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ENFORCEMENT OF ENVIRONMENTAL VIOLATIONS IS NOT DEAD

Contrary to some opinions, federal and state environmental enforcement is alive and well. You don't have to be a high-profiled, multi-national company like BP to be a target of federal and state civil and criminal enforcers. With budget issues in the forefront these days, and over the past several years, enforcement lives. It's just different.

The Environmental Protection Agency ("EPA") recently released its "Fiscal Year 2012 EPA Enforcement & Compliance Annual Results." As that report indicates, the EPA reached a five-year high by assessing more than \$250 million in civil and criminal penalties and fines, and a four-year high in achieving estimated total pollution reductions largely through consent orders. On the other hand, the total number of actions is down, meaning the EPA was pursuing more "bang for the buck," targeting and prevailing on higher-profiled, more complex, and bigger ticket issues.

In coming years, this trend is expected to continue. While BP's recent criminal penalty deal with the United States over the Deepwater Horizon incident is sure to greatly skew numbers for the next year for criminal matters (and possibly also for civil matters if a civil penalty agreement is reached), the EPA still intends to pursue, both civilly and criminally, violations with high impact. Violations that result in personal injuries or deaths will likely be high on the target list, as well as matters affecting disadvantaged communities (environmental justice issues). Moreover, the EPA will not merely limit its efforts to traditional air/water/waste issues, but will pursue matters under pesticide laws as well, as it did against Scotts Miracle-Gro Co in 2012.

What does that mean for most companies? A few thoughts and observations:

- States will still be the primary enforcement agency. They, too, have been hit hard with budget cuts and are less able to cover their own territory as they once did. Look for state agencies to issue a number of narrower-focuses and smaller enforcement actions that rely on self-reporting. Examples are air permit and water permit violations that must be reported under applicable permits.
- Look for more states to assess and collect penalties rather than issue mere compliance orders. Violations asserted may not be big-ticket items, but most will require some penalty payment as part of any settlement.
- Also look for multi-agency and federal-state coordination of enforcement efforts. Agencies will need to rely upon each other to cover the field, given budget constraints.
- Repeat violators will likely get more scrutiny. Like the "squeaky wheel" poor past performers will be like low hanging fruit for strapped surveillance teams.

Maintaining compliance remains as important as ever. Continue to conduct compliance audits and routine inspections. Keep up with maintenance. Continue to emphasize a culture of environmental and safety awareness. It only takes one mishap for you to find the EPA, Occupational Safety and Health Administration ("OSHA"), and state enforcement people at your facility, which could be the start of a long, very costly, and very disruptive investigation and enforcement experience.

– [Michael A. Chernenkoff](#)



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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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