

The EPA's \$1.6B Step Back

Law360, New York (May 2, 2011) -- With the 2011 budget finally complete, and as work ramps up on the 2012 budget, it is clear that massive cuts are needed to reduce the deficit and the federal government needs to kick its spending habit.

The last-minute agreement that narrowly avoided government shutdown included \$38 billion in cuts, although the Congressional Budget Office later stated that much either would not be realized this year or involved money that existed only on paper.

Of the cuts, nearly \$1.6 billion came from the U.S. Environmental Protection Agency. Certainly this is a significant start, but because most of those cuts were to state and tribal assistance grants, which help local entities with compliance programs, the cuts are likely to result in pass through of costs to already budget-strapped local entities.

Instead of simply passing costs onto state and local programs, the federal government should step back and evaluate the purpose and direction of the EPA, and recommit to a goal of effective and efficient pollution control.

In 1970, the EPA began with a broad mandate of cleaning up the environment, at a time when Rachel Carson's "Silent Spring" led public discourse, cities choked on smog and the Cuyahoga River burned. Many environmental laws already existed, but enforcement was split among several different agencies, generally based on whether the pollution occurred in air, on land or in water.

After a study by the President's Advisory Council on Executive Organization, President Richard Nixon concluded that the piecemeal approach to environmental regulation failed to account for the interrelation of the sources of pollution, and that a far more effective approach would be a unified agency.

Nixon sent his reorganization plan to Congress with the message that it would "promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions and the expeditious administration of the public business, and ... increase the efficiency of the operations of the government to the fullest extent practicable."^[1]

Today, much of the visible pollution that drove 1970s environmental policy is a thing of the past, but the EPA continues to set ever-loftier goals, supported by ever-increasing appropriations. In its first year, the EPA received about \$1 billion and employed 4,084 people.

In the 2011 budget cuts, the agency ended up with about \$8.8 billion, down from a high of \$10.3 billion in 2010, the year the EPA budget jumped 35 percent. In 2010, 17,278 people worked for the EPA. Ever-increasing budgets and staff are certainly not unique to the EPA, and, given the current budget difficulties, the EPA should consider re-evaluating its spending in light of the times and the goals with which it started.

It is unnecessary to find and clean up benign microscopic concentrations (now at parts per trillion) of certain chemicals in our environment, yet the EPA is now pursuing such a regulatory agenda.

In the decades since its birth, the EPA made great headway on its original goals — pesticides are heavily regulated, Stage 1 ozone episodes in the Los Angeles area dropped from about 120 per year in the late 1970s to one per decade in the 2000s, and ducks, herons and rowing teams can be spotted on the Cuyahoga. With the regulation and enforcement up and running, the EPA should consider taking a step back, as opposed to pushing for more staffers and more funding.

In the decades after the 1970s, the agency entered the market by making acid rain a tradeable commodity, and took on America's car makers by setting future standards for emissions and fuel efficiency, all along creating tighter and tighter air and water quality requirements, more difficult for businesses and municipalities to meet.

Many of the programs implemented in recent years should be re-evaluated, keeping in mind the original purpose of the EPA — effective and efficient pollution control. And one program in particular is particularly suitable for re-evaluation: Superfund.

The program created in the wake of the Love Canal disaster, with the noble goal of cleaning up past damage done, became a massive program of litigation and never-ending cleanup programs with no outer limits and no cost-benefit analyses.

Superfund, which started with a \$250 million budget the first year^[2] to be funded by taxes on crude oil, hazardous chemicals, and various other products, has grown to a program costing \$1.2 billion per year that is no longer funded by the tax, which expired 16 years ago.

It has been sharply criticized for its costs, to both businesses and government, often tied up in the litigation process. Although figures vary year to year, the EPA spent \$25 million on litigation in 2007, as well as \$26 million identifying the responsible parties and \$4 million negotiating with them.^[3]

Ten years ago, in an analysis supported in part by the EPA, James T. Hamilton and W. Kip Viscusi analyzed one of the reasons Superfund is so expensive: the assigned risk. In "Calculating Risk? The Spatial and Political Dimensions of Hazardous Waste," the economists and their students analyzed the EPA's risk assessment and found that not only were the values assigned as maximum individual cancer risks far too high, but that even those assigned risks posed no threat without some hypothetical future in which people turned the sites into residential neighborhoods.

Further, although government agencies frequently assign values to individual lives for cost benefit analyses, Superfund does not require that benefit assessments be done or that the benefit exceed the cost. When the book was published in 1999, agencies providing cost-benefit analyses to the Office of Management and Budget used values of \$3 million to \$7 million per person, but most of the 150 Superfund sites evaluated by Hamilton and Viscusi had a cost per cancer case averted of more than \$100 million, with a median of \$388 million.

Although any death caused by hazardous waste is one too many, the analysis is an example of Superfund's, and the EPA's, lack of boundaries, and failure to take into account the costs to industry and the individual taxpayer.

Aside from the expense of setting a policy based on the last bit of risk posed by a site, another expense is associated with the last bit of purity, or purity for its own sake. On Feb. 2, EPA Administrator Lisa P. Jackson announced a plan to set drinking water standards for perchlorate, as well as a single drinking water standard for 16 volatile organic compounds, such as TCE and PCE.

Although the regulations are directed at drinking water, they will also impact current and past Superfund sites, where the limits are frequently used as the required level of cleanup, known as the applicable or relevant and appropriate requirements (ARARs).

At sites in which potential drinking water is involved, a change in the drinking water standards leads to a change in the ARAR, which could add time to a cleanup program or create additional issues at already-closed sites.[4] The EPA's Comprehensive Environmental Response, Compensation and Liability Act Section 106 program is also totally out of control.

Orders are issued without any pre-enforcement review, and recipients are left having to comply with the often outrageous demands of the agency or face draconian penalties if risky litigation with the government in United States courts is unsuccessful. Of course, the EPA refuses to close out orders and permit federal court oversight, unless the recipients of its orders agree to waive their rights to review the orders in the future.

In an article in the EPA Journal, the EPA's first administrator, William D. Ruckelshaus, stated that he blames the idealism of the 1970s for the agency's later controversies:

"We thought we had technologies that could control pollutants, keeping them below threshold levels at a reasonable cost, and that the only things missing in the equation were national standards and a strong enforcement effort. All of the nation's early environmental laws reflected these assumptions, and every one of these assumptions is wrong ... The errors in our assumptions were not readily apparent in EPA's early days because the agency was tackling pollution in its most blatant form. The worst problems and the most direct ways to deal with them were apparent to everyone." [5]

The current EPA, with its massive budget and staff and seemingly endless ability to redefine standards, seems to have forgotten that when the EPA started, it was not with the single-minded vision of purity for the sake of purity, but to centralize and simplify the previous piecemeal approach to environmental issues, and serve the "total public constituency." [6]

As Roy L. Ash stated in his memorandum to the president proposing a centralized environmental protection administration, "It must appreciate and take fully into account competing social and economic claims." [7]

Nixon specifically stated in Reorganization Plan No. 3 that industries "would be assured of consistent standards covering the full range of their waste disposal problems." It is unlikely that he could foresee ever-tightening standards applied retroactively through Superfund.

Forty years ago, the EPA set in motion the environmental regulatory machine that hums today. Before allowing for continuing expansion of the agency's original mandate, the EPA should, along with all other federal agencies, evaluate its current purpose and mission, focusing on its founders' original vision: an independent agency focused on the environment, but balancing the needs of the constituency.

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[1] Reorganization Plan No. 3 of 1970, July 9, 1970, available at <http://www.epa.gov/history/org/origins/reorg.htm>.

[2] EPA Press Release, June 3, 1979, available at <http://www.epa.gov/history/topics/cercla/01.htm>.

[3] General Accounting Office, Superfund: Funding and Reported Costs of Enforcement and Administration Activities, July 18, 2008, available at <http://www.gao.gov/new.items/d08841r.pdf>.

[4] See Third Five-Year Review Report For Arsenic Trioxide Superfund Site, Southeastern North Dakota (September 2008) available at <http://www.epa.gov/superfund/sites/fiveyear/f2008080002505.pdf>; Explanation of Significant Differences, Coakley Landfill Superfund Site, (September 2007) <http://www.epa.gov/region01/superfund/sites/coakley/274471.pdf>.

[5] Jack Lewis, The Birth of the EPA, EPA Journal, Nov. 1985 available at <http://www.epa.gov/history/topics/epa/15c.htm>.

[6] See Reorganization Plan No. 3 of 1970, July 9, 1970, available at <http://www.epa.gov/history/org/origins/reorg.htm>; Ash Council Memorandum for the President, April 29, 1970, available at <http://www.epa.gov/history/org/origins/ash.htm>.

[7] Ash Council Memorandum for the President, April 29, 1970, supra note.