



KEY DEVELOPMENTS IN ENVIRONMENTAL ENFORCEMENT

Boyd Bryan
Jones Walker LLP

Air & Waste Management
Association

Louisiana Section Annual
Conference

Baton Rouge, Louisiana

October 16, 2019

Rollback of regulations does not mean reduced enforcement

- January 30, 2017 – President Trump Executive Order requiring that whenever a federal department or agency proposes or promulgates a new regulation, it shall identify two existing regulations for repeal.
- Reports are that this goal is being met, and certainly there have been many rollbacks of Obama-era regulations.
- However, regulatory changes take time, and many judicial challenges have been successful.
- **Key Points:**
 - Deregulation does not equate to lax enforcement.
 - Core statutes have not changed.
 - Enforcement continues, despite reduced resources.

Trend towards transparency of compliance information

- April 3, 2018 – Internal memorandum issued by EPA’s Office of Enforcement and Compliance Assurance (OECA) stating that, contrary to a suggestion in a 2015 enforcement memorandum issued under the Obama EPA, there is no default expectation that “innovative enforcement” tools—such as advanced monitoring, independent third-party verification of compliance with settlement obligations, electronic reporting and public accountability through increased transparency of compliance data—will routinely be sought as injunctive relief in all EPA settlements, where such activities are not required by applicable law.
- Nevertheless, the clear trend is toward greater visibility of compliance reporting, such as through electronic reporting of emissions and effluent data.
- NGOs are playing a greater role in evaluating and exposing noncompliance.
- What happens behind the fenceline may not stay behind the fenceline!

EPA-State cooperation in enforcement

- EPA will generally defer to authorized states as the primary implementer of inspections and enforcement in authorized programs.
- Exceptions:
 - Where the state requests that EPA assist or take the lead.
 - For violations that are part of a National Compliance Initiative.
 - Emergency situations or situations where there is a substantial risk to human health or the environment.
 - Where a state lacks adequate equipment, resources, or expertise.
 - Situations involving multi-state or multi-jurisdictional interests or interstate impacts.
 - Significant violations that the state has not timely or appropriately addressed.
 - Serious violations for which EPA's criminal enforcement authorities may be needed.
 - State enforcement program review inspections.
 - Enforcement at federal or state owned or operated facilities.

See Memorandum from Susan Parker Bodine, EPA Assistant Administrator for Enforcement and Compliance Assurance, titled "Enhancing Effective Partnerships Between the EPA and States in Civil Enforcement and Compliance Assurance Work," dated July 11, 2019, available at: <https://www.epa.gov/sites/production/files/2019-07/documents/memoenhancingeffectivepartnerships.pdf>.

EPA's National Compliance Initiatives for FY2020-FY2023

Seven priority areas of focus of EPA's enforcement and compliance assurance program:

1. Creating cleaner air for communities by reducing excess emissions of pollutants from stationary sources
 - Focus on significant sources of VOCs and HAPs, in particular where emissions may affect an area's attainment status or adversely affect vulnerable populations
2. Reducing hazardous air emissions from hazardous waste facilities
 - Improving compliance by hazardous waste TSDFs and LQGs
 - Widespread noncompliance noted related to leaking or open pressure relief valves and tank closure devices, monitoring, recordkeeping, and other requirements
3. Stopping aftermarket defeat devices from vehicles and engines
 - Focus on stopping the manufacture, sale, and installation of hardware and software designed to defeat required emissions controls on vehicles and engines (including non-road)

EPA's National Compliance Initiatives for FY2020-FY2023

4. Reducing significant noncompliance with NPDES permits
 - Approximately 40,000 major and minor individually-permitted facilities
 - More than 29% in significant noncompliance (e.g. failure to submit reports, significant exceedances of effluent limits)
 - In FY2018, almost 4 billion pounds of pollutants discharged above permit limits
 - Focus on all facilities in significant noncompliance, not just industrial contributors
5. Reducing noncompliance with drinking water standards at community water systems
 - Approximately 50,000 drinking water systems that serve water to the same people year-round (Community Water Systems)
 - In FY2018, 40% violated at least one drinking water standard, 30% had monitoring and reporting violations, and 7% had health-based violations

EPA's National Compliance Initiatives for FY2020-FY2023

6. Reducing risks of accidental releases at industrial and chemical facilities
 - Thousands of facilities make, use, and store extremely hazardous substances, many in environmental justice communities
 - Historically, catastrophic accidents at approximately 150 facilities each year
 - Reduce the risk of chemical accidents by enforcing the Clean Air Act Risk Management Program and General Duty Clause
7. Reducing childhood exposures to lead
 - Increase compliance with lead-safe renovation requirements
 - Mapping of communities with elevated lead exposures, targeted geographic initiatives, and public awareness campaigns

See Memorandum from Susan Parker Bodine, EPA Assistant Administrator for Enforcement and Compliance Assurance, titled "FY2020-FY2023 National Compliance Initiatives," dated June 7, 2019, available at:

<https://www.epa.gov/sites/production/files/2019-06/documents/2020-2023ncimemo.pdf>.

DOJ Criminal Division Guidance Document, “Evaluation of Corporate Compliance Programs”

Factors prosecutors should consider in conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements include:

- the adequacy and effectiveness of the corporation’s compliance program at the time of the offense and at the time of the charging decision, and
- The corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one”

Three fundamental questions a prosecutor should ask:

1. Is the corporation’s compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
3. Does the corporation’s compliance program work in practice?

DOJ Criminal Division Guidance Document, “Evaluation of Corporate Compliance Programs”

Guidance memo is to assist DOJ prosecutors in criminal matters, and is not binding on EPA or state environmental agencies.

However, LDEQ’s nine-factor penalty analysis includes similar considerations:

- The nature and gravity of the violation
- The degree of culpability, recalcitrance, or indifference to regulations or orders
- Whether the person charged failed to mitigate or make a reasonable attempt to mitigate the damages caused by the noncompliance

Similar factors considered under EPA’s penalty policy.

The clear message:

- A strong compliance program is a means to prevent noncompliance, and a factor considered in enforcement.
- The effectiveness – not only the existence – of the compliance program matters.

See U.S. Department of Justice, Criminal Division, Guidance Document titled “Evaluation of Corporate Compliance Programs,” updated April 2019, available at: <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

Limitations on the use of guidance documents to create binding obligations

- November 16, 2017 – Internal memorandum issued by AG Jeff Sessions to DOJ components and employees prohibiting DOJ from issuing guidance documents that purport to create rights or obligations binding on persons or entities outside of the Executive Branch (including state, local, or tribal governments), in circumvention of the notice-and-comment rulemaking process.
- January 25, 2018 – Internal memorandum issued by the DOJ Associate Attorney General to the heads of its civil litigating components and U.S. Attorneys, prohibiting DOJ from using its enforcement authority to effectively convert agency guidance documents into binding rules, or using noncompliance with guidance documents as a basis for proving violations in civil enforcement cases.
- October 9, 2019 – Two Executive Orders issued by President Trump, prohibiting the use of guidance documents to impose new standards of conduct, requiring each agency to maintain on its website a searchable, indexed database of all guidance documents, and requiring at least a 30-day public notice and comment period before issuance of a “significant guidance document.”

October 9, 2019 Executive Orders available at: <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/> and <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/>.

Limitations on the use of guidance documents to create binding obligations

It matters.

- EPA's "once in, always in" (OIAI) policy
 - Originally published in a 1995 EPA memorandum
 - States that a facility that is a major source of HAP on the first compliance date of an applicable MACT standard must permanently comply with the standard, even if it subsequently becomes an area source by limiting its potential to emit.
 - Stated purpose: to prevent "backsliding" from MACT requirements by operating at levels to reduce emissions below major source threshold.
 - EPA acknowledge the OIAI policy was only a "transitional policy guidance" intended to remain in effect only until EPA promulgated regulations addressing the timing issues. It never did.
 - In 2016, EPA provided comments to and requested information from LDEQ regarding a proposed air permit modification (from major to area source), based on the OIAI policy. LDEQ provided the explanation and issued the modified permit.
 - January 2018 – EPA issued a memorandum repealing the OIAI policy.
 - June 25, 2019 – EPA issued a proposed rule to reverse the OIAI policy.

Limitations on the use of guidance documents to create binding obligations

It matters.

- EPA's "sham permitting" guidance
 - Issued by EPA in 1989
 - Addresses EPA's concern that an owner or operator may obtain a minor source permit for the purpose of allowing it to commence construction (i.e. expedite construction) of the facility prior to obtaining a major source permit.
 - States that where EPA can demonstrate intent to operate at major source levels, it will consider the minor source permit to be a "sham" and void ab initio, and will take appropriate action to prevent the owner or operator from constructing or operating the facility without a major source permit
 - Identifies criteria that EPA permitting personnel should scrutinize in determining permit applicant's intent.
 - An internal EPA guidance only; not law. None of the criteria are stated in any statute or regulation.
 - In 2018, environmental group challenged LDEQ's issuance of a major source permit based on the "sham permitting" guidance.
 - Claim dismissed on exceptions of no cause of action and no right of action.

Curtailing the use of Supplemental Environmental Projects (SEPs) in DOJ Settlements

- A SEP is “an environmentally beneficial project or activity that is not required by law, but that a defendant (or respondent) agrees to undertake as part of the settlement of an enforcement action.” SEPs are “projects or activities that go beyond what could legally be required in order for the defendant (or respondent) to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws.”
 - DOJ and EPA determine the amount they are willing to settle for by considering several factors, including SEPs.
- June 5, 2017 – Memorandum issued by AG Jeff Sessions prohibiting the DOJ and U.S. Attorneys from entering into settlements of environmental claims or charges that provide for a payment or loan to non-governmental person or entity that was not a party to the dispute or directly harmed by the conduct, subject to certain exceptions.

Curtailing the use of Supplemental Environmental Projects (SEPs) in DOJ Settlements

- January 9, 2018 – Memorandum by the Assistant AG of the DOJ Environment and Natural Resources Division (ENRD), explaining the exceptions under which third-party payments are permissible (e.g. payment to cleanup contractors).
- November 7, 2018 – Memorandum by AG Jeff Sessions regarding settlement of lawsuits against state and local governmental entities, and prohibiting consent decrees that “extract greater or different relief from the defendant than could be obtained through agency enforcement authority by litigating the matter to judgment.”
- August 21, 2019 - Memorandum by the Assistant AG of the DOJ ENRD, stating SEPs involving state and local governments fall within the core of the AG’s November 7, 2018 memo, and therefore are precluded in settlements with state or local governments, absent the granting of an exception.
 - Reasons: Violate Congress’ constitutional power over appropriations; diversion of funds from the U.S. treasury; undermining of state and local legislative processes, effectively allowing a “forced appropriation.”
 - Suggests that DOJ is considering also limiting the use of SEP’s in settlements with private parties.

Curtailling the use of Supplemental Environmental Projects (SEPs) in DOJ Settlements

Key Points:

- DOJ has curtailed the use of SEPs in settlements with state and local governments, and this may be extended to settlements with private parties
- EPA recognizes the use of SEPs in settlements on its website, but notes that they “must have a strong ‘nexus’, or connection, to the violations being resolved, and advance the goals of the statute from which the violations stemmed;” and generally, “must involve the same pollutant or same health effects as were involved in the violations being resolved, addressing the same adverse impacts or risks to which the violations contributed, or preventing future similar violations.”
- “Beneficial environmental projects” (BEPs) under the LDEQ regulations are patterned after, but not identical to, SEPs under federal law.
 - Notably, it is not necessary for BEPs to relate to the violation.
 - It is unclear whether the curtailment of SEPs under federal law will impact the use of BEPs in Louisiana.

See U.S. DOJ, ENRD Memorandum titled “Using Supplemental Environmental Projects (“SEPs”) in Settlements with State and Local Governments,” dated August 21, 2019, available at: <https://www.justice.gov/enrd/page/file/1197056/download>.

EPA Audit Policy

- May 2018 - EPA announced a renewed emphasis on its audit policy (or voluntary self-disclosure policy), which is intended to encourage regulated entities—primarily through mitigation of civil penalties related to self-disclosed violations—to voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of environmental violations.
- March 29, 2019 - EPA finalized a New Owner Clean Air Act Audit Program tailored to the oil and natural gas sector (well sites, including associated storage tanks and pollution control equipment).
- Expands on EPA's 2008 "New Owner" policy which incentivizes new owners of regulated facilities to make a clean start by addressing environmental noncompliance that began prior to the acquisition, through enhanced mitigation of civil penalties related to such noncompliance.

Questions?

Boyd A. Bryan
Jones Walker LLP
8555 United Plaza Boulevard
Baton Rouge, Louisiana 70809
Office: 225-248-2134
Mobile: 225-278-5385
Email: bbryan@joneswalker.com

New address effective November 4, 2019:
445 North Boulevard, Suite 800
Baton Rouge, Louisiana 70802