as the most important achievements in EPA enforcement programs, and the most significant problems which arose in those programs?

II. Questions Regarding Institutional Relationships in EPA Enforcement Work

A. How would you characterize the following sets of institutional interrelationships among EPA enforcement personnel since the end of 1992?

1. EPA regional enforcement people and EPA headquarters enforcement people.
2. EPA enforcement attorneys and EPA enforcement technical people.

B. How would you describe the institutional interrelationships between EPA enforcement people and the following other government entities since the end of 1992?

1. State personnel (including organizations of state environmental officials, state environmental agency employees, and state elected officials).
2. DOJ attorneys and managers.
3. U.S. Attorneys and their professional staffs.
4. Congress.
5. Other federal agencies and departments.
6. The White House.